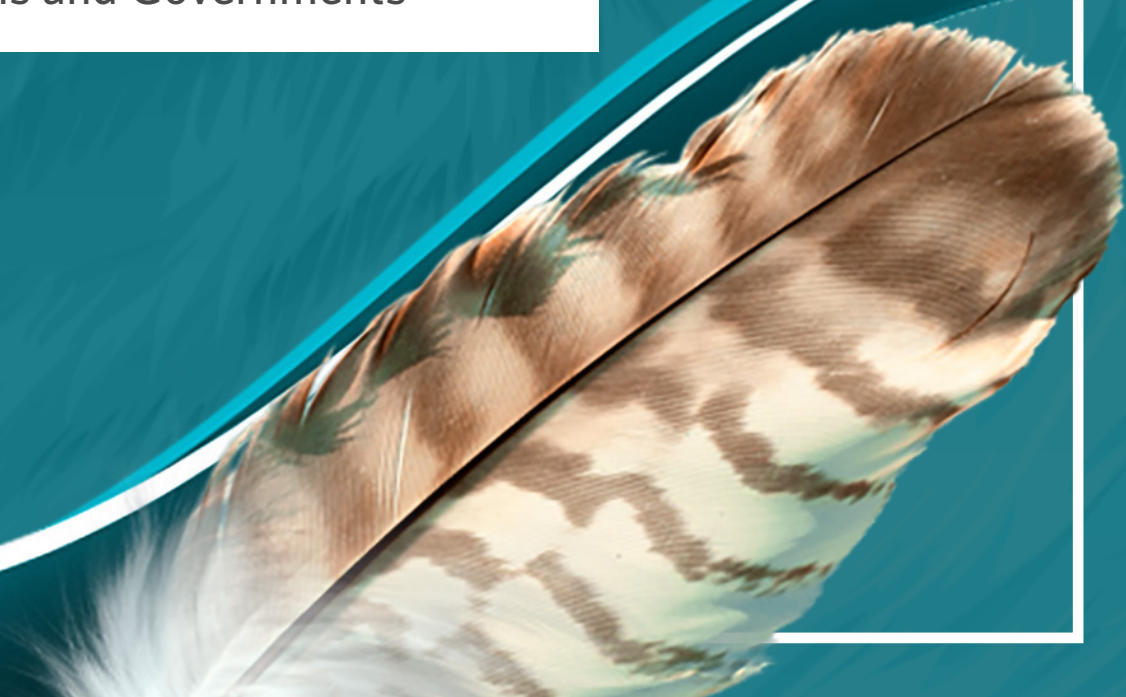


IMPLEMENTING UNDRIP IN BC: A DISCUSSION PAPER SERIES  
BY THE RESIDENTIAL SCHOOL HISTORY AND DIALOGUE CENTRE

“Indigenous Governing Bodies”  
and advancing the work of Re-Building  
Indigenous Nations and Governments





The Declaration on the Rights of Indigenous People Act (DRIPA) includes provisions for the government to enter into agreements, including those related to consent-based decision making, with "Indigenous governing bodies." The definition of "Indigenous governing bodies" within DRIPA "means an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the Constitution Act, 1982."

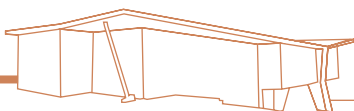
The purpose for inclusion of a definition of "Indigenous governing bodies," and the specific meaning of the definition that is in DRIPA, have been the subject of significant speculation and discussion. In order to help build understanding and informed dialogue about this aspect of DRIPA, we share the following observations and analysis of two issues: (1) What is the purpose of the definition of "Indigenous governing bodies"?; and (2) How should we interpret the definition of "Indigenous governing bodies"?

## 1 Purpose of Definition of "Indigenous governing bodies"

Public statements from representatives of the BC government as well as the First Nations Leadership Council (FNLC) have expressed that a main purpose of the definition is to create space for agreement-making with Indigenous governments that are determined by Indigenous peoples. In this way, the definition is a response to certain limitations that are present within the existing provincial statutory scheme that may restrict the ability of the provincial government to enter into agreements with Indigenous governments other than *Indian Act* Bands, or entities (such as some tribal councils) incorporated under federal or provincial statute.

Why is such space important?

First, by including the definition it addresses an obstacle and irritant that both First Nations and the province experience in negotiations about 'who' can enter into an agreement on behalf of First Nations. In many instances, First Nations are put into the position of having their internal governance structures and processes, which are authorized under their own legal orders and by their people, be effectively considered legally incapable of entering into an agreement with the province. In some instances the disrespect and complications this creates have prevented the signing of the agreement itself. In other instances, it creates significant internal discord and tensions, as well challenges and negativity within the negotiation process itself. By creating space in section 6 and section 7 of DRIPA for agreements with "Indigenous governing bodies" a statutory basis is set for the province to overcome these obstacles that are created by the operation of provincial law.



