WHAT CONTEXTS QUALIFY AS INDIGENOUS ENTREPRENEURSHIP?
PERSPECTIVES ON THE LEGITIMACY OF COLONially DEFINED COMMUNITIES

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Note: throughout this submission, as a mark of respect to Indigenous peoples, the word ‘Indigenous’ will be written with a capital ‘I’ and the word ‘Aboriginal’ with a capital ‘A’.

ABSTRACT

This investigation scrutinizes the concept of Aboriginal land rights under Canadian Law with the purpose of determining if and how ‘nation’ and ‘land rights’ are important in determining the definition of what qualifies as a legitimately ‘Indigenous context’ when considering the distinction between Indigenous and mainstream entrepreneurship. It is argued that communities that do not exercise land rights and lose the special relationship with the land may no longer enjoy the sui generis nature of Aboriginal title. An analytical matrix is developed which clarifies consideration of complex and contentious land rights and conceptual issues. The major implication of the study is its ability to contribute greater analytical focus and power when examining business projects between Indigenous communities and mainstream economic actors where land and resources are the keys to successful strategic alliances.
After that, there was little more to be said. Great feuds often need very few words to resolve them. Disputes, even between nations, between peoples, can be set to rest with simple acts of contrition and corresponding forgiveness, can so often be shown to be based on nothing much other than pride and misunderstanding, and the forgetting of the humanity of the other – and land, of course. (McCall Smith, 2007, p. 129)

**INTRODUCTION**

Indigenous peoples globally are struggling to reassert their nationhood within the post-colonial states in which they are embedded. Claims to their traditional lands and the right to use the resources of these lands are central to Indigenous peoples’ drive to maintain or re-establish nationhood within the boundaries of hegemonic states (Anderson, 1999). Through entrepreneurship and business development, they believe they can attain self-sufficiency and financial independence (Anderson, 2002). Anderson, Giberson and Pasco (2005, 3) identified the formation of mutually beneficial business alliances with non-Aboriginal organizations as a critical factor to re-establishing nationhood. Furthermore, they point to the fact that while the potential for strategic alliances exist, not all Indigenous communities form alliances with non-Indigenous organizations.

This paper is concerned with the key issue of what qualifies as a distinctly Indigenous context when considering a given entrepreneurial venture, activity or process and particularly a strategic alliance with a mainstream economic entity. This paper will explore the global issue of defining Indigenous context with regard to the situation and data pertaining to one modern state, Canada. Specifically, we address two focal points:
(1) to investigate two conceptual contexts – ‘nation’ and ‘land rights’ – which are central to Indigenous entrepreneurship at the community level and (2) to critically examine the legitimacy of colonially defined communities qualifying as ‘Indigenous’ contexts. The paper will provide a focused scrutiny of the Aboriginal title and rights in Canada to determine the legitimacy of ‘nation’ and ‘land rights’ as legitimate Indigenous contexts for consideration in Indigenous entrepreneurship. A conceptual framework is distilled for the analysis of Aboriginal title and rights litigation to provide clarity on how Indigenous land rights and governance structure affect qualification as Indigenous context. The framework is applied in two scenarios to understand the impact of these contexts.

**METHODOLOGY**

The study is largely a documentary investigation and analysis. It entails a focused scrutiny of Aboriginal land rights under Canadian Law with the purpose of determining if and how ‘nation’ and ‘land rights’ are important in determining the definition of what qualifies as a legitimately ‘Indigenous context’ when considering Indigenous entrepreneurship. The study was conducted and the paper is organized as follows.

First, a comprehensive search and examination of selected statutory invention and litigation involving Aboriginal title or Aboriginal land rights in Canada was conducted. Pertinent information was distilled and categorized from selected cases to provide a comprehensive framework for understanding land rights for Aboriginal peoples in Canada. Second, conclusions were drawn from the analysis and a structured framework depicting how ‘nation’ and ‘land rights’ affects qualification as Indigenous context was developed. Finally, consideration was given to the implications of the investigation.
INDIGENOUS PEOPLE AND INDIGENOUS ENTREPRENEURSHIP:
definitional issues

It is important to define the terms and concepts utilized throughout the paper including: Indigenous people, Aboriginal people, Band and nation. Neitschmann has provided a definition of ‘nation’. It distinguishes the concept of ‘nation’ from the concept of ‘state’:

A nation is a cultural territory made up of communities of individuals who see themselves as “one people” on the basis of common ancestry, history, society, institutions, ideology, language, territory, and often, religion. A person is born into a specific nation. (Neitschmann, 1994, p. 226)

The General Council of the International Labour Organization defines Indigenous people as:

Peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions (International Labour Organization, 1991).

