March 2020

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Canadian Law on Shared Territories and Overlaps, and Rebuilding Indigenous Legal Approaches in British Columbia

Table of Contents

March 2020

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Preface

The paper is not legal advice and does not represent a political position of any First Nation or First Nations organization. It is a technical document prepared to support policy dialogue among First Nations leaders on shared territories and overlaps in British Columbia.

March 2020

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Introduction

This paper provides an overview of Canadian law on Aboriginal Title, shared territory, and overlaps for First Nations peoples in British Columbia. It identifies the significance of Indigenous and First Nations Legal Orders and approaches to the future of approaching shared and overlapping territory to the future of approaching shared and overlapping territory.

Setting the Context: The Shortcomings of Litigation on Shared and Overlapping Territory

Predictably, the manner in which disputes over First Nations territories, fishing, harvesting, and gathering rights, and related land-based activities, have been approached within Canadian and British Columbian policy and law has posed multiple barriers to progress to date. Seeking to address or resolve these barriers through continued civil litigation processes, despite their numerous restrictions, including cost and complexity, will leave this area in limbo for decades. That Title and rights continue to be asserted through litigation for the purpose of obtaining declarative and other remedies reflects the few viable alternative options that are available. Years of sustained government policy denying inherent and assigned rights and Title continues to impact this area. Indeed, this policy of denial continues to feature heavily in courtrooms, where the common legal strategies of government include ceaseless and unavailing procedural challenges, defences against Aboriginal Title and rights claims based on suggestions that the Nation does not exist, pleadings that the Nation is not the correct Title holder, and defences that invoke arguments that the Nation has abandoned or acquiesced to others' use of their Traditional territory.

Often, territorial overlaps or resource allocation matters are raised by reference to *Indian Act*[1] bands where lands have been reserved for the exclusive use and benefit of members of an Indian band under the *Indian Act*. Nation rebuilding is an active process and various steps, stages, and arrangements have been put in place, including modern treaties and processes to implement Douglas treaties.

Nations deserve and require more active and meaningful support for the rebuilding of Nations. Policy and law changes must support the inherent right of self-government and jurisdiction and a withdrawal of the *Indian Act* in self-determined priorities.[2] During this period of change, issues of shared territories and overlaps are intertwined with colonial policies. Territorial conflicts are not choices of hostile First Nations seeking to override other Nations.

[1] *Indian Act*, RSC 1985, c I-5.

[2] For a valuable discussion of this see Jody Wilson Raybould, PUGLASS, *From Where I Stand: Rebuilding Indigenous Nations for a Stronger Canada* (Vancouver: UBC Press, 2019).

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

First Nations have had no choices or compromised choices in relation to their governance and territories that these matters have been exacerbated.

Accountability for change rests with all, but responsibility for the current impasse and limited access to justice in relation to territorial overlaps rests on the shoulders of Canada and British Columbia. In the meantime, these matters are often the focus of sharp and adversarial litigation, with a First Nation asserting Title and rights, while other First Nations defend and at times aligning with the Crown to deny such rights and Title.[3] This makes for strange alliances and may even cause trauma and difficulty for First Nations already addressing punitive Crown policies for their citizens.

Canadian Courts have come alive to the deeper dilemmas with litigation and the limited rulings that they can offer. Courts now repeatedly observe or nudge parties to meaningful resolution and implementation of Title and rights in a forum outside of the adversarial court system, even if that forum does not clearly exist. The Supreme Court, for example, has acknowledged the central role of Indigenous Legal Orders in such a proper forum and as a necessary requirement for giving meaning to Aboriginal Title and rights, as noted in its recent decision in the *Innu* case.[4] These words take on heightened importance in light of the passage of Bill 41 in British Columbia and the broader implementation of the *United Nations Declaration on the rights of Indigenous Peoples* (hereinafter "the UN Declaration").

Despite these acknowledgements, however, to a significant extent, existing processes outside of the courtroom for dealing with shared territory and overlaps, for example, those indicated by British Columbia Treaty Commission policy and approaches, have not been able to provide the tools necessary for the resolution of these issues. Prominent current and former Commissioners have signalled the need for new tools many times in their reports over the previous decade. This appears to have been largely ignored or has not been matched with actual change. It is thus timely to reconsider what steps might be available. The companion paper prepared by Dr. Roshan Danesh provides helpful guidance on practical next steps to create a mechanism for resolution of shared territories and overlaps.

Addressing Shared and Overlapping Territory with First Nations Legal Order Approaches

Over and above Court acknowledgement that a fuller understanding of Aboriginal Title and rights must involve First Nations legal orders, and judicial identification of the need for First

[3] See, for example, *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1646, 2019 CarswellBC 2831 at para 3; *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1645, 2019 CarswellBC 2828 at para 27; *Cowichan Tribes v Canada (Attorney General)*, 2019 BCSC 1606, 2019 CarswellBC 2783 at paras 1-3; *Cowichan Tribes v Canada (Attorney General)*, 2019 BCSC 1922, 2019 CarswellBC 3297 at para 13.

[4] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, 2020 SCC 4 (CanLII) at para 31, 212, 224, and 238.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Nations' supported mechanisms outside the court to address shared and overlapping territories matters, we cannot minimize the profound residual damage and broken nature of this area after 140 years of imposed colonial law and policy. The Crown's policies often reflect specific government's political choices on which Nation they will work with, and those alliances shift without a principled legal and rights recognizing foundation. Where territorial decisions are made, these might be more *ad hoc* with First Nations or bands that have political or economic clout and thus are able to navigate these political systems. The proper identification of the constraints and role of colonial systems is necessary to shift to a position where greater focus can turn to First Nations approaches and intertribal diplomacy and legal work.

First Nations Legal Orders have been leading the way in the creation of contemporary political spaces for First Nations. First Nations legal order work involves articulating and rebuilding norms and protocols for the resolution of disputes within and between Nations. Intertribal protocols and agreements are increasingly being prepared in a way to create space to do that work and request governments to permit collaboration. Examples of such necessary steps have included both historical and more recent efforts to enter into intertribal protocols and include the work of First Nations who have enacted or revitalized practices and laws for peace-making and the respectful co-existence of Nations. The list of Nations who have engaged in this work, or are engaging it in, is extensive.

