

SHARED TERRITORIES / OVERLAP RESOLUTION MECHANISM

The issue of shared territories/overlaps is one that all First Nations in British Columbia, to varying degrees, are faced with. The term is typically used to refer to situations where more than one First Nation asserts Aboriginal Title to a particular geographic area. A related, but conceptually different, situation arises where more than one First Nation asserts a particular non-exclusive Aboriginal right to a particular resource that exists across wide geographic spaces. A key example is the Fraser River fishery.

While it was never their choice, Indigenous Nations in BC have been divided into Indian Bands under the *Indian Act*. It is understood and acknowledged that the process of reconstituting First Nations' governments and sorting out territorial issues is part of the process of decolonization.

Assertions by more than one First Nation to a particular area have led to conflict, and in some cases, litigation, which affects opportunities available, while also damaging relationships. This is becoming particularly acute in the post-*Haida* era where First Nations are, in some instances, competing for accommodation opportunities. As well, the completion of treaties is being challenged by First Nations who claim that part of the area subject to a proposed treaty with another First Nation is within their traditional territory. In some instances as well, the location of Indian reserves is challenged by First Nations. For both the Province and First Nations, there is an increasing urgency to resolve issues of shared territory or overlaps. The emergence of recognition-based relationships and agreements (e.g. shared decision-making, revenue and benefit sharing) between the Crown and First Nations may be limited until such resolution occurs.

It has been recognized, in principle¹, that there are benefits of a broader regional approach to the fulfillment of honour of the Crown obligations – the provincial Crown has indicated that it is unworkable to deal separately with over 200 Indian Bands on the basis of recognition. It is further acknowledged that First Nations should determine the appropriate First Nations Government body for shared decision-making, and that shared decision-making requires funding, and effective dispute resolution mechanisms.

First Nations have acknowledged the need to address the issue of shared territories/overlaps.² As set out in “*All Our Relations*” – *A Declaration of the First Nations of British Columbia*, November 29th, 2007, First Nations declared:

We acknowledge the interdependence we have with one another and respectfully honour our commitment with one another where we share lands, waters and resources. We commit to resolving these shared lands, waters and resources based on our historical relationship through ceremonies and reconciliation agreements.

First Nations need to develop a plan to give effect to this Declaration. The resolution of shared territories/overlaps is primarily an issue to be addressed by First Nations, with capacity resources provided by the Crown. This paper presents an approach to/ideas for addressing this challenge.

Indigenous Laws – The Tool for Resolving Shared Territory Issues

The resolution of shared territories/overlaps requires direct consideration of the inter-relationships and histories between First Nations. In some cases, this will be a simple process of mutual affirmation and recognition by First Nations of each other where relations have been stable and based upon mutually recognition and/or where historical or modern treaties or protocols have been established between them. But, it will also sometimes involve a process of reconciliation between or among First Nations that have had negative experiences with each other in the past.

The predominant understanding from a non-Aboriginal perspective, of the question of overlaps or shared territory disputes, is that it is a “map drawing” exercise. Namely, that as two or more First Nations assert that their Traditional Territory, including lands over which they hold Aboriginal Title, a process must be undertaken to identify a definitive boundary between where the Territory of one Nation ends and that of the other begins.

This understanding of the issue is highly problematic as it reflects a common law and Eurocentric concept of what the issue is that is at stake and what it means to resolve it. Historically, First Nations did not manage their complex interrelationships through clarification

¹ Shared decision making principle, developed collaboratively on May 31, 2008.

² See also First Nations Summit Resolution #1107.09 and UBCIC Resolution #2007-17.

and adoption of borders which could be drawn on a map. Rather, a range of mechanisms were employed which ordered how members of Nations would interact with each other in certain areas, and the types of activities that were permissible. When the issue is viewed from an Aboriginal perspective, the range of options and opportunities for resolution greatly expands.

The essential starting point for understanding the issue of overlaps is to acknowledge the fundamental distinction between what this paper will refer to as Indigenous Title and Aboriginal Title.

Indigenous Title is the inherent and sovereign Title that a First Nation holds according to Indigenous laws. Indigenous Title cannot be understood or defined through reference to either constitutional or common law. Rather, it is the legal relationship to the land which is defined by those Indigenous laws and legal systems which have governed First Nations since time immemorial.

Aboriginal Title, on the other hand, is a legally recognized interest in land as defined by constitutional and common law. It is a legal construct that is defined as being in relation to the Crown's asserted sovereignty and interest in the land.

Indigenous Title and Aboriginal Title are not co-extensive with each other; however, they do intersect. Namely, Indigenous Title defines a key part of the "Aboriginal perspective" which the Supreme Court of Canada has confirmed must be incorporated into defining Aboriginal Title and Rights, and more generally in identifying patterns of reconciliation.

Stated another way, understandings of Indigenous Title, defined by Indigenous laws, must guide and shape the content of Aboriginal Title. Resolving the shared territory/overlap issue can be understood as **the process of applying and implementing Indigenous laws to guide how First Nations' Indigenous Titles intersect and interact**. In this respect, the act of resolving the shared territory/overlap issue is an exercise of sovereignty and autonomy, which will then guide the understanding and evolution of how Aboriginal Title is defined and understood under the common law.