The United Nations Organization defines Indigenous people similarly but omits references to social, economic, cultural and political institutions. A 1995 resolution states that:
Indigenous or Aboriginal peoples are so-called because they were living on their lands before settlers came from elsewhere; they are the descendants...of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means (General Assembly The United Nations, 1995).

The term ‘Aboriginal’ is defined in Canada’s Constitution Act of 1982. The Act states:

… Aboriginal peoples of Canada include the Indian, Inuit and Métis peoples of Canada (Imai, 1998, p. 215).

‘Indigenous’ is a generic term used to describe all the original inhabitants of a nation. Therefore, the terms Indian, Inuit, and Metis are legal terms used to define the segment of society Indigenous to Canada. The 2006 census reported the total population of Aboriginal people in Canada as being 1.2 million people: with approximately 60 percent First Nations (Indians); 33 percent Métis; and Inuit make up the remainder (Statistics Canada, 2006).

About 196,070 or 4.8% of the population in British Columbia, identify with at least one Aboriginal group as defined by the Indian Act of Canada (Statistics Canada, 2006). However, almost everyone within that province is influenced or impacted in some way by the status of these Indigenous people. The fundamental reason for this interdependent relationship is the sharing of the land and its resources to gain future prosperity.
**Distinguishing Indigenous from mainstream entrepreneurship**

There is now an emerging field of Indigenous entrepreneurship (Hindle and Moroz 2009; Hindle and Lansdowne 2007 and 2005; Hindle 2005; Anderson 2002; Anderson 1999; Newhouse 1999; Cornell and Kalt 1998; Asch 1997; Chiste 1996; Dana 1995; Cornell and Kalt 1995). A meaningful Indigenous research canon exists and has been used to give definition to the field (Hindle and Moroz, 2009). The canon identifies a range of studies focused on four fundamental distinct themes: 1) culture and social norms; 2) education and the fostering of general and specific skills required for venturing; 3) organizational drivers and constraints; and 4) land and resources. Figure 1 is a reproduction of the model of the field of Indigenous entrepreneurship research, distilled from the canon of important works in the field by Hindle and Moroz (2009).

- *Insert figure 1 here*

Hindle and Moroz (2009), inter alia, identify land rights, in a general way, as a fundamental issue of 'Indigenous’ entrepreneurship. However, greater clarity, focus and detail is necessary to understand the impact of this fundamental issue to the field of Indigenous entrepreneurship. There is a fundamental question which requires a detailed answer. Does the method used by an Indigenous group to assert title over its traditional territory and/or its chosen governance structure help distinguish Indigenous entrepreneurship from mainstream entrepreneurship? A comprehensive examination of the litigation involving Aboriginal title or Aboriginal land rights in Canada and an overview of the historical context of the Indigenous land question provides insight into this fundamental issue.
INDIGENOUS LAND AND MAINSTREAM LAW

A trajectory toward recognition

Tensions between the Indigenous people in British Columbia seeking to retain control of its traditional territories and non-Aboriginal peoples’ and governments’ determination to limit Aboriginal rights and title to their traditional territories are significant. Consider the most extreme positions of each side on the land question as heard from proponents on both sides and documented by Kunin (2001). On one side, an Aboriginal people could insist on following its own traditional laws of governing within its own territory and forbid all non-Aboriginal people from using any land and resources within this territory. On the other side, the federal and provincial governments could follow a historical mandate of *terra nullius* and declare that Aboriginal rights have been extinguished and not accommodate any special or unique rights to traditional territories. This act would theoretically allow the non-Aboriginal governments to make decisions with respect to all land and resources in accordance to whatever justification they deemed appropriate.

*Terra nullius* is a Latin expression meaning “land belonging to no one”. Europeans claimed present-day Canada and Australia as *terra nullius* and utilized this concept as the foundation of land law in each country. Hindle (2005) has compared the status of Indigenous entrepreneurship in Australia and Canada. The consequences of the terra nullius mandate have been devastating for both Aborigines in Australia and the Aboriginal people in Canada. In considering the extreme positions of each party to the land question, it is apparent that significant tension and problems exist in resolving the
historic issue. Furthermore, it is unlikely that either party’s extreme position will be implemented.