Promising Approaches for the Resolution of Overlapping and Shared Claims

Looking to the future, the full implementation of Aboriginal Title and Tenure, including the resolution of overlapping and shared claims and the reconciliation of Title and Tenure with Crown Title, mandates the thorough and unmitigated recognition of First Nations Legal Orders and corresponding shifts from current practices and constraints. This means understanding what is part of the colonial context of policy and law, and what is a bridge to a different approach. The processes needed may not shift completely but need a well-defined pathway. When priorities are determined by First Nations, draw upon First Nations systems of law and intertribal practices and traditions, and use flexible over "frozen in time" frameworks, there is much promise for dramatic and meaningful progress. Correspondingly, the purpose of this paper is to frame those issues and identify the space for this work, using First Nations Legal Orders and concepts, and a pathway of meaningful change.

Important Considerations

While there is not space in this paper to detail in substantial detail the two following considerations, it is essential to ground future work in the proper context, given the need for legal and political clarity when searching for answers to questions that serve as prime barriers

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

to the resolution of any intertribal matter such as, for example, identifying who has capacity to represent the Title and rights holders of each group.

Thus, alongside and antecedent to any system for approaching overlapping or shared territory issues, Nation rebuilding and the proper designation of governing bodies amongst rights and Title holders are steps that must be separated from the resolution of shared overlaps and territory issues. Without a self-determined government, supported and sanctioned by rights and Title holders, transitional governments (i.e. band council governments) may struggle to conclude or resolve these disputes. This is a deeper issue and speaks to the interrelated tasks of addressing rights recognition, self-determination, and shared territory and overlaps dilemmas. Thus, for the purposes of the present dialogue on shared territory and overlaps, it is assumed that deeper levels of work on First Nations rebuilding is well underway and underpins the resolution.

Capacity and representation follow 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." Nation rebuilding work depends on Crown policy shifts which are not yet in place—although in British Columbia there is movement with the passage of Bill 41 and the inclusion of recognition of Indigenous governing bodies self-determined by First Nations. More substantive and meaningful change is required to support the inherent right of self-government and self-determination.

Further, the necessary work of First Nations to address territorial overlaps and co-existence also requires the full protection of any mechanism or institution designed to support that function by Canadian common and constitutional law. This is a point emphasized as well by Roshan Danesh in a companion paper for the forum. Canadian courts have consistently identified the limits of resolving rights and Title issues through litigation, and emphasize that First Nations governments have legal concepts that need to be guiding the process of resolving overlaps. Self-determined choices for resolving shared territories and overlap disputes includes designating and creating a mechanism through authority already in Section 35 of the *Constitution Act, 1982*, but explicitly recognized and affirmed, possibly in federal and/or provincial legislation.

First Nations Legal Orders and Nation Rebuilding

Defining "Legal Orders"

While articulating a nuanced definition of "First Nations Legal Order" is notably difficult, it can broadly be understood as a legal system derived from First Nations' practices, customs, stories, ceremonies, values and norms in relation to recognizing, regulating, and protecting First Nations government, decision-making authority, lands, water, citizens and intergovernmental

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

relations. First Nations Legal Orders' work is a dynamic and unfolding process that weaves distinct authorities and approaches in First Nations law and governance into the resolution of disputes and promotes First Nations law as a source of law—an order of law in Canada.. First Nations Legal Orders are not derivative of the common or civil law. These orders exist from distinct sources of law and policy based on First Nations' pre-existence as Nations, holding territory and governing systems long before settlement. These are inherent in origin but not frozen in time systems. Like any "living tree" legal system, First Nations legal orders are capable of change, growth and reflect the needs and requirements of people. First Nations legal order work is foundational work in British Columbia with widespread support from First Nations leaders, lawyers, scholars, Elders, knowledge-keepers, joined with others. [5]

The Resurgence of First Nations Legal Orders

First Nations Legal Order work has been resurgent over the last two decades due to the failure of colonial law and policy to withstand human rights contest and challenge. The impact of the UN Declaration in bringing the minimum standards of human rights for the survival and dignity of Indigenous peoples has opened new space for First Nations government, culture, language, and Title and rights. The human rights protections recognized for Indigenous Peoples and as applied to the Canadian context, including British Columbia, has exposed frailties in Canadian case law on Title and rights. In particular, the colonial mythologies used to justify blanket Crown sovereignty over First Nations lands and territories by using the apocryphal claim of the declaration of such at a particular date (for BC after the Oregon treaty in 1858). It is one of those ironies of Canadian law and First Nations legal orders that we are working to address shared territories and overlaps when the premise of Crown having sovereignty over the territory is the declaration of ownership and control by the Crown in 1858 without any extensive presence in the territory, or "use and occupation." This is why Canadian law alone may not provide an adequate foundation for resolving shared territories and overlaps.

First Nations Litigation Asserting Title and rights

First Nations in British Columbia challenged the denial of rights by governments and engaged the litigation process leading to multiple path-breaking decisions, which are major victories despite all of the hardship and determination required to achieve them. These cases do represent the conclusion that First Nations law, history, and reason cannot be completely

[5] There is some discussion of this point in BC Treaty Commission, "Recommendation 8: First Nations resolve issues related to overlapping traditional territories among themselves" (2014) at 17, online (pdf): <http://www.bctreaty.ca/sites/default/files/BCTC-Annual-Report-2014.pdf> [BCTC 2014 Annual Report].

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

erased or ignored. However, in terms of practical shifts and remedies, the implementation of Title and rights has been slow and inadequate. On the one hand, Title and rights litigation in British Columbia has led to remedies declaring that rights exist. On the other hand, as was outlined in the Introduction, there are significant shortcomings acknowledged by many within the litigation process itself. It has also demanded time and resources and delayed the resolution of innumerable issues (with leading cases involving 20+ years). These colonial litigation processes rely on rule formalism and strict proof demands, giving rise to the current situation where progress is limited due to the patchwork nature of the litigation results, and the need to address overlapping rights and Title that may not have been articulated. Nation and territorial "overlaps" are a barrier to certainty. Moreover, the articulation of rights and Title in civil litigation proceedings is often narrowly focused on declarations for specific Title and rights holders, with Governments unwilling to apply these more widely, insisting on a narrow interpretation of the outcome for only one Nation.

