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Shared Territories and Overlaps: *Overview of Themes and Issues*

1. What has caused shared territories and overlaps?

The challenge of "shared territories" (an area in which more than one Nation may both have title and rights) and "overlaps" (an area in which more than one Nation advances that it is exclusively their territory) is a direct result of colonialism.

For countless generations Indigenous peoples have structured relations between them through their laws and protocols. This includes how lands and resources were stewarded and governed in ways that respected the sovereignty of Indigenous peoples, including their relationships with their respective lands and territories.

These relations between Indigenous peoples were maintained through a wide range of mechanisms including: the use of ceremony; respect for roles, authorities, and the granting of permissions; means of resolution of disputes and maintaining of understandings; the application and operation of Indigenous legal orders; and use and sharing of knowledge systems.

The disruption of these patterns began in the earliest stages of colonialism, and was entrenched through the Crown's denial and assimilation agendas. A fundamental premise of colonialism was the propagation of a pernicious fiction – that Indigenous peoples did not have sovereign relationships with their territories, and that the land was empty. This fiction expressed itself in a legal and policy framework intended to separate and dispossess: forced dislocation; the creation of the reserve system; the imposition of the *Indian Act* and the Band Council system of governance; the taking up of lands and resources by settlers; the violation of historic treaties; and the exclusion of Indigenous peoples from means of recourse, including the court system.

The disruption of mechanisms for maintaining relations between neighbouring Nations – including territorial boundaries - was accompanied by the imposition of Eurocentric systems and values. This included Eurocentric concepts of property and land ownership, a focus on fixed and narrow categories and types of land relations, a pre-occupation with mapping and boundary delineation, and the primacy of individual ownership.

Today, this disruption, and imposition of colonial systems manifests itself in many ways, including shared territory and overlap issues where there is conflict regarding the territorial boundaries of Indigenous peoples. For example, shared territory and overlap issues are a major challenge and source of tension in the context of the British Columbia Treaty Process which

impacts all First Nations within and outside of that process and also arise in other contexts such as the negotiation of revenue and benefit sharing arrangements.

2. What are the impacts of shared territories and overlaps on First Nations?

We are in a moment of significant transition. Through tremendous advocacy of Indigenous peoples over many generations, the colonial enterprise of denial and extinguishment has been legally and politically revealed for what it is – a racist form of oppression that must be wholly rejected, and whose legacy needs to be substantively addressed.

The imperative today is for true reconciliation grounded in the recognition and implementation of the inherent title and rights of Indigenous peoples consistent with section 35 of the Constitution, and the upholding of the basic human rights of Indigenous peoples in the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration). Shared territories and overlaps are one of the legacies of colonialism that must be addressed for this true reconciliation to take place – so that the title and rights of all Indigenous peoples can be fully implemented, and Indigenous governments, laws, and jurisdictions respected.

Many First Nations in BC – indeed, a large majority - find themselves confronting the following current reality:

- Traditional understandings of relations between neighbouring nations are often no longer in place.

- First Nations remain at different stages of rebuilding their Nations and governments, with the current reality being that there typically remains many First Nations and governments in the same territory.

- The Crown does not yet fully recognize the relations between Indigenous peoples and their territories, and their title and rights, and continues to have laws and policies that are not based on recognition.

- First Nations are put in the place having to advance and advocate for their land rights in ways that are cognizable and often demanded by the Crown and the common law – such as through boundary maps, and evidence of occupation that meets imposed Eurocentric standards.

- Lack of clarity regarding territorial boundaries is used by the Crown and industry to the detriment of all First Nations including to: delay or avoid establishing proper relations; justify avoiding or using minimal approaches to meeting obligations to consult and accommodate, or complete agreements or understandings; and support outcomes with some First Nations that may infringe the rights of others. This includes Crown practices, such as in the British Columbia Treaty Process and other processes, of entering into extensive negotiations regarding title and rights without

due consideration of Indigenous connections to the lands and resources. A common outcome of this has been delay in reconciliation for First Nations involved in negotiations, and often conflict – including in the courts – with First Nations whose rights may be impacted by negotiations and agreements that are reached.

To say it another way, shared territory and overlap issues act to prevent 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. This is also made evident by legal decisions regarding Aboriginal title.

Aboriginal Title, as confirmed by the Supreme Court of Canada in decisions such as *Delgamuukw*[1] and *Tsilhqot'in Nation*[2], 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 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"[3], and one indicia of Title, as affirmed later by the Supreme Court of Canada, is that historically a Nation occupied it exclusively, in the sense 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.[4] It exists because of the sovereignty of Indigenous peoples who have owned and governed the land and resources that now comprise British Columbia for countless generations.

