"OVERLAP": CAUSES AND IMPLICATIONS OF CONTESTED INDIGENOUS CLAIMS TO TERRITORY IN THE CONTEXT OF THE BC TREATY PROCESS

by

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ABSTRACT

The BC treaty process employs a model of claims negotiation new in the Canadian experience. Contrary to long-standing federal claims policy, treaties are being settled in areas where multiple indigenous groups lay claim to the same territory. Drawing on theories of human territoriality, critical legal geography, and indigenous geography, this thesis examines the indigenous socio-spatial identities at work within (and beyond) the BC treaty process, the spatial dimensions of aboriginal rights as articulated by Canadian courts, and BC Supreme Court actions that have arisen because of overlapping claims. Two overarching goals of the BC treaty process are to achieve certainty of jurisdiction and to avoid aboriginal rights litigation. This thesis concludes that insufficient Crown and judicial engagement with the issue of overlapping claims undermines both of these goals.

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GLOSSARY

LTFA	Lheidli T'enneh Final Agreement
MNFNFA	Maa Nulth First Nation Final Agreement
NFA	Nisga'a Final Agreement
TFNFA	Tsawwassen First Nation Final Agreement

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CHAPTER 1: INTRODUCTION

A primary goal of the BC treaty process is to achieve certainty of jurisdiction over land and resources (BCTC, 2011a; McKee, 2009; Penikett, 2006; Woolford, 2005). The recent settlement of three modern treaties in British Columbia, however, is being celebrated against a backdrop of criticism and judicial challenge that casts the BC treaty process in a cloud of uncertainty. This thesis is concerned with one contentious dimension of the BC treaty process, overlapping and contested indigenous claims to territory, a phenomenon that is increasingly recognized as a significant barrier to the ethical settlement of treaties in British Columbia (BCTC, 2010a, 2010b, 2009).

Indigenous groups wishing to negotiate a treaty in British Columbia are required to make "statements of intent:" assertions of collective identity and "traditional territory." Overlapping claims arise where multiple indigenous groups assert claims to the same geographic area. In the context of the BC treaty process, overlapping and contested claims are evident where one or more indigenous group contends that modern treaties are conferring treaty rights in areas for which there may not be a legitimate or exclusive claim.

Territory is commonly enacted as a device for clarifying something else (Delaney, 2005; Sack, 1986). Unpacking what this "something else" is, who defines it and for what purpose, is fundamental to understanding the causes, implications, and possible strategies for working through the issue of contested claims within and beyond the BC treaty process. If territory is to be understood as a means to establish certainty by delineating areal spheres of rights and authority (Delaney, 2005; Sack, 1986), it follows that the meaning of territory needs to be defined and understood. Territory does not "work" unless there is acceptance, or at least tacit acceptance, of its legitimacy (Delaney, 2005).

Indigenous understandings of territory, however, are often anything but simple, especially when contrasted with dominant (Western) understandings of place (see for example Thom, 2009, 2005; Egan, 2008; Larsen, 2006; Overstall, 2005; Turner et al., 2005; Turner and Jones, 2000; Marsden, 2002, 2001; Brown, 2002; Marsden and Galois, 1995; Ingold, 1987). The phenomenon of overlapping claims is thus more than a "problem" looking for a "solution," more than a mechanical issue of "resolving" contested boundary locations, it is in fact symptomatic of broader contestations concerning the meaning of boundaries, the ontology of space (Bird-David, 1999; Ingold, 1987), and competing visions for the actualization, through treaty negotiation, of indigeneity.

How social collectives are defined, how they designate who are "insiders" and "outsiders" and for what purpose, bears on how socio-spatial identities are expressed (Alfred, 2009, Newman, 2006; 2005, 2000; Poata-Smith, 2004; Paasi, 2000, 1999; Newman and Paasi, 1998; Canada, 1996). Indigenous groups[1] participating in the BC treaty process are variously organized as "nations," *Indian Act*-defined Bands, tribal councils, customary organizations, and other types of "umbrella" organizations (BCTC, 2011b). By "receiving" expressions of territory associated with these identities, the BC treaty commission has facilitated the addition of a "new" layer of socio-spatial identity to the landscape of indigenous geographies of British Columbia, the meaning and bounds of which are contested along multiple axes of difference.[2]

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[1] The terms we use to describe groups of indigenous peoples are important and contextual. In the context of the BC treaty process, the term "First Nation" has a specific meaning: "First Nation means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia" (*BC Treaty Commission Act, 1995*). In this thesis I employ the term "indigenous groups" to refer to groups of indigenous peoples, however organized, which may or may not be participating in the BC treaty process. In the legal context, I use the term "aboriginal" to refer to peoples whose aboriginal rights are afforded protection by s.35(1) of the Canadian Constitution (*Constitution Act*, 1982). When referring to specific indigenous groups, I attempt to use the name used by the group itself.