A Recent Supreme Court of Canada Decision on Aboriginal Title

The most recent pronouncement from the Supreme Court of Canada on the legal nature of Aboriginal Title arose in a mining/injunction case in *Innu Nation* released in February 2020. It builds on the foundational decisions from the line of British Columbia cases, including *Tsilhqot'in Nation* and *Delgamuukw*. This case is important for the topic of shared territories and overlaps. It addresses the territorial scope of Aboriginal Title and also clarifies that there is ample space for work to begin on the matters at hand with British Columbia First Nations on their intertribal matters of shared and overlapping territories. Critically, the Court held that Title is not derived from common law or civil law, but is a unique Title based on Indigenous values, beliefs, and Legal Orders. The majority wrote,

> Aboriginal Title pre-dates all other interests in land in Canada, arising from the historic occupation of t by distinct cultures. Like Aboriginal rights more generally, Aboriginal Title is *sui generis*. Even before *Tsilhqot'in Nation v. British Columbia*, this Court frequently warned against conflating Aboriginal Title with traditional civil or common law property concepts, or even describing Title using the classical language of property law.[6]

[6] The Court stated the following as reference for this point: "344, at paras. 6-7; *Van der Peet*, at para. 115 (dissenting reasons of L'Heureux-Dubé J.); *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at paras. 14 et seq.; *Delgamuukw*, at paras. 111 et seq.; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 129 (concurring reasons of LeBel J.); *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 21" in relation to this finding (Innu para 29). The Court further footnoted the following key cases in support of this finding: *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54; *Guerin*, at p. 382;

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Owing to its origins in the special relationship between Indigenous peoples and the Crown, Aboriginal Title has unique characteristics that distinguish it from civil law and common law conceptions of property. Aboriginal Title is inherently collective and exists not only for the benefit of the present generation, but also for that of all future generations . . .[7] With its aim of benefiting both present *and* future generations, Aboriginal Title restricts both the alienability of land and the uses to which land can be put. . .[8] These features are incompatible with property as it is understood in the civil law and common law. . .[9]

Moreover, Aboriginal perspectives shape the very concept of Aboriginal Title, the content of which may vary from one group to another. As such, disputes involving Title should not be resolved "by strict reference to intractable real property rules" but rather must also be understood with reference to Aboriginal perspectives. . . [10]

In *Tsilhqot'in Nation*, this Court said that

> [t]the characteristics of Aboriginal Title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal Title *sui generis* or unique. Aboriginal Title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal Title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal Title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts". [para. 72]

At the same time, the Court recognized that

Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654, at pp. 677-78; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R." *Innu* at para 29.

[7] The SCC references "*Tsilhqot'in Nation*, at para. 74; see also B. Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015), 71 *S.C.L.R.* (2d) 45, at pp. 45-47" on this point. *Innu* at para 30.

[8] The SCC references "Tsilhqot'in Nation, at para. 74" on this point. *Innu* at para 30.

[9] The SCC states, "see K. Anker, 'Translating Sui Generis Aboriginal rights in the Civilian Imagination', in A. Popovici, L. Smith and R. Tremblay, eds., Les intraduisibles en droit civil (2014), 1, at pp. 23-28" on this point. *Innu* at para 30.

[10] The SCC references "St. Mary's Indian Band, at para. 15; see also Delgamuukw, at para. 112; Marshall, at paras. 129-30 (concurring reasons of LeBel J.)" on this point. *Innu* at para 31.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> Aboriginal Title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. [para. 73][11]

The *Innu* case involved Aboriginal Title to a territory spanning two provinces, so the territorial overlap expanded beyond the provincial boundaries. This posed no problem for the issue of recognition, but was a concern as to which court could hear the matter. I.e., did the Innu have to proceed in Quebec and Newfoundland both to assert their Title, or could they proceed in one court and have it applied elsewhere? In the end, the Court decided they could pursue it in one jurisdiction because Aboriginal Title was not like fee simple property rights. It is a unique kind of constitutional Title and right.

The majority of the Court (in a split 5:4 decision) found that Aboriginal Title claims that cross boundaries can be addressed in a single proceeding in one province. In part, they decided this because of the nature of Aboriginal Title, and the importance of access to justice for First Nations, who, they found, should not face the barrier of two proceedings on the same matter. The majority held,

> We agree with the intervener the Tsawout First Nation that this is particularly unjust given that the rights claimed pre-date the imposition of provincial borders on Indigenous peoples. We reiterate that the legal source of Aboriginal rights and Title is not state recognition, but rather the realities of prior occupation, sovereignty and control[12]. . . We do not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights.[13]

The recognition in the decision of the realities of prior occupation, sovereignty and control by First Nations is opening the door for greater consideration of First Nations legal approaches and concepts. Furthermore, the emphasis on the importance of remedies that reflect the nature of Aboriginal Title and rights should require greater consideration of remedies within the civil litigation process, but more importantly, remedies that represent inter-societal or First Nations and Canadian law processes.

---

[11] *Innu* at paras 29-33.

[12] The Court states "see, e.g., *Delgamuukw*, at para. 114" on this issue at *Innu* para 49.

[13] *Innu* at para 49.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

The challenge for shared territories and overlaps and First Nations approaches is how to resolve matters according to intersocietal law approaches, and especially with First Nations legal order principles. The paper prepared by Danesh for the Shared Territories and Overlaps Forum, explores the need for creation of institutional and operational systems to address overlaps building on Indigenous Legal Orders. The options presented by Danesh frame the next steps in the discussion on resolving conflicts in British Columbia, including the opportunity to draw upon the Indigenous legal system knowledge for the creation of a First Nations' institution that can provide a policy and adjudicative replacement for the current gap in the system.

Danesh restates what has been a common position, including by special rapporteurs engaged by Canada to assist to move the treaty making process forward in the past. For example, Douglas R. Eyford, in his report to the Prime Minister, *Forging Partnerships — Building Relationships — Aboriginal Canadians and Energy Development*, November 29, 2013, notes:

> The impact of overlapping claims should not be underestimated. . . Ultimately, shared territory disputes are best resolved by Aboriginal communities, whether through negotiations or an acceptable dispute resolution process.[14]

This work on building dispute processes is highly specific to place. The history and circumstances of provincial land tenure, survey and development calls out for a province-wide approach. British Columbia—with a pre-colonial and post-colonial history of stalled treaty-making after the Douglas Treaties until contemporary times, is a unique context. Even the Douglas Treaty Nations did not get an enforceable type of Title to their villages, field sites and remedies for this denial of rights has resulted in territorial overlaps as processes evolve to rectify those matters.

Intertribal legal order work is heavy lifting in British Columbia. It must be generated from First Nations to have legitimacy and effectiveness, but it requires a supportive Crown. It has to be anchored in First Nations efforts toward Nation rebuilding, reframe territorial conflicts outside the colonial presentation of these as "thorny obstacles" to progress, and recast this work as valuable intertribal rebuilding work that is collaborative, cooperative, and guided by the UN Declaration. It is peacemaking and justice work that is essential.