Given the diametrically opposed extreme positions outlined above, it is important to understand the current legal landscape with respect to Aboriginal title in British Columbia. Over the last 30 years, the legal system has considered the injustices of Aboriginal people and their traditional territories where the province of British Columbia has justified its policy of denial of Aboriginal title by raising extinguishment arguments. The courts have resoundingly rejected the Province’s position.

On June 3, 1992, the Australian High Court recognized ‘Native Title’ in the *Mabo* judgment. The judgment overthrew the legal fiction of *terra nullius* and found that native title to the land existed in 1788. As Brennan J. stated: “an inhabited territory which became a settled colony was no more a legal desert than it was ‘desert uninhabited’….” (*Mabo v. Queensland*, 1992, p. 58). *Mabo* also concluded that this title may still exist provided it has not been extinguished by subsequent acts of government and given that Indigenous groups continue to observe their traditional laws and customs. Referring to this statement in *Van der Peet*, Justice McLachlin of the Supreme Court of Canada stated “Once the ‘fictions’ of *terra nullius* are stripped away, ‘[the] nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs’ of the Indigenous people” (*R v. Van der Peet*, 1996, p. 144).

Justice McLachlin stated that “assertion of British sovereignty was thus expressly recognized as not depriving the Aboriginal people of Canada of their pre-existing rights; the maxim of *terra nullius* was not to govern here” (*R v. Van der Peet*, 1996, p. 146). McLachlin states further “...the Aboriginal people could only be deprived of the

This is a post facto ruling. In actual practice, Aboriginal peoples were dispossessed from their lands, denied access to their lands and resources, and their laws ignored by successive governments on the provincial and federal levels. Furthermore, treaties have not been concluded with the majority of Indigenous nations.

On December 11, 1997, the Supreme Court of Canada set out a landmark decision in the case of *Delgamuukw v. British Columbia*. The two most important matters decided in the case include the treatment of oral histories from Aboriginal peoples by the Court and clarification around Aboriginal title.

The Court decided that Aboriginal oral histories must be given significant weight in any subsequent legal proceedings. Chief Justice Lamer stated:

> *Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.* (*Delgamuukw v. British Columbia*, 1997, p. 62)

Lamer continued by stating “The justification for this special approach can be found in the nature of Aboriginal rights themselves [and] …a court must take into account the perspective of the Aboriginal people” (*Delgamuukw v. British Columbia*, 1997, p. 590).

This does not mean that oral history is unfettered and that any statement by an Aboriginal must be accepted. Rather the accommodation of the Aboriginal perspective “must be done in a manner which does not strain the Canadian legal and constitutional structure”
This finding is important otherwise an “impossible burden of proof” (p. 62) would be placed on the Aboriginal peoples who did not have written records.

Similar to previous Supreme Court of Canada decisions dating back to Calder in 1973, in Delgamuukw, Lamer asserts that Aboriginal title is sui generis or in a class of its own. Furthermore, the Supreme Court determined that Aboriginal title qualifies provincial ownership. Lamer states “…on extinguishment of Aboriginal title, the province would take complete title to the land…” (Delgamuukw v. British Columbia, 1997, p. 108). Furthermore, the Province has no jurisdiction to extinguish Aboriginal title that exists as a right protected under s.35 of the Constitution.

A test for proof of Aboriginal title is provided in Delgamuukw. The criteria include:

(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive (Delgamuukw v. British Columbia, 1997, p.89).

While Aboriginal title is protected under s. 35(1), it is not absolute. “Those rights may be infringed, both by the federal and provincial governments. However, s. 35(1) requires that those infringements satisfy the test of justification” (Delgamuukw v. British Columbia, 1997, p.98). The test of justification consists of two parts. “First, the infringement of the Aboriginal right must be in furtherance of a legislative objective that is compelling and substantial (Delgamuukw v. British Columbia, 1997, p.98). “The second part of the test of justification requires an assessment of whether the infringement
is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples” (Delgamuukw v. British Columbia, 1997, p. 99).

The decision in Delgamuukw outlined further important features of Aboriginal title.

First, Aboriginal title encompasses the right to exclusive use and occupation of land; second, Aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and third, that lands held pursuant to Aboriginal title have an inescapable economic component. (Delgamuukw v. British Columbia, 1997, p.102)

Reconciliation is the underlying theme throughout the Delgamuukw decision and is central to the relationship between the Crown and Aboriginal peoples. “[T]he fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty to consult.” (Delgamuukw v. British Columbia, 1997, p.103) Lamer encouraged the Crown and Aboriginal nations to solve disputes through negotiation rather than litigation. Reconciliation can be realized through negotiated settlements where the Crown conducts those negotiations in good faith. (Delgamuukw v. British Columbia, 1997, p. 114)

The Delgamuukw decision articulated the need for governments to make systematic changes in to their policies as they affect Aboriginal peoples. Furthermore, governments needed to create a mandate to negotiate settlements with Aboriginal nations based on recognition, accommodation and reconciliation. However, British Columbia
continued its policy of denying Aboriginal title. In 2004, the Supreme Court of Canada concluded further litigation in *Haida Nation v. British Columbia (Ministry of Forests)*. The principal issue is whether an obligation exists on the Crown and third parties to consult with an Aboriginal people about potential infringements prior to the Aboriginal title or rights being determined.