[2] The BC treaty process is a voluntary process of political negotiations among First Nations, Canada and British Columbia. According to the BC treaty commission, the neutral facilitator of the BC treaty process, "the main goal of

It is a fundamental right of indigenous peoples to define their own identity (United Nations, 2007). The actualization of this right necessarily extends to issues of governance and jurisdiction, both with respect to indigenous-state relations and to relations between and among indigenous groups. Because the settlement of treaties involves the statutory formalization of indigenous socio-spatial identities, the Crown is implicated in the issue of overlapping and contested claims, by default or design.[3] The issue is not a strictly indigenous polemic.

The negotiation and settlement of treaties in contested areas opens a veritable Pandora's box of difficult questions: Does the Crown's practice of negotiating with multiple indigenous groups in areas of contested claims have the potential to privilege some indigenous groups to the detriment of others? Does the settlement and implementation of treaties in contested areas prejudice the constitutionally protected rights of indigenous groups that are not party to such treaties? And finally, are contested claims a barrier to the ethical settlement of treaties, and if so what can and should be the role of the Crown and the courts in effecting reconciliation of contested claims in the context of treaty negotiation in British Columbia?

In the following chapters I argue that insufficient Crown and judicial engagement on the issue in effect denies Canada's obligation to treat with indigenous peoples in a manner that is equitable and just. I argue that the issue is indeed problematic in the context of treaty negotiation because the settlement of treaties in contested areas in effect privileges some

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the treaty process is to provide certainty of jurisdiction over land and resources" (BCTC, 2011a, p. 1). The authority of the BC Treaty Commission to "receive" statements of intent is discussed in chapter 4.

[3] Three treaties have been ratified under the auspices of the BC treaty process: the Tsawwassen First Nation Final Agreement (2006), the Maa-Nulth First Nations Final Agreement (2006), and the Yale First Nation Final Agreement (2010). The Lheidli T'enneh Final Agreement (2006) was reached but not concluded due to insufficient support from Lheidli T'enneh members (BCTC, 2011b; BCTC, 2007). The Nisga'a Final Agreement (1999) was negotiated with Canada's Comprehensive Claims Process (i.e., was not subject to the policies of the BC treaty process). As discussed in chapter 4, all of these treaties have been challenge in court because of overlapping claims.

indigenous groups to the detriment of others, and in so doing prejudices the aboriginal rights of indigenous groups with overlapping claims. A *laissez faire* approach to the issue at best puts the BC treaty process on ethically (if not legally) ambiguous ground, and at worst undermines two of its primary goals: to achieve certainty of jurisdiction and to avoid aboriginal rights litigation. What is required, and what I explicate in the following chapters, is an understanding of the causes and implications of overlapping claims, to serve as a foundation for further enquiry into strategies for harmonizing contested claims within (and beyond) the BC treaty process.[4]

Methodological considerations

This project has its origins in my long-standing interest in the rights of communities to land and resources, and in particular my interest in questions related to how we can better understand and accommodate indigenous rights and ways of knowing land within regimes of resource allocation and management, including claims negotiation. Over the span of the past twenty years, I have worked as a researcher, resource analyst and cartographer for and with a number of indigenous organizations, including Indian Bands, a tribal council, a tripartite land use planning group, and a group of hereditary indigenous leaders located in British Columbia and in the Northwest Territories. Such experience prevents me from claiming objectivity in undertaking this project. This project is very much compelled by my desire to support what I believe is an important and just cause: the goal of indigenous people to actualize their rights to land and self-determination.

This project may be said to fall within the broad category of "action research" in that

[4] While beyond the scope of this thesis, it is worth noting that negotiations between the Crown and indigenous groups concerning revenue sharing and land management are similarly challenged by the issue of overlapping claims, particularly where governments are required to the assess the relative strength of claims to determine which First Nations to consult, negotiate and accommodate (see for example Canada, 2010; British Columbia, 2010).

its objective is to effect policy change that furthers a political goal, that of ethical treaty settlement. I do not claim, however, that this project lies at the more transformative end of the action research spectrum, where research "empowers people who are normally just the subjects of research, to develop their capacity to do their own research and develop their own solutions" (Kirby and McKenna, 1989, p. 26). My goal here is more modest: to engage with the intellectual space *between* (Katz, 1994) indigenous and non-indigenous perspectives, to improve understanding, and to seek out ways to bridge epistemological divides.