The recognition of self-determination and the rights of Indigenous peoples to set their own priorities reinforces the space for First Nations legal order approaches. Articles 27 and 40 of the *United Nations Declaration on the rights of Indigenous Peoples,* can support and help bring a human rights lens to guide the work on shared territories and overlaps:

[14] BCTC 2014 Annual Report at 26.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[15]
>
> Indigenous peoples have the right to access and prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[16]

The UN Declaration has been given a specific implementation process for British Columbia in Bill 41. It includes recognition of Indigenous governing bodies according to self-determination. It contemplates the alignment of the laws of British Columbia with the Declaration, and an Action plan between British Columbia's government and Indigenous peoples. The Action Plan must include consideration of an area of profound inaction—shared territories and overlaps. It would be valuable if Canada as well had UN Declaration implementation legislation and engaged in an Action Plan with the Declaration as the framework for progress on shared territories and overlaps. The reason these matters should be priorities in an Action Plan is that they have been used to justify inaction. As Danesh observes in his companion paper for this Forum,

> [O]verlap and shared territory issues are also all hindrances to the full recognition and implementation of Title and rights—and the degree of progress of full achievement of this goal is at least partially dependent upon the pace and scale of addressing and resolving them. Aboriginal Title, as confirmed by the Supreme Court of Canada in decisions such as *Delgamuukw*[17] and *Tsilhqot'in Nation*,[18] extends to large areas, carries with it jurisdictional authorities and the necessity to meet the standard of consent, and includes the Title-holder having the full beneficial interest in lands and resources. In the trial decision in *Tsilhqot'in Nation*, the test for proper Title and rights

[15] UN Declaration art 27.

[16] UN Declaration art 40.

[17] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at paras 155-158 [*Delgamuukw*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>.

[18] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do> [*Tsilhqot'in* (2014)]

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> 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,"[19] and one indicia of Title, as affirmed later by the Supreme Court of Canada, is that historically a Nation occupied it exclusively, in the meaning of having jurisdictional control over it. Aboriginal Title is not dependent upon Crown recognition or Court declaration for its existence, and does not emanate from the *Constitution of Canada*.[20] It exists because of the sovereignty of Indigenous peoples who have owned and governed the land and resources that now make British Columbia for countless generations.
>
> Given this character of Aboriginal Title, its full implementation—expressing the full promise and reality of Title in all of its dimensions—is advanced when First Nations are organized as proper Title and rights holders; with its systems of governance and law continuing to evolve and supported by increasing capacity; and where territorial boundaries, and relations with neighbouring Nations, are clear, structured, and understood.

Danesh is correct to highlight that Aboriginal Title might have full implementation if the proper rights and Title holders sanction and support rebuilding of Nations, and develop capacity to take a structure and clear approach to boundary issues. Developing a coherent approach out of the body of Aboriginal Title and rights case law is unwise. It can be informative, but it cannot be foundational because it has already acknowledged significant limitations and directed matters outside the courts for resolution.

The history of jurisprudence on Aboriginal Title has problematic antecedents. Professor Kent McNeil has recently published a thorough analysis of the 1888 *St. Catherine's Milling Case*, dissecting why this case is a flawed precedent yet has been relied upon in the main line of Canadian Aboriginal Title and rights cases.[21] Professor McNeil describes the slow and difficult process to gain proper recognition of First Nations Title of rights up to present, and notes that only after path-breaking and monumental efforts at Title and rights litigation did shifts begin. He summarizes that, after the monumental *Tsilhqot'in Nation*:

---

[19] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, 2007 BCSC 1700 (CanLII) at para 470, online: <https://www.bccourts.ca/jdb-txt/sc/07/17/2007bcsc1700.pdf> [*Tsilhqot'in* (2007)].

[20] *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154, 2015 BCCA 154 (CanLII) at paras 60-66, online: <https://www.canlii.org/en/bc/bcca/doc/2015/2015bcca154/2015bcca154.html>.

[21] Kent McNeil, "The Modern Caselaw," in *Flawed Precedent: The St. Catherine's Case and Aboriginal Title* (Vancouver, UBC Press, 2019) 144.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> Title comes from exclusive occupation of the land at the time of Crown assertion of sovereignty, not from the *Royal Proclamation of 1763*. It is proprietary in nature and encompasses the entire beneficial interest in the land, subject to the inherent limit that the land cannot be used in ways that will substantially deprive future generations of its benefits. The Crown's underlying Title has no beneficial content whatsoever. The Indigenous perspective, including Indigenous law, must be taking into account in assessing claims to Aboriginal Title, but is unclear whether…this law's role is limited to being part of the evidence used to prove exclusive occupation…Indigenous law and authority should also govern the internal dimensions of Aboriginal Title while the common law governs the rights of the Aboriginal Title holders as against the outside world.[22]

The *St. Catherine's Milling* Case was decided in the absence of First Nations peoples present tendering their own evidence or argument. Aboriginal Title jurisprudence has progressed, yet these difficult foundations constrain the development of human rights for First Nations peoples. According to the case law, the Crown can extinguish Title and are only required to compensate for the loss. Rather than promote co-existence and respect, there are threads in the Title jurisprudence on extinguishment, limitation of rights, that underscore unilateral Crown prerogative to abridge Indigenous peoples' fundamental human rights without their participation or consent.

The jurisprudence on Title and rights is problematic in this regard and caution is needed should we attempt to extrapolate principles from it for the purposes of resolving shared territories and overlaps. A body of jurisprudence that sanctions the unilateral Crown extinguishment of Aboriginal Title and rights, embraces the doctrines of discovery or acquiescence is difficult to defend in the post-UN Declaration era. Furthermore, it is an aggressive stand.

The late Justice Vickers identified the work required within the Canadian legal system to decolonize a mindset. In the interim application decision on oral evidence and records during the trial in *Tsilhqot'in Nation* (2007),[23] Justice Vickers reasoned "[i]in order to truly hear the oral history and oral tradition evidence presented in these cases, Courts must undergo their own process of decolonization."[24] Justice Vickers accepted the relevance of contextual interpretation of history documents so that colonial assumptions would not cloud the record unchallenged. This was important, but the decolonial process should be taken up more vigorously in the Canadian justice system.

---

[22] *Ibid* at 181.

[23] *Tsilhqot'in* (2007) at para 132.

[24] *Tsilhqot'in* (2007) at para 132.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Case Law on Shared Title and Overlaps

The case law on shared territories and overlaps is limited and has arisen in two contexts. First, the treaty-making process, and second, the consultation and accommodation area.