Given the character of common law 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; when their systems of governance and law are continuing to evolve and supported by increasing capacity; and where territorial boundaries, and relations with neighbouring Nations, are clear, structured, and understood. Proper recognition and implementation of Title and Rights requires the resolution of shared territory and overlap issues.

3. What work is on-going to address shared territories and overlap?

First Nations in BC, over many decades, have been working on their relations with their neighbours to address issues of shared territories and overlaps. There has been much success, including though the completion of many protocols, understandings, and agreements which confirm patterns of relations including territorial boundaries. At the same time, First Nations

[1] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do.
[2] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.
[3] See paragraph 470 in https://www.bccourts.ca/jdb-txt/sc/07/17/2007bcsc1700.pdf.
[4] See paragraphs 60 -66 in https://www.canlii.org/en/bc/bcca/doc/2015/2015bcca154/2015bcca154.html.

across BC are at different stages in doing their governance and Nation-building work, including re-establishing proper relations with neighbours.

Parallel to work done by First Nation in their direct relations with each other, there has been a longstanding recognition that there is necessary shared and collective work to be done. To that end, First Nations have worked together on numerous occasions to develop policy approaches, consider the development of new institutions, share knowledge and ideas, and innovate new mechanisms.

At the All Chiefs' Forum convened by the First Nations Leadership Council in November 2007, First Nations Chiefs and leadership issued the "All Our Relations" Declaration. The Declaration signified the growing unity among First Nations in BC and highlighted the need to build unity through the creation of Nation-to-Nation protocols, resolution of overlaps and development of principles that focus on relationship building. Further, Chiefs in BC have passed a number of resolutions at meetings of the Union of BC Indian Chiefs (UBCIC), the First Nations Summit (FNS) and the BC Assembly of First Nations (BCAFN) aimed at bringing about solutions to resolve overlap and shared territory issues. In March 2014, the FNLC held the BC Chiefs Forum on Overlaps and Shared Territory Issues to discuss amongst First Nations leadership in BC the significant challenges facing First Nations with respect to this issue. As a result, the FNLC has been coordinating the development of this framework to set out First Nations perspectives on overlap and shared territory issues and to inform an approach forward.

In undertaking this work, First Nations are reflecting a reality that ultimately only they can lead the work of addressing shared territories and overlap issues. This work is part of government and Nation re-building that must be rooted in Indigenous self-determination and the inherent right of self-government. Crown colonial imposition created these conflicts. Self-determination is the foundation for resolving them.

This does not mean, however, that the Crown does not have constructive and essential roles to play. Indeed, Crown colonialism created this reality. Crown governments must shift from their practices that exploit or reinforce division to ones that respect and support the work First Nations are doing to resolve these issues. To be blunt, this has not yet occurred in a meaningful way, and the Crown pursues lengthy negotiations, including treaty and other negotiations, without due consideration of the Indigenous connection to the lands and resources in question, or ensuring or respecting agreements and processes between Indigenous peoples regarding territorial boundaries. Crown governments still primarily operate in a way that seeks to take benefit from the uncertainty created by shared territories and overlaps. This is seen in court positions, consultation practices, and how the government negotiates agreements. As well, the Crown should be actively and substantively supporting First Nations to put mechanisms in place to address these issues, without interference and with no strings attached. To date, this rarely has occurred.

As well, it is vitally important to recognize that in recent years an important shift has taken place. A consensus has emerged amongst First Nations and Crown governments that the standards to guide the work of reconciliation are the basic human rights enshrined in the *UN Declaration*. This has

been confirmed in multiple ways, including through the passage of the *Declaration on the Rights of Indigenous Peoples Act* in British Columbia. Importantly, this affirms that the work of reconciliation must be grounded in implementation of the right of self-determination, the inherent right of self-Government, recognition of the lands, resources and territories of Indigenous peoples, and free, prior and informed consent. Approaches to addressing shared territories and overlaps must be observant of and consistent with the *UN Declaration*.

4. What are critical topics for further developing approaches to shared territories and overlaps?

In exploring collective ways forward to resolve shared territory and overlap issues there are a number of critical topics that require exploration.