The "positioned" approach I employ is supported by the work of scholars who have paid close attention to links between research, politics, and the production of knowledge (Howitt and Stevens, 2005; Gregory, 2004; Madge et al., 1997; Katz, 1994; Nast, 1994). Such scholars suggest that there is rarely if ever one universal truth but rather multiple, continually contested "partial truths" (Clifford, 1986). In this view methodological orientations are profoundly shaped by the epistemological and personal position of the researcher, which influences the research questions that are asked, the choice of text and people to consult, the way information is interpreted and what is done with research results (Madge et al., 1997). Research is inherently political not only because the knowledge it produces has political implications but because the entire process of research is politically infused (Howitt and Stevens, 2005; Gregory, 2004; Tuhiwai Smith, 1999; Madge et al., 1997; Nast, 1994).

Post-colonial research, for example, places emphasis on identifying and confronting asymmetrical configurations of power that construct forces of social oppression (Howitt and Stevens, 2005; Gregory, 2004). Post-colonial research aligns with feminist and other critical orientations in that it attempts to challenge "underlying assumptions that serve to conceal the power relations that exist within society and the ways in which dominant groups construct

concepts of "common sense" and "facts" to provide *ad hoc* justification for the maintenance of inequalities and the continued oppression of [indigenous] people" (Tuhiwai Smith, 1999, p. 185-186).

A goal of post-colonial research, then, is to acknowledge and give voice to the legitimacy of indigenous knowledge, ways of knowing and being (Howitt and Stevens, 2005). A post-colonial epistemology is "a way of structuring assumptions, values, concepts, orientations, and priorities in research" (Tuhiwai Smith, 1999, p. 183). According to Tuhiwai Smith (1999), however, such an approach alone is not sufficient. What is essential to post-colonial research is that it be conceived, designed and carried out in a way that respects cultural ground rules, which, in Tuhiwai Smith's (1999) view, can be best accomplished by researchers whose preferred epistemologies are aligned with those they research or, better yet, by indigenous researchers themselves.

Tuhiwai Smith's (1999) point is an important one. Researchers play a decisive role in the production of knowledge about indigenous peoples and the ways they are represented to broader society. Tuhiwai Smith's call for formerly silenced indigenous voices to take a prominent place on the academic stage is one that needs to be respected and accommodated. It is equally important, however, that respect for indigenous voices does not preclude others from uncensored dialogue. The objective of such dialogue is to have "a conversation, which not only informs each 'speaker' about the other, but transforms the relationship between them and possibly, in addition, even modifies their self-understandings" (Cairns, 2000, p. 16).

An exploration of post-colonial approaches to research is particularly useful in that it exposes both what this project is and what it is not. I do not claim, for example, that I adopt an approach consistent with that of post-colonial research, or that I employ an indigenous epistemological "lens" in the analysis that follows. The questions with which this project is

concerned were not articulated by an indigenous community. In fact, the approach I employ has embedded a number of suppositions that may be contested in some indigenous circles, such as the idea that the issue of overlapping claims is indeed problematic in the context of treaty negotiation and that the Crown and the Courts are implicated in the issue. The future-focused approach I employ flows from these suppositions, and is derived largely from my view that in order for there to be widespread and just treaty settlement, it will be necessary for *all* parties to claims negotiation to find ways to actualize "workable" forms of indigenous territorial identity through claims negotiation.

Such a future-focused approach leaves much of the tremendously important work of challenging dominant discourses of colonialism to others, in favour of focusing on the causes and implications of the *contemporary* territorial identities at work in the BC treaty process. This approach is very different from the approach of post-colonial scholarship where exploring the links between the colonial past and present are of paramount importance (Egan, 2008; Howitt and Stevens, 2005; Gregory, 2004). This project might be considered broadly post-colonial in that I have sought to expose some of the dominant discourses related to how indigenous territorial identity is conceptualized by the courts of Canada and within contemporary claims negotiation. In this way the value of this research for indigenous people may lie not in my admittedly limited expertise in cross-cultural interpretation, but in the explication of how practices of the Crown and the courts might be understood and changed to further shared goals.

Lastly, before turning to the specific method I employ and to the structure of this document, it should be noted that the social phenomena with which territoriality is so intimately tied are incredibly complex and varied in the context of indigenous territorial claims, and this has resulted in a study that is necessarily broad in scope. It is the conclusion

of this thesis that each instance of overlapping and contested claims requires intense inquiry to inform processes of territorial reconciliation. The purpose of this project is to lay some of the groundwork for such inquiry.