Treaty Making Case Law on Overlaps

- *Chief Allan Apsassin* case arose in relation to an application for injunction to stop a treaty ratification in the Lheidli T'enneh Final Agreement due to overlapping territory issues. The court did not grant the injunction and the ratification process was allowed to proceed, although rejected on treaty vote.[25]
- In *Cook*, the Court found against the Sencot'en Alliance's who sought to challenge the ratification of the Tsawwassen Final Agreement based on failing to consider shared territories and overlaps. They were unsuccessful and the Court referred to the impracticality of ping pong negotiations that would result if the applicants were successful;[26]
- In *Tseshaht*, the Court concluded that Nation-to Nation overlap agreements in territories covered by the pending Maa-nulth Final Agreement transformed disputed lands into fee simple lands and did impact the applicant but that situation could coexist without conflict because non-derogation clauses were a "complete answer" to concerns respecting overlap.[27]

Consultation Caselaw on Overlaps

Overlap litigation has also arisen in the context of the Crown's duty to consult and accommodate rights holders:

---

[25] *Chief Allan Apsassin et al v Attorney General (Canada) et al,* 2007 BCSC 492 at para 43. The Court held, "[a]t one end of the spectrum lie cases where the claim to Title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice." *Ibid* at para 46.

[26] *Cook v The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722, 2007 BCSC 1722 (CanLII) at para 185; Also see Christopher Devlin and Tim Thielmann, "Overlapping Claims: In Search of 'A Solid Constitutional Base,'" which was prepared Canadian Bar Association annual CLE on June 12-13, 2009, 9, online (pdf): <http://www.dgwlaw.ca/wp-content/uploads/2014/12/Overlapping_Claims.pdf>.

[27] *Tseshaht First Nation v Huu-ay-aht First Nation*, 2007 BCSC 1141, [2007] BCJ No 1691 at 10-11.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

- In *Gamlaxyeltxw*, the Court considered a challenge from eight hereditary Gitanyow chiefs of the allocation of moose under a management plan related to the Nisga'a Treaty. The Court denied the application on the basis that consultations would negatively impact the Nisga'a Treaty right to manage moose and that, consequently, duty to consult would undermine the treaty process.[28]
- In *Haida Nation*, the Supreme Court considered the correlation between the obligation to consult and the "strength of claim" assessment. They held that consultation has to be "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or Title, and to the seriousness of the potentially adverse effect upon the right or Title claimed."[29] Note, however, that the "strength of claim" rubric has been highly contentious in BC and this case is a difficult one, as litigation has been successful in previous matters where the Crown assessed no strength of claim.[30]

The limited jurisprudence on overlaps and shared territories has not upheld challenges when they were presented, cautiously deferring to political processes such as the treaty process instead. Consequently, there is not a substantive and sufficient body of case law to permit broad findings or principles applicable to the areas of shared territory and overlaps.

Aboriginal Title: Can it be Joint?

Shared territories and overlaps arise from a variety of situations and challenges in reaction to agreements or arrangements that might have contributed to the exclusion of many First Nations. As the Supreme Court of Canada noted in the recent *Innu* case,

> Overlapping land claims raise real procedural and substantive challenges that have yet to be resolved by this Court. In the meantime, courts should not stretch procedural rules to enable decisions that will appear to affect the rights of Indigenous groups that are neither present nor (presumably) bound by the result.[31]

---

[28] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2018 BCSC 440, 2018 BCSC 440 (CanLII) at paras 249-251.

[29] Further, in *Haida Nation*, 2004 SCC 73, [2004] 3 SCR 511, the Supreme Court established that the scope of the duty to consult and accommodate is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or Title, and to the seriousness of the potentially adverse effect upon the right or Title claimed."

[30] *Ibid* at para 43. The Court further stated, "[a]t one end of the spectrum lie cases where the claim to Title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" *Ibid* at para 46.

[31] *Innu* at para 296.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Joint Aboriginal Title has received nominal consideration and discussion in Canadian jurisprudence. The Supreme Court of Canada has recognized Title can be held in a shared manner as well as an exclusive manner. The difference between the two depends on the nature of the traditions and practices of the First Nations, and their use, occupation, and knowledge, as well as the ethno-geography of the land.

Legal tests and concepts of Title depend on the occupation, possession, and relationship between First Nations and Lands at the time of the assertion of Crown sovereignty in British Columbia, which is the date of the conclusion of the *Treaty of Oregon*—1858. That the concept of sovereignty assertion leads to a conversion of First Nations Title as 'subservient' to Crown 'higher interests'—placing Aboriginal Title as a burden on 'superior' Crown Title—has obvious flaws that have been highlighted by leading Indigenous scholars in Canada over the past 20 years.[32]

In *Delgamuukw*, Chief Justice Lamer recognized the possibility that joint Title could be recognized in Canadian law.[33] He found exclusive occupation at the time of assertion of Crown sovereignty was a requirement for proof of aboriginal Title, yet, stated that joint Title could arise from "shared exclusivity":

> Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal Title itself, because I have defined aboriginal Title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal Title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that Title. The proof of Title must, in this respect, mirror the content of the right. Were it possible to prove Title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal Title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

---

[32] John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," (1999) 37:3 *Osgoode Hall L J* 537, online (pdf): <https://www.sfu.ca/~palys/Borrows1999-Sovereignty%27s_Alchemy.pdf>; Gordon Christie, "Delgamuukw and the Protection of Aboriginal Land Interests," (2000) 32:1 *Ottawa L Rev*, online (pdf): <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1057&context=fac_pubs>; Val Napoleon, "Delgamuukw: a legal straightjacket for oral histories?" (2005) 20:2 *Canadian Journal of Law and Society* 123; Brian Thom, "Aboriginal rights and Title in Canada after Delgamuukw: Part Two, Anthropological Perspectives on rights, Tests, Infringement & Justification," 14(2) *Native Studies Review* 1.

[33] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at paras 155-158 [*Delgamuukw*].

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> In their submissions, the appellants in the case pressed the point that requiring proof of exclusive occupation might preclude a finding of joint Title, which is shared between two or more aboriginal nations. The possibility of joint Title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint Title could be reconciled by recognizing that joint Title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's. However, since no claim to joint Title has been asserted here, I leave it to another day to work out all the complexities and implications of joint Title, as well as any limits that another band's Title may have on the way in which one band uses its Title lands.[34]

Justice La Forest, in concurring reasons, also recognized the possibility of joint Title:

> I recognize the possibility that two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two aboriginal groups in the same territory.[35]

Chief Justice McLachlin also cited *Delgamuukw* for the proposition that "[s]hared exclusivity may result in joint Title."[36] Consequently, while the future remains uncertain, there optimism regarding the possibility for the recognition of joint Title within Canadian common law. In addition to these grounds, a review of the other sources *Delgamuukw* uses provides further insight into the ways joint Title could become recognized by the courts. Indeed, Professor McNeil notes that Lamer, CJ, in *Delgamuukw* identified two sources of authority regarding joint

[34] *Delgamuukw* at paras 155-158 (emphasis added).

