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Who owns B.C.?

B.C. Premier Gordon Campbell has proposed legislation that would:

- Recognize that aboriginal title exists throughout B. C.;
- Give unelected native leaders a veto power over mining, forestry, recreation and other development activities on Crown land; and
- Require that all revenues from stumpage fees, mining royalties and recreational fees be shared with the native leadership.

More than 95% of B. C. is Crown land. Title is currently held by the province on behalf of all British Columbians. If Mr. Campbell's recognition legislation becomes law, title will be held instead by about 30 powerful yet-to-be created "indigenous nations," which would be entitled to the revenues from all activities on Crown land.

B. C. Aboriginal Affairs Minister Michael de Jong says that the recognition legislation will be "unprecedented" and "will represent change on a seismic scale." A significant part of the change is that those claiming aboriginal title will no longer be required to provide evidence to back up their claim. Mr. de Jong says aboriginals "shouldn't be required to stand in court and call evidence" of their history and their "presence in this part of the world," even though the Supreme Court has declared such evidence essential.

No one has explained how the provincial treasury will make up for the loss of revenue from forest and mining operations on Crown land, nor has anyone explained how this transfer of title will impact resource-dependent communities throughout the province.

A legal opinion on the government's plan to recognize "aboriginal title" prepared by two Vancouver lawyers well-versed in aboriginal law suggests that the Campbell government does not comprehend the significance of the action. They observe: "No final court decision has actually found aboriginal title anywhere in Canada." Mr. Campbell's territorial approach to aboriginal title has been "decisively rejected by the Supreme Court of Canada."

The Supreme Court in its 2005 Marshall/ Bernard decision effectively killed the kind of aboriginal title espoused by Mr. Campbell and aboriginal leaders that would see virtually all land in the province come under the control

of new and powerful aboriginal governments merely because they are aboriginal. The court rejected the conferring of aboriginal title in the absence of clear evidence of regular and exclusive pre-sovereignty occupation.

Mere seasonal or occasional visits to an area are not sufficient to establish aboriginal title to land. For that to occur there must exist a clear intent and an ability to exclude all others from the area. The free movement or welcoming of fur traders, explorers, prospectors, miners, missionaries, Hudson Bay Company personnel and government officials would work to undermine claims of exclusive control and would make it virtually impossible to establish aboriginal title in most of B. C.

Mike Harcourt, a long-time advocate of aboriginal title, has identified the problem: Many aboriginal title advocates today appear "wilfully blind" to what the Supreme Court of Canada has actually said.

Immediately after announcing the intention to introduce recognition legislation, the Campbell government gave notice to the B. C. Supreme Court that it was withdrawing from the Ahousaht trial -- a major case involving a claim of aboriginal title to coastal waters off Vancouver Island -- because the government was no longer able to take "a strictly legal position regarding the test for aboriginal title." This was a signal that aboriginal title in B. C. is henceforth to be based not on the law but on Gordon Campbell's latest whim. The problem here is more than "wilful blindness." The Campbell government has politicized and undermined the responsibility of the B. C. Attorney-General to place sound legal arguments before the court.

As a result of the Campbell government's withdrawal from the Ahousaht trial, there is a real fear that a re-elected Campbell government will also withdraw from the Tsilhqot'in appeal, a case involving a claim of aboriginal title in the B. C. Interior, which is now before the B. C. Court of Appeal.

Aboriginal title may be one of those rare issues best left to the Supreme Court of Canada. Certainly it is beyond the capacity and competency of the Campbell government, which is proceeding without regard to the consequences for future generations of British Columbians.

- John Cummins is the Conservative Member of Parliament for the riding of Delta-Richmond East in B. C.