The Supreme Court of Canada in *Haida* articulated several important aspects of the Crown duty with respect to Aboriginal title. First, Aboriginal title and rights must be recognized, understood by government from an Aboriginal perspective, and accommodated when the Crown seeks to make decisions which will infringe Aboriginal title and rights (*Haida Nation v. British Columbia*, 2004, p. 22-32). Second, “[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.” (*Haida Nation v. British Columbia*, 2004, p. 19) Third, the duty to consult must take place early in the process, notably the strategic planning stage (*Haida Nation v. British Columbia*, 2004, p.39)

The Court concluded:

*In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.* (*Haida Nation v. British Columbia*, 2004, p.15)

The *Haida* decision considered whether or not third parties have a duty to consult and accommodate. “The Crown alone remains legally responsible for the consequences
of its actions and interactions with third parties, that affect Aboriginal interests” (Haida Nation v. British Columbia, 2004, p.30). The Court does not absolve third parties from all aspects of dealing with Aboriginal title and rights.

The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate. (Haida Nation v. British Columbia, 2004, p.32)

Following Haida, the Province of British Columbia initiated the New Relationship Vision with Aboriginal leadership throughout British Columbia. A plan outlining the vision and principles of the New Relationship was developed as a result of meetings with Aboriginal leaders and stated that the relationship is to be “…based on respect, accommodation and recognition” (British Columbia Government, 2007, p. 1). This plan called for the negotiation of Government-to-Government Agreements on land use planning, management, tenuring and resource revenue and benefit sharing (British Columbia Government, 2007, p. 4).

There appears to be significant deviation from the New Relationship Vision when evaluating provincial legislation and policies guiding consultation and the negotiation mandates from the Province pertaining to accommodation and reconciliation. The Province modified the rejected position it took in Delgamuukw whereby Aboriginal title exists only on reserve lands. The modified position includes the reserve lands and
narrowly defined areas that Aboriginal peoples could prove they used. Furthermore, the Province added to this position by only recognizing limited rights. For example, while the Province admits in *Wilson* that the Okanogan have a right to harvest timber for domestic purposes, it does not accept a livelihood component. Clearly this strategy is designed to limit the economic component realized in the *Delgamuukw* decision with negotiating the agreements outlined in the New Relationship.

The deviation in provincial legislation and policies from the New Relationship has culminated in the latest decision from the Supreme Court of British Columbia in the *Tsilhqot’in Nation v. British Columbia*. The principal issues include the Tsilhqot’in people seeking declarations of Aboriginal title over a particular tract of land and a declaration of an Aboriginal right to trade in animal skins and pelts. Justice Vickers rejected the Province’s latest position for justification on denying Aboriginal peoples the right to use, manage and benefit from their traditional land. In fact, the Court was clear on its opinion over the position.

*What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a ‘postage stamp’ approach to title, cannot be allowed to pervade and inhibit genuine negotiations.*

*A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are part of the land that has provided ‘cultural security and continuity’ to Tsilhqot’in People for better than two centuries.*

*A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land[s] that ultimately define and sustain them as a people,*
the recognition of long standing presence of Tsilhqot’in People in the claim area is a simple straightforward acknowledgement of a historical fact. (Tsilhqot’in Nation v. British Columbia, 2007, p. 457)

Litigation is causing rapid evolution in the jurisdictional understandings of the provincial, federal and Aboriginal laws. The Supreme Court in Tsilhqot’in took significant steps in clarifying the division of powers with respect to legislation affecting Aboriginal title. The Province argued that it has the constitutional capacity to infringe upon Aboriginal rights. The Court disagreed and clearly stated its reasons. “I have already concluded that where Aboriginal title lands have been clearly defined, those lands are not ‘Crown lands’ as defined by the Forest Act (Tsilhqot’in Nation v. British Columbia, 2007, p. 327) The Court further clarifies that:

…the provisions of the Forest Act authorizing the management, acquisition, removal and sale of timber on Aboriginal title lands do affect the very core of Aboriginal title….The Forest Act…cannot apply to Aboriginal title land because the impact of its provisions all go to the core of Aboriginal title. The management, acquisition, removal and sale of this Aboriginal asset falls within the protected core of federal jurisdiction…. (Tsilhqot’in Nation v. British Columbia, 2007, p. 334)

The law recognizes the distinction between ‘band’ and ‘nation’

The Province argued that an Indian Band, and not the Nation, is the proper rights holder and should have brought the action. Justice Vickers rejected this position with the following justification:
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. (Tsilhqot’in Nation v. British Columbia, 2007, p. 147)

Applying the factors noted above, the evidence clearly showed that the Tsilhqot’in are the proper holders of Aboriginal title and rights (Tsilhqot’in Nation v. British Columbia, 2007, p. 148).

The Court did not provide a declaration of Aboriginal title over the Claim area but offered the opinion that Tsilhqot’in Aboriginal title does exist inside and outside the Claim area. The reason for not granting the declaration was a result of a defect in the pleadings. The Court’s power to issue a remedy is framed by the pleadings. Justice Vickers left open the opportunity for the Tsilhqot’in to apply for a declaration of damages when a declaration for Aboriginal title is granted. Furthermore, he explicitly stated that “[t]he resources on Aboriginal title land belong to the Tsilhqot’in people and the unjustified removal of these resources would be a matter for appropriate compensation” (Tsilhqot’in Nation v. British Columbia, 2007, p.440).

On the second principal issue the Court found that Tsilhqot’in people have an Aboriginal “…right to trade in skins and pelts as a means of securing a moderate livelihood” (Tsilhqot’in Nation v. British Columbia, 2007, p.409). The Court also rejected the Province’s position that the right is restricted to specific species of animals.
The Province’s position that fee simple title extinguishes Aboriginal title to privately held lands is shared in other countries including Australia. However, the conclusions of the courts in the respective countries are significantly different. The High Court of Australia held in *Mabo and others v. Queensland* that Native title is extinguished by grants in fee simple, true leases, and other dispositions that are inconsistent with the continued enjoyment of native title. Therefore, the construction of a building is considered to be inconsistent with the continued enjoyment of native title causing extinguishment. (*Mabo v. Queensland*, 1992, see para 81)

The Supreme Court of Canada reached a different conclusion noted earlier in the Delgamuukw decision. Jurisdiction to extinguish is held solely by the federal government under s. 91 (24) of the Constitution Act, 1867. Furthermore, s. 35(1) of the Constitution Act, 1982 provides constitutional entrenchment of Aboriginal rights. Therefore, the Province cannot extinguish Aboriginal rights through fee simple title to lands. (*Tsilhqot’in Nation v. British Columbia*, 2007, p. 322)

**Summary position: the land issue and the law**

The land question in British Columbia is contentious as witnessed by the volume of litigation addressing the subject. If past practice can be used as a guide, it is unlikely that this will change in the near future. While the land question has not been completely resolved, some clarity has been provided in some respects. The Province of British Columbia does not have the power to extinguish Aboriginal title and rights and furthermore, Aboriginal title and rights have not been extinguished. The holder of Aboriginal title and rights is the nation and infringement of Aboriginal title and rights must be justified and meaningful consultation and accommodation must take place.
The *Tsilhqot’ín* decision has created a more balanced field for negotiating settlements. The Court rejected the Province’s floor characterized by the plaintiff as the ‘postage stamp’ approach to recognizing title. If the Province maintains its mandate of consultation and accommodation designed around minimum obligations, the ‘postage stamp’ no longer meets the minimum threshold to negotiating in good faith.

To achieve certainty to the land question, the Province must engage Aboriginal peoples in a meaningful shared decision-making process that will develop frameworks for consultation and accommodation that are sustainable and meaningful. In the absence of this process, third party interests may be vulnerable to those who own the title and rights within the territory the third party conducts business. This potential for vulnerability is an opportunity for Aboriginal groups to negotiate a multitude of agreements with third parties where title and rights are impacted.