[35] La Forest in *Delgamuukw* at para 196 (emphasis added).

[36] McLachlin in *R v Marshal*l; *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at para 57 [*Marshall*].

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Title and shared exclusivity: the common law and American case law, which might provide insight into what joint Title would look like and its required elements of proof.[37]

Shared Exclusivity in the Common Law

As noted by McNeil,

> In the common law, possession is exclusive in the sense that there can be only one possession of the same parcel of land at any given time. If two People are in dispute over the possession of a parcel of land, they cannot both have possession. . .Shared exclusivity can exist only in situations where the single possession is held by co-possessors whose claims are not in conflict with one another. . .The common law concept of shared exclusivity therefore applies where two or more persons concurrently have possession of the same parcel of land.[38]

Indian Claims Commission in the United States

McNeil further highlights US cases dealing with joint aboriginal Title. These involved a unique class of claims for compensation for lands taken without fair payment (akin to specific claims in Canada), not applications for declarations of Title. Most US cases originated in claims brought before the Indian Claims Commission, the statutory body created in 1946 to provide compensation for past wrongs and unfair dealings by the US, with remedial powers limited to monetary awards. This limits the applicability of US case law to Canadian aboriginal Title claims, but it still provides insight into how courts have dealt with joint Title issues. Professor McNeil identifies the following principles from US case law:

1. "The occupation upon which aboriginal Title in the United States is based must have been exclusive in the sense that the Aboriginal group claiming Title must have been the only ones who occupied the land. Accordingly, if the land in question was used by two or more tribes who were rivals or had no connection with one another, none of them would have Aboriginal Title;"[39]

---

[37] Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (2015) 48:3 *UBC L Rev* at 23, online (pre-publication pdf): <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3785&context=scholarly_works>.

[38] McNeil at 10-11.

[39] McNeil at 15.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

2. "If the lands in question were visited, used, or fought over by two or more groups without one of them prevailing and establishing its exclusive occupation, then none of them would have Aboriginal Title;"[40]
3. "If two or more groups with some kind of connection used the same lands in an amicable rather than an adversarial fashion to the exclusion of other groups, they could have joint Aboriginal Title;"
4. Relationship between the groups: Some United States case law holds that, for joint Title to exist, "the relationship between the separate groups claiming it must have been 'extremely close,'"[41] with strong political, social, and cultural ties, almost to the point of forming a single or closely integrated entity.[42] Other cases indicate that the relationship between the separate groups does not have to be extremely close, and that separate groups who shared land jointly and amicably could make out a claim for joint Title.[43] McNeil is of the view that the second line of authority is more correct and logical, and would be more likely to be applied in Canada.[44]

The Requirements for the Proof of joint Title

To prove joint Title held by one or more separate nations, the First Nation in a legal proceeding in British Columbia civil courts needs to establish that they occupied and shared land together at the time of sovereignty to the exclusion of all others. The test for sufficiency and exclusivity of occupation would be the same as in a Title claim brought by a single First Nation, except that the exclusive occupation would have been shared by multiple groups. Under American law, the distinct aboriginal groups sharing exclusive occupation must have had an amicable relationship. Further, the distinct plaintiff groups would need to establish their shared "intention and capacity to control the land" as per the test for exclusivity from *Tsilhqot'in Nation* (2014).[45]

The effect of a joint Title declaration

McNeil raises some interesting points about the nature of the interest held by joint Title holders in the event of a finding of joint Title:

---

[40] McNeil at 16.

[41] McNeil at 21.

[42] McNeil at 18-19, and 21.

[43] McNeil at 19.

[44] McNeil at 22.

[45] *Tsilhqot'in* (2014) at para 48.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

a. It is possible that two or more distinct aboriginal groups could have shared land pre-sovereignty and used the land in different ways.[46] There would be a question as to how the distinct pre-sovereignty uses would affect present-day uses of the land by Titleholders.[47]
b. Joint Title would still be *sui generis* like aboriginal Title, and would still be subject to limits such as a) inalienability to the Crown; and b) the inherent limit on uses of the land that prevent future generations from benefiting from the land.[48]
c. Since Aboriginal Title includes decision-making authority over the land, there would be questions as to how the different groups would make joint decisions on its use. Likely the governance structure would be determined by the aboriginal groups according to their own laws and practices.[49]
d. Given these factors, joint Title would be unique in each case according to the practices and land uses of the different nations who shared the land.[50]

Note, however, that some procedural issues surrounding joint title claims have arisen, as noted below. First and foremost is the likely requirement that, if a joint title action is commenced, separate counsel will be required for each of the First Nations in the matter to avoid conflicts of interest.

Conflicts of interest and Joint Title and rights: The *Ahousaht* Litigation

Ahousaht involves a claim by eleven *Indian Act* bands for Aboriginal Title and fishing rights, or, alternatively, a declaration that rights and Title were held collectively by the larger Nuu-chah-nulth Nation. The plaintiff claimed that each Band held Title to specific territory within the claim area, or alternatively that they held Title to the entire area as one Nation. In an interlocutory decision, Canada applied for an order that the plaintiffs be required to provide particulars of the boundaries of each plaintiff's claim area, and an order disqualifying the plaintiffs' counsel from acting on behalf of the eleven plaintiff First Nations on the grounds that they were in a conflict of interest. Justice Garson identified the problem at issue on both

[46] Paraphrased from McNeil at 9-10.
[47] Paraphrased from McNeil at 24.
[48] Paraphrased from McNeil at 37.
[49] Paraphrased from McNeil at 33-34.
[50] Paraphrased from McNeil at 36.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

applications as "the conflicting aboriginal Title claim of the individual first nations as to their adjoining boundaries."[51]

Notably, *Ahousaht* was decided after examinations for discovery of the representative plaintiff of each band had taken place. In this case, the plaintiffs acknowledged that there were overlapping claims but argued that, by narrowing the relief sought and seeking limited declarations, any conflict would be avoided and the court would not be required to address the overlapping claims. Justice Garson wrote, "[c]learly, pursuit of aboriginal Title by the plaintiffs, collectively, is problematic because the plaintiff bands could not be represented by one law firm as that firm would then be in conflict."[52] The plaintiff opposed providing further particulars of the claim area boundaries, arguing that they had been sufficiently particularized at law and further, it was not possible to do so without fracturing the litigation and creating a conflict of interest.