Indigenous laws and legal orders

Indigenous legal orders, laws and customs guide governance, conflict resolution, and peace-making within and between First Nations.[5] These legal orders are diverse, dynamic, and distinct, and were a foundation for how relations between neighbouring Nations, including territorial relations, were governed and resolved for millennia. Indigenous legal orders are grounded in a different worldview and set of values than the common law:

> The worldviews that underlie Western and Indigenous cultures are starkly different from one another. For example, Indigenous approaches to addressing conflict are more accurately described as conflict transformation in that they seek to address the conflict in ways that heal relationships and restore harmony to the group. In contrast, Western conflict resolution methods prioritize reaching an agreement between individual parties over mending relationships that have been damaged by the conflict.[6]

Resolving shared territory and overlap matters has always emphasised the necessary role of Indigenous legal orders. This work is part of addressing the legacy of colonialism, and implementing self-determination, and to that end it must be grounded in laws, customs and approaches that are legitimate and resonate for Indigenous peoples, cultures, and communities. Reproducing approaches grounded in western, colonial, or imposed worldviews and practices rarely works. This is evidenced by how it is widely accepted that when the courts have been asked to address shared territory matters the typical outcomes range from unsatisfactory to creating even more division.

Indigenous dispute resolution

Typically, in North America, dispute resolution is talked about in terms of processes such as “negotiation”, “mediation”, or “arbitration”, and the different models of such processes, such as ‘interest-based’, ‘problem-solving’, ‘transformative’ and so on. What is often not emphasised

[5] While the primary sources for First Nations laws and conflict resolution processes are First Nations themselves, there is a growing body of expert and scholarly research, much of it developed in partnership with First Nations.
[6] Polly Walker, “Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization,” 528.

sufficiently is that this way of talking about and thinking about conflict resolution is culturally specific, born out of specific developments and forces in Europe and North America over the last half century. There is nothing universal or neutral about these processes of dispute resolution – they are expressions of the time, place, cultures and societies in which they emerged.

When speaking about resolution of shared territories and overlaps it is thus important to ensure that Indigenous conceptions of dispute resolution are being engaged and worked with as part of developing models and approaches. Indigenous dispute resolution processes are plural, dynamic, and grounded in Indigenous legal orders. In addition to being informed by different worldviews then western models, there is also a danger in unquestionably propagating western approaches to dispute resolution – namely justice and equality will not be served:

> The dominant western political vocabulary has a readily available story about how to resolve disputes between groups over perceived conflicts of interests, aspirations, or access to resources: let each side make its case before a neutral third party, who will decide objectively on a just settlement. This common-sense story of adjudication has deep roots in western cultural, legal, and philosophical traditions, and is closely tied to accounts of political legitimacy. In its common-sense version, this story about neutrality and justice has tremendous currency in North America: it is seen as describing not only the aspirations of our legal and political systems, but even their typical operation. Seen from the standpoint of Aboriginal struggles for survival, equality, and self-determination, however, the dominant western account of justice looks deeply corrupt.[7]

As well, it is important to emphasise that Indigenous legal orders are plural and diverse, and as such, so too are approaches to Indigenous dispute resolution. As one study of modes of Indigenous dispute resolution across Canada identified from working with a number of communities, including Elders, Matriarchs and knowledge-keepers:

> (1) There is no 'one size fits all' approach within or among Indigenous legal traditions. There are a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.
> ...
> (2) Indigenous legal traditions reveal both consistency and continuity over time, and responsiveness and adaptability to changing contexts.[8]

Utilizing Indigenous dispute resolution to resolve shared territories and overlaps means recognizing that many models of process will be needed – and that they must be legitimate to and reflective of the peoples and cultures who are utilizing them.

Indigenous Institutions

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[7] David Kahane, "Dispute Resolution and the Politics of Cultural Generalization" 6.
[8] Nisha Sikka, George Wong, and Catherine Bell, "Indigenous Centered Conflict Resolution Processes in Canada", 6: http://www.coemrp.ca/wp-content/uploads/2015/12/report-on-indigenous-centred-conflict-resolution-processes-in-canada.pdf.

First Nations in BC have long identified the need for institutional supports in doing critical work such as the resolution of shared territory and overlap issues. New mechanisms and institutional supports were called for in the *Royal Commission on Aboriginal Peoples* over 25 years ago and throughout the history of the British Columbia Treaty Process, and were also a priority in the *New Relationship Vision* in 2005 and the proposed recognition legislation in 2009.

The idea of forming an Indigenous commission was included in the original version of the *Commitment Document* completed in 2015[9], and maintained in the final (2018) version. The *Commitment Document* is supported and endorsed by First Nations through resolution at the BCAFN, FNS, and UBCIC. The Commitment Document described creating, within three years, an Indigenous commission that would assist with boundary resolution.

The development of new institutions is also supported by the Calls to Action of the Truth and Reconciliation Commission and the UN Declaration.

Given all of this, there is growing momentum and consensus amongst First Nations and Crown governments that the time has come to consider development of a new Indigenous institution. Such an institution should be designed, controlled, and led by First Nations, and support Indigenous peoples as they advance the aspects of self-determination and government and Nation re-building that are connected to restoring proper relations with neighbouring Nations.

[9] https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/commitment_document_work_plan__2016.pdf.