**THE ROLE OF INDIGENOUS ASSERTION OF TITLE IN ENTREPRENEURIAL PROCESS**

An adequate definition of Indigenous context is a fundamental precursor of the achievement of equitable benefits based on Indigenous lands. Making the argument that comprehensive distinct contexts do not exist to distinguish the field of Indigenous entrepreneurship from mainstream entrepreneurship follows similar logic to the provincial and federal governments’ position with respect to Aboriginal land title. As noted earlier, the Court has rejected this position of blanket assimilation and instead subscribes to a series of tests to determine title. A similar approach could well be followed in determining what entrepreneurial ventures, activities and processes qualify as Indigenous entrepreneurship.
Distillation of the Aboriginal title and rights litigation results in a conceptual framework to evaluate entrepreneurial ventures involving Indigenous communities where land and resources are essential. This framework is depicted in figure 2.

There are two dimensions at play. The first dimension is the strength of relationship with the traditional territory and its resources. While this dimension is continuous, we consider the two extreme positions. At one extreme, the relationship with the traditional territory is weak and potentially non-existent. Utilization of the traditional territory following traditional laws and customs are rarely if ever observed. At the other extreme, the relationship is strong where the Indigenous group accesses the traditional territory and observes their traditional laws and customs.

The test for the strength of relationship to the traditional territory follows the Delgamuukw decision. The criteria include: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive (Delgamuukw v. British Columbia, 1997, p.89). This test for title results in a pass or fail outcome which matches the extreme positions of weak or strong on the continuous dimension. This poses a question of the legitimacy of the test surrounding the other positions on this continuous dimension. The explanation for these circumstances stem from the fact that an Indigenous group may fail to meet the test in some areas of its traditional territory while passing in other areas. This test is necessary only when evaluating an entrepreneurial activity where
the Indigenous group or one or more of its members is using a particular piece of land or resources as an integral component of a proposed entrepreneurial process.

The second dimension in the framework is the form of governance the Indigenous group uses to assert its title and rights. On one side, the Indigenous community governs itself using a colonially defined governance structure known as the ‘Band’. This governance structure stems from administrative convenience and does not depict the true identity of the people. On the other side, the governance structure represents the true identity of the people including their lineage, shared language, customs, traditions and historical experiences.

A significant problem of contradiction occurs when Aboriginal and non-Aboriginal governments attempt to determine a process of development based on Aboriginal title through a colonially defined community known as the ‘Band’, a unit originating in nineteenth century attempts to affect treaties between original inhabitants and colonial administrators. Currently, the Department of Indian and Northern Affairs (DIAND), defines a ‘Band’ as “…a group of First Nations having a historical connection and a common interest in land and money” (Frideres and Gadacz, 2001, p. 58). Historically, ‘bands’ were made up of small groups of families who lived as a single entity. The contemporary meaning of the term ‘Band’ has evolved to describe the administrative unit at each First Nation community legally recognized by DIAND (Imai, 1998). The ‘Band’ is a colonial invention not an Aboriginal artifact. It is not representative of the traditional communities where Aboriginal title is based. Furthermore, the Tsilhqot’in decision recognizes the Nation is the proper Aboriginal title and rights holder. Therefore, a decision surrounding Aboriginal title by a colonially
defined community is inherently contradictory and creates a weak position for the protection of the traditional territory.

Quadrant A in the framework encompasses the strongest degree of Indigeneity. Communities within this category exercise the right to exclusive use and occupation of land and they can be observed managing and benefiting from the traditional territory. These Indigenous communities would pass the test for proof of Aboriginal title. Furthermore, these communities govern utilizing traditional institutions and share a common language, set of customs, traditions and historical experiences. The entrepreneurial ventures, activities or processes undertaken by Indigenous communities in this quadrant undoubtedly qualify as Indigenous entrepreneurship.

Quadrant D in the framework encompasses the weakest degree of Indigeneity. Communities within this category do not exercise the right to exclusive use and occupation of land and do not manage and benefit from the traditional territory. These Indigenous communities would not pass the test for proof of Aboriginal title. Furthermore, these Indigenous communities govern utilizing a colonially defined governance structure known as the ‘Band’ and have largely assimilated into the mainstream society. The entrepreneurial ventures, activities or processes undertaken by and within Indigenous communities in this quadrant most likely do not qualify as Indigenous entrepreneurship but constitute instead a variant of mainstream entrepreneurship.