Method

An overarching objective of this project is to lay the groundwork for further inquiry involving focused interviews with key actors in the BC treaty process and with individuals and groups who have worked through similar issues in other jurisdictions, such as those engaged with New Zealand's Waitangi Tribunal and Maori Land Court and Australia's National Native Title Tribunal. With this in mind, early in the conceptualization of this study I decided that this project would be entirely literature-based, and involve the review and synthesis of both primary and secondary sources, both academic and "gray."

To this end, I employed a phased approach to literature review, synthesis and critical analysis. Phase one involved a review and synthesis of scholarship related to methodological considerations and a number of key theoretical considerations. Phase 2 of the project necessarily overlapped with phase 1, and involved the iterative synthesis of sources related to claims negotiation and settlement, indigenous territorial identity, and aspects of Canadian common law related to the spatial dimensions of aboriginal rights. Phase 3 involved engaging with unpublished "gray" material, including the text and maps of the statements of intent of indigenous groups participating in the BC treaty process, and the legal challenges to modern treaties brought because of overlapping and contested claims.

Data management and analysis

The volume of text critically evaluated in this study would have been difficult to manage without a systematic method of organization and abstraction. Qualitative

methodology literature contains a range of techniques that can guide such processes, all of which require that the researcher comprehend data, ascribe preliminary meanings, theorize relationships, and contextualize data into findings. Most of the methodological literature reviewed for this project describes such content or thematic analysis in the context of interview-based research (Thorne et al., 2004; Dunn, 2005; Cope, 2005; Ryan and Bernard, 2003, 2000; Kirby and McKenna, 1989). A number of these techniques proved useful to this project.

Following methods outlined by Waitt (2005), Dunn (2005), Cope (2005), Ryan and Bernard (2003, 2000), and Kirby and McKenna (1989), I employed an iterative process of constant comparative analysis, involving a systematic process of reading, interpreting meanings, and identifying sections of text relevant to the subject of inquiry. An entirely digital process was employed: documents were scanned, sections of text were copied to a database, and preliminary descriptions where assigned to each "block" of text. Through a process of comparative analysis, I developed and filed "blocks" of text into broad categories based on the meanings of text and their relationships. This stage is often referred to as developing a codebook (Waitt, 2005; Cope, 2005; Kirby and McKenna, 1989).

Thematic coding was necessarily an iterative process as categories merged, split, and new categories emerged. From these thematic categories I drew a number of analytic themes, from which theories and arguments were developed (Waitt, 2005; Cope, 2005; Dunn, 2005; Ryan and Bernard, 2003, 2000). Employing a technique of constant comparative analysis resulted in a highly iterative process. Preliminary categories often needed to be reformulated based on comparison of text within and between groupings. Despite this, the information management process employed proved efficient and systematic, moving from a collection of unorganized text to a categorized, described, and coded set of data from which the concepts

and arguments presented in the following chapters have been drawn.

Document structure

The organization of this document follows a somewhat standard format for theses. This introduction is followed by a theory chapter, where I introduce a number of key conceptual considerations on which I have drawn. The theory chapter is presented in two sections. The first focuses on how identity, narrative, and law are implicated in the social production of territory and boundaries, and the role of boundaries in the production of socio-spatial identities across axes of time and geographic scale. In the second section I relate this conceptual understanding to historic (that is, pre-colonial) indigenous territoriality and tenure. The goal here is not to attempt to define *the* indigenous connection to land, for such a task would be impossible, but to expose *an* understanding of how axes of time and geographic scale are contingent aspects of indigenous socio-spatial identities.

Chapter 3 presents an analysis of the spatial dimensions of aboriginal rights as articulated by Canadian courts, and in particular explicates how different conceptions of aboriginal rights are equated with different conceptions of indigenous territorial identity. The overarching goal of chapters 2 and 3 is to expose how indigenous socio-spatial identities are produced and contested in multiple ways, and in doing so provide insight into the analysis of overlapping and contested claims that follows.

Chapter 4 is the crux of this thesis, where I argue that the issue of overlapping and contested claims is indeed problematic in the context of treaty negotiation in British Columbia, and that insufficient Crown and judicial engagement on the issue undermines two primary goals of the BC treaty process: to promote jurisdictional certainty and avoid aboriginal rights litigation. The goal of chapter 4 is to make this case: to illustrate by

example an understanding of the causes and implications of overlapping and contested claims, and in doing so demonstrate that the current approach of the Crown and the BC Supreme Court to the issue undermines the ethical (if not legal) legitimacy of the BC treaty process.