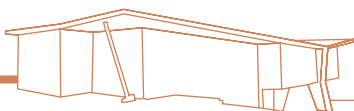
Second, and more broadly, the definition is a recognition of the on-going and vital work Indigenous peoples are doing to re-build their structures and systems of government, consistent with the standard of Indigenous self-determination as expressed in articles 3, 4, and 5 of the UN Declaration. A central aspect of colonialism has been Crown efforts to dismantle Indigenous governments, and impose government structures on Indigenous peoples. A central feature of decolonization is Indigenous peoples leading the work of re-building governance on their terms, through their own legal orders, traditions, and cultures. One of the roles of federal and provincial government in properly supporting this is ensuring that they are getting their own houses in order, including pulling back legislative provisions that limit or close the door on recognition of the governing structures that Indigenous peoples build themselves.

## 2 Interpretation of the Definition of "Indigenous governing bodies"

Dialogue and discussion about Indigenous governments, including in legal arguments and judicial decisions, has often struggled to draw an important distinction between two distinct, but interrelated, questions.

First, is the question of who holds constitutionally protected Title and Rights under section 35 of the *Constitution*, or as is often termed the "proper title and rights holder"? This is a question that has been answered through the evolution of the law under section 35. The definition of "Indigenous governing bodies" in DRIPA includes the words "...Indigenous peoples that hold rights recognized and affirmed by section 35 of the Constitution Act, 1982." This should be interpreted as reflecting the established law of the proper Title and Rights holder. The definition does not seek to alter or change, or define, who the proper Title and Rights holder may be – rather it imports the established understanding and answer to this question in section 35 jurisprudence.

The answer to the question of the proper title and rights holder – importantly – is rooted in the laws, histories, cultures, and traditions of Indigenous peoples. In the trial decision in *Tsilhqot'in Nation*, the test for proper Title and Rights holder was articulated by the Court as being the "historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion" (paragraph 470). In other words, the collective that holds title and rights is determined and shaped by the historic and lived reality of Indigenous peoples. For these reasons, who is the proper Title and Rights holder will vary. In some instances, it may be a larger collective – in others a smaller – and determining this (such as in a legal context) requires real understanding and proper reliance upon both the common law and Indigenous laws, experience, and knowledge.



Of course, one element of colonialism has been intense efforts to break up Indigenous Nations and peoples – to try to sever their connections and realities as peoples, and the relations of Indigenous peoples to their territories. This nefarious goal was advanced through multiple means, including trying to sever family, community, and cultural connectivity such as through the residential school system, and through the creation of the reserve system including forced dislocation of peoples onto reserves.

The question of the proper Title and Rights holder is different than the second, distinct question of who represents the proper Title and Rights holder? To state it another way, who is the government of the collective that holds Title and Rights? Breaking up Indigenous governance systems was a focus of colonialism – and for First Nations this included the imposition of *Indian Act* Band Councils.

The standards of the UN Declaration do not tolerate or allow for such imposition. Rather, the UN Declaration makes clear that Indigenous peoples have a right to self-determine who represents them. The relationship between self-determination and Indigenous governments and political structures is made clear in Articles 3, 4, and 5 of the UN Declaration:

### **Article 3**

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

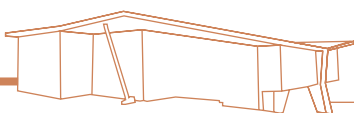
### **Article 4**

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

### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

As well, there is relevant and emerging jurisprudence that touches on issues of the advancement of rights by Indigenous governments on behalf of rights and title holders. In recent years, these issues have arisen before the courts in Title and Rights cases in British



Columbia including questions of standing to advance such claims (*Campbell, 2012; Hwlitsum, 2018; Metlaktala, 2018*). One aspect of the emerging case law highlights the importance of inclusiveness by Indigenous governments in ensuring the representation of rights and title holders, and the continuity of contemporary descendants with the historic Nation even where *Indian Act Bands* are present. This emphasises the importance of Nation and government re-building by Indigenous peoples work consistent with the right of self-determination.

The definition of "Indigenous governing bodies" in DRIPA includes the words "...means an entity that is authorized to act on behalf of Indigenous peoples." This definition occurs in a legislative context which affirms the application of the UN Declaration to the laws of British Columbia (s. 2); expressly does not delay the application of the UN Declaration (s. 1); and requires the alignment of laws with the UN Declaration (s. 3). Given this, this part of the definition must be read as affirming the self-determination of Indigenous peoples regarding who represents them. The concept of "authorization" in the definition must be read as a form "authorization" pursuant to Indigenous legal processes and standards, consistent with the UN Declaration, and not subject to any government approval, demands, or interference.

Given this, the definition of Indigenous governing bodies should be seen as affirming the right of Indigenous collectives who hold title and rights under section 35 of the Constitution to determine their own governments.

Finally, it is important to remember the inadequacies of common law processes – including the adversarial court system and its rules of evidence – for supporting the work of re-building Indigenous governments and clarifying the proper governing representative of rights and title holders. DRIPA, by confirming the UN Declaration as a principled framework with minimum standards to be adhered to, can help support a shift to the development of more appropriate forums, processes, and mechanisms for addressing these matters grounded in Indigenous legal orders. These issues are discussed more in "*Co-operatively Resolving Conflicts through the Application of United Nations Declaration on the Rights of Indigenous Peoples.*"