Quadrant B in the framework is interesting in that the Indigenous community governs itself utilizing traditional institutions and shares a common language, customs, traditions and historical experiences. However, it does not exercise the right to exclusive
use and occupation of land. Furthermore, people in the ‘quadrant-B’ situation are not actively managing and benefiting from the traditional territory. These Indigenous communities would not pass the test for proof of Aboriginal title. However, the communities are not governing in a contradictory manner and are still the rightful owners of the Aboriginal title and rights. Clearly, in this case, the test for proof of Aboriginal title compromises their level of Indigeneity. These Indigenous communities will lose much of the benefits their traditional territory provides, including the economic components, simply due to the fact that the community is not exercising its exclusive rights to the territory. The communities in this quadrant will see more significant losses to the control and exercising of title and rights in the short-term with unfettered competition for its traditional territories and resources. However, these communities may see a leveling off and the protection of the small areas they continue to utilize over the long-term. The entrepreneurial ventures, activities or processes undertaken by Indigenous communities in this quadrant most likely will qualify as Indigenous entrepreneurship.

Quadrant C in the framework is interesting in that the Indigenous community governs itself utilizing a colonially defined governance structure known as the ‘Band’ and has, accordingly, assimilated to a considerable degree into the mainstream society with respect to its governing institutions. However, the community exercises the right to exclusive use and occupation of land. Furthermore, people in communities classifiable as belonging in quadrant-C are actively managing and benefiting from the traditional territory. These Indigenous communities would pass the test for proof of Aboriginal title. In this quadrant, the communities are governing in a contradictory manner and are utilizing inappropriate governance institutions to manage, protect and exercise their
Aboriginal title and rights. The Courts have rejected this approach for the exercise and protection of Aboriginal title and rights. It is very likely that this situation greatly compromises the Indigenous community’s Indigeneity. However, the entrepreneurial ventures, activities or processes undertaken by Indigenous communities in this quadrant most likely will qualify as Indigenous entrepreneurship. In the long-term, there is clearly significant risk that the Aboriginal title and rights held by any community classifiable as belonging in this quadrant will be eroded and lost.

The importance of Indigenous context classification: considering various scenarios

It is conceivable that some entrepreneurial ventures, activities and processes owned and operated by Indigenous communities may lack the distinguishing contexts to be considered within the field of Indigenous entrepreneurship and provide a more suitable fit within mainstream entrepreneurship. This situation is noted in quadrant D in the framework. Consider a scenario where an Indigenous community fits quadrant D. This Indigenous community has been completely displaced from its traditional territory with no inherent relationship with the land and has had a colonially defined governance structure foisted upon it. Furthermore, this community has assimilated and without resistance fully utilizes this governance structure. Has this situation become so compromised that it is no longer ‘Indigenous’? This question is clearly sensitive yet addressing it is absolutely necessary in order to contribute greater analytical focus and power when examining business all kinds of business projects – and especially strategic alliances - between Indigenous communities and mainstream economic actors.
Furthermore, it is fundamental to determining what qualifies as a distinctly Indigenous context when considering Indigenous entrepreneurship as a distinguishable phenomenon.

Consider a second scenario where an Indigenous nation has been displaced through the development of reserves but has maintained a strong relationship with the traditional territory and asserts title and rights on a nation basis. To amplify this scenario, the authors refer to the case of the Scuzzy Creek Hydro Project in Pasco and Hindle (2008).

The Nlaka’pamux Nation in British Columbia is an exemplar for illustrating the use of strategic alliances that allows some certainty for third parties while asserting control over its traditional territory. The Nlaka’pamux Nation Tribal Council (NNTC), one of the Nation’s political organizations, expects corporations to acknowledge whose territory they are looking to do business in and understand the Nation’s interests. The principles are clear – Aboriginal title and rights to the territory are fundamental to any venturing or alliance of interests: recognition of title is not to be fuzzy or negotiable. The Nlaka’pamux Nation Tribal Council (NNTC) is saying to any potential mainstream partner: if you want to do business with us you have to recognize, unequivocally, that you are on our land which is subject to our sovereignty. This is a very vigorous assertion of land and title rights. “The commitment to understanding these principles within the Nation’s traditional territory is necessary prior to any fruitful discussions on business development taking place” (Pasco, 2007). Chief Bob Pasco has been the Chairperson of the NNTC since 1982. He played a central role in the development of the Scuzzy Creek Hydro and Power project and was key in solidifying an equity position in the project.
There was a period of time where corporations conducted business within the Nlaka’pamux Nation’s traditional territory and consistently stripped the communities of their land and resources. In conversation with Chief Pasco, one quickly learns of the numerous examples where this has taken place. He follows this up with a passionate discussion about how the Nlaka’pamux Nation Tribal Council changed this trend in the early 1980’s by stopping significant proposed developments in Nlaka’pamux territory by multinational corporations. For example, in 1985, the Nlaka’pamux Nation Tribal Council was successful in obtaining an injunction (Pasco v. CNR) at the Supreme Court of Canada to stop the Canadian National Railway from double tracking within its traditional territory.