In an attempt to avoid any conflict between the eleven plaintiff First Nations, the plaintiffs narrowed their claim to two specific areas, leaving Aboriginal Title to all other rivers for later consideration. In areas of overlap, they sought only declarations that one or more of those plaintiffs claiming the area has Aboriginal Title, but not as to which plaintiff has Title.[53]

Justice Garson found an irreconcilable conflict on the basis that "[m]any areas over which each of the plaintiffs claim aboriginal Title and fishing rights, overlap with each other."[54] She reasoned,

> The Claim Map sets out the Territories that each of the plaintiff nations individually claims aboriginal Title to, as well as the boundaries of the Nuu-chah-nulth Territory that the collective of the nation claims Title to. There are large areas of overlap, where two or more nations claim Title to the same area. It is these areas of overlap that are the true problem and the basis for both of Canada's applications.[55]

Justice Garson considered the possibility of shared Title but noted that the facts did not support joint Title, nor had it been pled in the matter:

---

[51] *Ahousaht Indian Band v AG of Canada*, 2007 BCSC 1162, 2007 BCSC 1162 (CanLII) at para 1, online: <https://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1162/2007bcsc1162.html?searchUrlHash=AAAAAQAWZ2Fyc29uICJ0aGUgY2xhaW0gbWFwIgAAAAAB&resultIndex=1> [*Ahousaht* (2007)]

[52] *Ahousaht* (2007) at para 13.

[53] *Ahousaht* (2007) at para 18.

[54] *Ahousaht* (2007) at para 27.

[55] *Ahousaht* (2007) at para 28.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> The problem with these areas of overlap is that while resource rights, such as fishing rights which are site-specific aboriginal rights, are non-exclusive and can legally overlap, aboriginal Title is exclusive and so cannot legally overlap. Although it is possible to have areas of shared aboriginal Title, no such areas exist on these facts and shared Title has not been pled .Instead each band believes that they have Title exclusively and that the opposing band is wrong. For example, Group A and Group B each claim aboriginal Title and fishing rights over Area X. When a witness for Group A is asked to comment on the assertion by Group B that it has aboriginal Title to Area X and the right to fish in Area X, he or she will invariably say that the opposite group does not have aboriginal Title to Area X nor the right to fish in Area X, because that area is the exclusive territory of the witness' own group. If a single counsel is allowed to represent both groups, then that counsel will be in a conflict of interest situation, both while the witnesses are on the stand and when referring to the testimony in final argument.[56]

The court reviewed the examinations for discovery of disputed land claims as between the plaintiff bands, and concluded that litigation of the claim would be impossible with a single legal counsel for all eleven bands:

> To determine which band actually has aboriginal Title to these areas of overlap, each band would need to present evidence on the issue and be cross-examined on that point. However, as each band is represented by the same law firm, it would be impossible for counsel to present evidence on those issues without being in a real conflict of interest.[57]

The court identified that for an Aboriginal Title claim, land boundaries "need not be delineated as specifically as would be required at common law," i.e., using a metes and bounds description, and that general boundaries were sufficient.[58] However, on the facts of *Ahousaht*, there were "large areas of overlap where exclusive occupation is claimed by opposing First Nations."[59]

The court ruled against an attempt to narrow the relief sought by seeking a finding that one of the plaintiffs had Aboriginal Title to an area of overlap and leaving the determination of which plaintiff had Title for negotiation or later decision by the court:

---

[56] *Ahousaht* (2007) at para 29, emphasis added.

[57] *Ahousaht* (2007) at para 33.

[58] *Ahousaht* (2007) at para 62.

[59] *Ahousaht* (2007) at para 62.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> Without identifying the appropriate modern day aboriginal group claiming Title, this court cannot determine whether that group has the requisite connection with the group who is said to have been in occupation of the territory at the time of the assertion of sovereignty.[60]

Justice Garson held that the conflict could be avoided by severing the trial so that, in the first phase, only the plaintiffs with non-overlapping territory would participate.

The *Ahousat* case represents a warning to those seeking collective relief in the civil litigation process—overlaps that will necessitate multiple lawyers, civil litigation rules, pretrial applications, and aggressive and technical advances to defeat claims pursued by the Crown.

Canadian Specific Claims Tribunal

Shared territorial claims and territorial overlaps issues also arise in Specific Claims in Canada. In the Specific Claims Tribunal context, there are several decisions, although the Tribunal is still fairly recent. Recently, the scope of claims it is able to adjudicate was legally interpreted to be broad enough to include pre-confederation village claims. With that expansion, it is likely many overlaps issues will arise in years to come. Overlaps disputes frequently stem from ambiguity in the historical documents and colonial records.

For example, a recent decision of the Tribunal involved a dispute over who the Saskatchewan "Touchwood Hills and Qu'Appelle Valley Indians" referred to in historical records. The claim was pursued with eleven separate First Nations *Indian Act* bands from Treaty 4 territory claiming to have been impacted by the same land and fishing site deprivation by virtue of Crown actions in a 1900s surrender. All of these bands argued they were included in the category of Indians referred to. The 2019 decision in *Kawakatoose et al*[61] resulted in a favourable ruling for a smaller group of bands, called the Kawacatoose Group, and the dismissal of the claims of others. While more of a dispute over the meaning of records than over

---

[60] *Ahousaht* (2007) at para 74.

[61] This claim involved 11 First Nations bands in Saskatchewan who all claimed compensation for a 1918 surrender of Last Mountain Indian Reserve 80A (IR 80A or Last Mountain Reserve). It was originally surveyed by John C. Nelson and later confirmed by Order in Council PC 1151 (PC 1151) on May 17, 1889, as "a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians." In 1918, IR 80A was ostensibly surrendered by the George Gordon, Poorman (known today as Kawacatoose), Day Star, Muskowekwan, Muscowpetung, Pasqua, and Piapot Bands (present-day First Nations called the Kawacatoose Group). The Declaration of Claim alleges that Canada did not administer the 1918 surrender of Last Mountain Reserve in accordance with its legal obligations. Other First Nations also located in the geographic area of the Touchwood Hills and Qu'Appelle Valley alleged they too were deprived of the fishing station and were appropriate claimants in the matter. For decision of the tribunal, see *Kawacatoose First Nation et al v Her Majesty the Queen in right of Canada*, 2019 SCTC 3, online: <https://decisia.lexum.com/sct/rod/en/item/419151/index.do>.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

territory, the Tribunal applied an interpretive approach based on reasoning from records, and relied less on oral evidence, as the oral evidence was not deemed to be specific to the intention of a surveyor. The Tribunal noted the importance of attachment of the claimants, who were rejected entitlement to the lands in question, viewing it as more of a modern attachment than one that would have been substantiated according to detailed knowledge of events at the time of surrender.