By approaching the question in this way, the outcome of the process of identifying how Indigenous Title interacts in a particular area may result in a range of outcomes much more

sophisticated, and appropriate, than the narrow and limited approach of simply drawing a line on a map. These outcomes could then be translated to shape the categories of Aboriginal Title in the common law. In this respect, it is worth noting that the common law already contemplates a spectrum of outcomes of Title including, for example, “shared, exclusive Aboriginal Title”. As well, the structure of section 35 jurisprudence is such that the understanding of Aboriginal rights, including those that involve an interest in the land, is capable of evolution to encompass new categories of Aboriginal Title that might reflect deepening understandings of Indigenous Title.

Existing Mechanisms and Processes

In British Columbia, there exists no established or time-tested methods of dealing with the shared territory/overlap issue in the modern context. The Courts are ill equipped, and generally an inappropriate forum, for addressing this issue and are too expensive for most First Nations to access. As well, the diversity of First Nations inevitably necessitates a diversity of approaches to resolving shared territories/overlaps. Below we examine several approaches that have been proposed, or employed, in Canada or elsewhere. This is not a comprehensive review. It is meant only to be illustrative of the kinds of approaches that do exist.

Many First Nations have taken the initiative and found ways to directly negotiate a resolution to their overlap issues. For example, some Nations have established a small **joint working group** to design a mutually acceptable process, manage issues of mutual concern and make recommendations for resolution of the territorial/boundary issues. In establishing the working group, it is agreed that Territory maps will be shared with the working group, and that a small committee of Elders from each Nation be establish to help the working group in developing a boundary recommendation. A joint set of **principles** often guide the working group. In some instances, a direct negotiation table is established, guided by certain understandings, to try to reach resolution.

A range of models have been proposed or employed which emphasize a role for Elders, and draw directly on their distinct knowledge. For example, some models propose a **council of Elders** who facilitate a process for examining, consulting about, and reaching resolution of a dispute. The key role of the Council would be, after hearing what the dispute is, to state what the

appropriate Indigenous law is to guide discussion between those involved and affected, and then to help guide a consultative process towards an agreement.³

Another set of models emphasizes the creation of **new institutions**. Some of these models are efforts at the creation of a distinctly Indigenous institution. For example, it has been proposed that an “Indigenous Legal Lodge”⁴ be established to inquire into overlap disputes, hear information from the First Nations involved, work with the parties to discuss and develop optional agreements, and facilitate agreement between the parties around one or more of the options. The Lodge would be structured with: a panel of three members from neutral Indigenous Nations with no direct interest in the dispute; a legal expert in Canadian law, three facilitators with knowledge and experience with relevant Indigenous legal orders; and representatives of the Nations who will share experience and knowledge of the overlap area, how the relationship was managed historically, and how their legal traditions might be drawn upon. The Lodge decision would not be binding, but instead would set out a mandated process for its affirmation by every generation.

While the Lodge model has distinct elements as an Indigenous institution, there are also models where a more conventional form of “**tribunal**” is established to try to assist parties towards resolution. For example, National Native Title Tribunal (Australia) is a quasi-judicial body which can be used as a forum for mediation to resolve overlaps. Such mediation often occurs in the context of trying to complete Indigenous Land Use Agreements -- which are agreements between Native groups and other entities (such as companies, the Crown etc.). The mediation services and approach is not tied to the application of Indigenous laws, but rather appears to be a more conventional application of mediation by an administrative tribunal like body.

There are fewer models that have been proposed which result in a binding decision on the parties concerning the overlap area. One model of binding decision is seen in the Overlapping Claims Resolution Agreement is a template Intra-Aboriginal Agreement provided by the National Native Title Tribunal (NNTT) of Australia. The template agreement provides:

³ One example of such a model is in Larissa Behrendt’s book *Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy*.

⁴ Val Napoleon, “Indigenous Legal Lodge” presented at the Indigenous Bar Association Annual Conference, October 26 – 28, 2007. The proposal was developed in the context of overlap disputes arising from the Lheidli T’enneh Treaty negotiations.

- (a) that the parties agree to amend and withdraw certain applications so that a native title outcome can be achieved that is favourable to all parties;
- (b) a relevant Land Council will commission an anthropological study in respect of the areas covered by the applications;
- (c) all parties to this Agreement will cooperate with that study;
- (d) the findings of the study, including a finding that a claim has little chance of success, will be binding on the parties; and
- (e) those parties who withdraw from certain claims which are then successful for other claim groups will nonetheless have unrestricted access to those areas, and be entitled to hunt, fish and perform ceremonies on that land.

Steps and Process

Both the principles and examples outlined above reinforce the necessity for resolution of shared territory/overlap issues to be through the expression of each Nation's sovereignty. Implementing processes for resolution are an opportunity to express and implement Indigenous laws. The challenge is to identify what steps might be followed to facilitate successful resolution, and what support mechanisms or institutions might be in place to help effect this resolution. A further challenge is to identify what constructive and meaningful role the First Nations Leadership Council and the New Relationship process might play in advancing resolution of overlaps.