Debbie Abbott, Administrator for the NNTC, stated in an interview with the authors that “we don’t want to always be stopping development, we just want to ensure that we have a meaningful participation in any development” (Abbott, 2007). This statement combined with the track record of stopping undesirable development can provide a substantial opportunity to negotiating strategic alliances with third parties. The Nation capitalized on one of these opportunities by obtaining a 25% ownership stake in the Scuzzy Creek Hydro and Power Project in exchange for providing the non-Aboriginal partners access to their traditional territory to develop the project. The net present value of the Nation’s ownership share is $1.78 million after purchasing an additional 15% for a discounted value of $190,000.

In utilizing the same framework to evaluate the second situation, different conclusions are drawn. The Nlaka’pamux have a high probability of proving title and rights, as they appear to meet each of the three elements in the test for proof of title.
Second, the Nlaka’pamux base and assert their title and rights on a nation basis. This meets the decision in *Tsilhqot’in*. The fact that non-Aboriginal proponents of a hydro project feared the risk of litigation and agreed to partner with the Nation is evidence of the significance of the land rights issue and the method by which an Indigenous community asserts title and rights.

Can the group in the second situation be characterized as more ‘Indigenous’ than the first example? Based on the definitions of ‘Indigenous’ by the International Labour Organization (1991) and the General Assembly of the United Nations (1995), both meet the definition and neither definition provides for degrees of ‘Indigenous’. However, in considering the laws pertaining to Canada, the later situation would be recognized as distinguishable from other residents of Canada. This clearly establishes the need to consider if Aboriginal title and rights create a necessary condition for a given process to be qualify as ‘Indigenous’ entrepreneurship – i.e. to be clearly distinguishable from mainstream entrepreneurship.

**CONCLUSIONS AND IMPLICATIONS**

The major implication of this study is its ability to contribute greater analytical focus and power when examining business projects between Indigenous communities and mainstream economic actors where land and resources are the keys to successful strategic alliances. Too often, alleged ‘partnerships’ between Indigenous and mainstream organizations have seen the Indigenous partner severely exploited. An adequate definition of Indigenous context is a fundamental precursor of the achievement of equitable economic benefits based on Indigenous lands.
Aboriginal title is *sui generis* or in a class of its own. It encompasses exclusive rights over any other individual within the country with respect to land and resources and includes an economic component. These facts strengthen the legitimacy of land rights as key determinants of Indigenous contexts when considering Indigenous entrepreneurship. However, communities that do not exercise these rights and lose the special relationship with the land may no longer enjoy the *sui generis* nature of Aboriginal title. In effect, they have assimilated into the dominant regime and subscribe to its laws and customs.

Canadian law finds the nation as the proper holder of Aboriginal title and rights. Essentially, this means that colonially defined and instituted governance structures at the band level must be, prima facie, considered as constituting weaker basis for qualifying any community situation as entailing ‘Indigenous’ entrepreneurship. A stronger basis is found where there exists a collectively determined, culturally authentic governance structure at the nation level.

Indigenous communities, mainstream governments and businesses in Canada are – and none too soon - coming to better mutual understanding and acceptance of the nature and potency of Indigenous land rights. The current legal requirement in Canada, federally, is to build a new relationship based on respect, accommodation, and recognition so that each party clearly understands the application of Aboriginal title and rights. As this evolves, the field of Indigenous entrepreneurship will become more prevalent and necessary. Hindle and Moroz (2009) identify four distinct, main themes of Indigenous entrepreneurship: 1) culture and social norms; 2) education and the fostering of general and specific skills required for venturing; 3) organizational drivers and constraints; and 4) land and resources.
This paper concludes that land rights and the nation are fundamental to Indigenous contexts. Weakness in the community’s conceptual and practical attachment to land rights and nation severely compromises the Indigeneity of the community and the viability of classifying its entrepreneurial ventures, activities and processes as ‘Indigenous entrepreneurship’ rather than mainstream entrepreneurship.

This study is intended to be the first stage in a sequence addressing the impact of Indigenous land rights and governance structure on the viability of entrepreneurial activities in Indigenous communities. Further research in this area will positively impact any parties and individuals considering or actively conducting business activities with Indigenous communities. The research may be significant for Indigenous communities to better understand the impact of these contexts on their development activities.


Appendix 1 – Figures and Tables

Figure 1 Indigenous entrepreneurship: a field-defining framework
(Source: Hindle and Moroz 2009)

Figure 2 Governance structure and land rights: context classification matrix