The specific claims cases, especially the pre-confederation claims, are likely to raise many thorny issues of overlaps in years to come. The oral history is not well documented, and the interpretation of historical documents is generally approached to be resolved in favour of First Nations, although the Tribunal did not follow that principle in the recent case.

First Nations Legal Order Practices on Overlaps

First Nations in British Columbia have created and sustained intertribal protocols and processes to resolve shared territories and overlaps for millennia. The disruption of these practices has been within the previous 150 years. While colonial laws and policies have been imposed, the use and importance of First Nations legal order work on protocols for these matters is a space that remains within the work of the First Nation. As former Treaty Commissioner Miles Richardson described it,

> These disputes are not new. Over 200 years ago, my people, the Haida Nation, had a dispute with our neighbours across the Sound, the Heiltsuk Nation. The dispute was about access to fish in a particular part of the ocean. This was a cause of conflict for years. Finally, the leaders tired of fighting — they realized they each had interests in the area. They decided that their respective Titles were intermingling and they would develop protocols for stewardship and sharing of resources. Recently, in the face of serious external threats to the marine environment, the present generations of the Heiltsuk and Haida nations renewed their commitment to an old treaty.[62]

In a similar vein, Hon Stephen Point explains the value of intertribal protocol as necessary First Nations legal and political work:

> I think the other answer is that First Nations need to, if they can agree, enter into a protocol agreement. The protocol agreement would just say we acknowledge that we need to define for ourselves where our territories are, and we agree upon a process

[62] Interview by Sophie Pierre of Miles Richardson on Musqueam Territory (August 21, 2014) by Chief Commissioner Sophie Pierre as cited in BCTC 2014 Annual Report at 7.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

> where the Treaty Commission comes in or a traditional territory commission panel to hear both sides and to make either recommendations or a decision.
> Now, the only question is if the Treaty Commission is authorized to do this, and I think underneath your legislation you are. Any recommendation or decision would be final, and then it is up to the parties to either accept or reject it, but at least they have got a mechanism.[63]

The British Columbia Treaty Commission has repeatedly called for new tools to support overlaps and territorial conflicts. As noted above, in court challenges to the modern treaty process, for the most part, First Nations questioning the impact of modern treaties on their territories have been unsuccessful. The modern treaty process has been described as a political agreement and not a precise arrangement to match or align with the traditional use or occupancy of the land. While there are a range of circumstances, Nations in the Treaty process have engaged with others through intertribal processes.

For example, Tla'amin were using these methods to work out relations with neighbouring First Nations bands during the treaty process in the 1990s. Tla'amin began overlapping and shared territory work early on in their treaty process, entering the process in 1993 and signing their first agreement with Sechelt (Shíshálh) First Nation in 1995. Tla'amin Chief Negotiator Roy Francis says,

> We knew this work was important and that it needed to be done. It's about relationship building with your neighbours. Acknowledging our traditional ways, our unwritten protocols. It's about getting permission and giving permission to hunt and gather and fostering ongoing cooperation and collaboration to share.

Historically, Tla'amin and two of its neighbours were one nation, but were separated into three *Indian Act* bands after colonization began. When entering the treaty negotiations process, Tla'amin, like other First Nations, had a choice on how they would organize themselves. Tla'amin considered joining with their close neighbours as one nation for the purposes of treaty negotiations, but decided to proceed on their own to a modern day treaty through the BC Treaty process. Along the way, they had to conclude protocols and agreements with those same First Nation neighbours, thereby creating a process or mechanism on overlapping and shared territory issues. For Tla'amin, these protocols were with extended families and relations in these other communities. This was a form of overlap resolution and, over time, perhaps

[63] *Ibid* at 11.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

Nation rebuilding. As an interim step, it was seen as valuable work to strengthen bonds between First Nations as transitions in governance and territory were underway.[64]

Many other intertribal protocols are under development or are currently functioning to address complex issues surrounding relations and shared territories. Like all processes, the intertribal protocol space requires a contemporary entity to help find a way forward. The consideration of a tribunal, commission, or proper institution based on Indigenous Legal Order practices and values, and created by the First Nations of British Columbia, is necessary and possible.

There has been a reluctance to share some of these protocols with the public. This hesitation reflects the need for time and space to engage territories without Crown interference. Nonetheless, is difficult to assess whether this work is progressing effectively at this time, as it is not analyzed.

Conclusion

The issues of territorial overlaps, Nation rebuilding, and shared territories and resources are not new issues in British Columbia. The Supreme Court of Canada has recently given support to the importance of access to justice considerations in the *Innu* case—ruling that Innu could bring an action in one province and was not rule-bound to proceed in two provinces when their Title crossed provincial boundaries. This reasoning can be extended and analogized to the context of shared territories and overlaps in British Columbia. There is no access to justice for First Nations in British Columbia if the Crown uses territorial overlaps as a defence to the settlement or return of lands. Furthermore, any access to justice obtained through litigation is slow, expensive, and bound by rules in the civil litigation system. The adversarial civil justice system will always be available for those who wish to use it. However, solutions to access to justice issues require a more profound and fundamental solution. To get access to justice, we need to create a justice mechanism that responds to the circumstances of First Nations in British Columbia.

I am confident that First Nations in British Columbia will collaborate and design a process and mechanism that supports this work. That mechanism will require full support from Canada and British Columbia. While the existing Canadian jurisprudence on shared territories and overlaps is of limited assistance, given the limitations discussed, it does signal clearly that the solution to these complex conflicts rests in an expert mechanism drawing from First Nation Legal Orders. The efforts to create institutional change should not be derived from Canadian caselaw and policy, but it will need to be grounded in common law protection and Constitutional protection, possibly with recognition-based legislation to ensure it can function

[64] BCTC 2014 Annual Report at 17.

Professor Mary Ellen Turpel-Lafond (*Aki-Kwe*)
Peter Allard School of Law
University of British Columbia
Turpel-Lafond@allard.ubc.ca
Senior Associate Counsel
Woodward and Company
metl@woodwardandcompany.com

without constant external challenge. Most importantly, the mechanism and process should reflect the implementation of United Nations Declaration Articles 27 and 40, among others so that the standards for the mechanism uphold human rights, peace, and justice.