The ideas set out below are based on the following core assumptions:

- There are significant points of unity for all First Nations dealing with a shared territory/overlap issue. Namely:
 - All First Nations have, since time immemorial, applied and implemented their own laws, including laws that governed relations with other First Nations.

- All First Nations are engaged in the common struggle to effect decolonization, and achieve recognition and respect of their sovereignty, governments, laws, Title, and Rights.
- No First Nation will benefit, and all First Nations will suffer, when the Crown is given the opportunity to exploit divisions between First Nations, such as where there is a shared territories/overlap issue.
- There is no “one size fits all” process. The diversity of First Nations, and the different nature of shared territories/overlaps, will require different processes.
- Indigenous sovereignty and Indigenous laws will be a core feature of all, or almost all, processes.

With these assumptions in mind, set out below is an example of what a new institution could look like. The body could be called the “Indigenous Title Council of British Columbia” (or some other such name). The Council would be neutral, non-affiliated, Aboriginal institution to provide dispute resolution services and support to First Nations seeking to resolve overlaps. The general roles of the Council would be the following:

- To research, design, and develop template processes for the resolution of shared territory/overlap disputes in British Columbia.
- At the request of First Nations, to facilitate the development and implementation of a process of shared territory/overlap resolution between those Nations.
- At the request of First Nations, to play neutral roles within shared territory/overlap resolution processes, including mediating, and where appropriate, arbitrating aspects of the dispute.

More specifically, the Council would support First Nations seeking to resolve shared territories/overlaps in the following ways:

- When First Nations are seeking to resolve an overlap, the Council would assist the Nations to develop the resolution process most suitable to their interests. This may be as

simple as the Council providing suggestions and information (including templates) of possible processes that the Nations may wish to adopt. It may be as involved as the Council playing the role of facilitator in the Nations' efforts to design and agree on a process most suitable to their needs.

- Within a Process, the Council would be available to assist the Parties to ensure the Process moves forward in a timely manner towards a successful outcome. This may involve the Council playing an on-going facilitative role within the process, or, depending on the design of the process, a mediation role. If the Council is not needed for an on-going role, the Council would be available to be accessed by the Nations when a roadblock is reached. Depending on the Nations' request, the Council might facilitate, mediate, or arbitrate, the roadblock.
- Depending on the nature of the Process, and at the request of the Nations, the Council may play a binding decision-making role, in some instances making a decision on the resolution of the shared territory/overlap issue.

The Council need not be conceived, at least in its early incarnation, as a standing body or institution, with all of the relevant expertise located "in-house". While it would have certain core internal capacities, it could fulfill some of its roles by drawing on external individuals and experts to play roles, under the Council's auspices, within particular resolution processes between First Nations. Indeed, such flexibility will likely be needed for the Council to be able to locate appropriate, qualified, and neutral individuals to play roles in the range of processes that may be implemented.

While First Nations will develop and implement, with the aid of the Council, the particular form of process that might be undertaken to resolve an shared territory/overlap issue, there are nonetheless certain general steps that one can imagine being implemented in some form within any particular process. These general steps might be conceptualized as follows:

- **Step 1: Process Protocol/Understanding:** The First Nations would agree on any key principles and the process for resolution. There are three core principles that might form a common basis for all, or almost all, processes:

- to co-operatively engage to educate each other on how their respective Indigenous laws would address the issue of shared territory/overlap;
- to co-operatively engage in discussions to seek to resolve shared territory/overlap issues by seeking ways to translate and apply those Indigenous laws into the contemporary context; and
- to co-operatively engage to ensure that the Crown is not advantaged in any way while the resolution process is going on with respect to any potential activities in the shared territory/overlap area. This may include understandings on information sharing and how mutually reinforcing positions may be taken with the Crown on key issues.

The Council would prepare templates, which could be filled in with any additional principles, and the model of process, adopted by the First Nations in any given instance.

- **Step 2: First Nation Internal Preparation** This step involves the First Nations internally identifying and preparing information/evidence concerning their Indigenous Title, how it relates to the areas in question, and how their Indigenous laws would have resolved or addressed this issue in the past.
- **Step 3: Information/Evidence Sharing** The First Nations involved would share their learnings from Step 2 with each other, in an effort to develop an understanding of each other's interests and perspective. Depending on the model of process, this might be done in a range of ways, such as through a working group advised by Elders, through an Elders Council, or directly between appointed representatives.
- **Step 4: Decision-Making and Documenting Outcome:** The First Nations would seek a final decision concerning the overlap, through the mechanism agreed to in step 1 and based on the information identified and shared through steps 2 and 3. The outcome would be clearly and strategically recorded in the way most advantageous for each Nation's Aboriginal Title and relationship with the Crown. One aspect of this recording of outcomes could be written, and template protocols would be available through the Council.

Conclusion

In conclusion, this paper sets out ideas, for consideration by First Nations, for establishing a new institution(s) to address this issue as a necessary component of resolving shared territories/overlap issues. The resolution of shared territories/overlaps is primarily an issue to be addressed by First Nations, but requires a commitment by the Crown to provide resources to support the process.