In the concluding chapter I summarize the findings of this project, suggest several possible strategies for working through the issue, and identify potential areas of research focused on the reconciliation of overlapping claims.

CHAPTER 2: CONCEPTUAL CONSIDERATIONS: IDENTITY, BOUNDARIES, TERRITORY AND TENURE

Territory is bounded social space that inscribes some sort of meaning onto areas of the physical world (Delaney, 2005; Sack, 1986). The meanings with which territories are imbued are highly contextual. Because this thesis is concerned with the incredibly varied and complex socio-spatial identities at work in the BC treaty process, a necessarily broad definition of "territory" is required. Following the work of authors such as Larsen (2006), Delaney (2005), and Sack (1986), I conceive of territory as the social control or influence of space, animated by varied forms of social attachment, representation and material-economic practice. Territories are enacted through boundaries, which function as markers of distinction and relation across a range of socio-spatial and temporal scales (Barth, 2000, 1969; Cohen, 2000; Paasi, 2000, 1999; Silvern, 1999; Newman and Paasi, 1998; Herb and Kaplan, 1999; Knight, 1982).

Equally important to the meaning of boundaries is the question of why and how people struggle over such meanings in the first place, and the contestations that are revealed through exploration of what boundaries "*do.*" For what purpose is the concept of territory employed? What is the role of territory in the formation of identities, and what part does identity play in the production of social space? And, of importance to this project, are conventional notions of territories and boundaries applicable to indigenous societies?

This chapter has two sections. The first is concerned with broad conceptual considerations, such as the social production of space, the intertwining of law, space and social power, and ways that identity, narrative and law are implicated in the production of boundaries across axes of identity, time and geography scale. The second is concerned with "traditional" indigenous systems of territoriality and tenure in British Columbia. The

overarching intent of this chapter is to highlight a number of conceptual considerations that have utility for understanding the meaning and salience of the socio-spatial identities at work within the BC treaty process, and to provide context for the discussion of overlapping and contested claims that follows.

Section 1: Law, Boundaries and Territorial Identities

Imbrications of law, space and power

Social science in recent years has witnessed a noticeable shift toward an interest in the irreducible relationship between space, power and law. Scholars working in this vein argue that parochial understandings of law are undermined by theory which recognizes the context-specific and spatial contingencies of law, a field that scholars such as Blomley and Delaney have characterized as critical legal geography (Blomley, 2008, 2003, 1994; Delaney, 2004; Delaney et al., 2001). The imperative for Blomley's (1994) seminal *Law, Space, and the Geographies of Power* is the contention that law and geography are often taken as independent: that law is too often characterized as an autonomous, self-sufficient field separate not only from geography but also from social life. Attention to the theoretical and practical implications of these insights has stimulated a wealth of exciting scholarship on what Delaney (2004, p. 850) calls the "the twin imperialisms" of law and geography, which ventures beyond the bi-disciplinary framework encoded in the term "legal geography" (see for example, Brenner and Eldon, 2009; Butler, 2009; Blomley, 2008, 2003; Delaney et al., 2001). In much of this work disciplinary segregation is recognized as an impediment to understanding social practice and experience. In "the worlds in which lives are lived, the 'legal' and 'the geographical' are no more encountered separately than are 'the political' and 'the economic', 'the social' and 'the sexual,' or any of the other analytical chunks into which

scholars are prone to break up reality" (Delaney, 2004, p. 849-850).

A particularly useful idea employed by critical legal geographers and others is that of *the (social) production of space*, a theoretical perspective initially articulated by French philosopher Lefebvre (1991/1974). This theory begins with the contention that "(social) space is a product" (p. 56), and that space "serves as a tool of thought and action [..,] control, and hence of domination and power..." (Lefebvre, 1991, p. 26). Lefebvre regards space not as a physical location or commodity but as a political instrument within a system of communication and agency (Lefebvre, 1991; see also Butler, 2009, 2007; Brenner and Eldon, 2009; Merrifield, 2000). Lefebvre's principle argument is that "common-sense" philosophies have structured dominant understandings of spatial relations, and that space is properly understood not only through the interrogation of physical space, but also through cognitive and lived dimensions (Lefebvre, 1991).

Lefebvre (1991) posits a conceptual triad for understanding the social production of space: 1) physical *spatial practices* such as everyday routines, networks and pathways through which social life is produced and reproduced; 2) abstract *representations of space* produced by "experts" within power-infused institutional apparatus, and; 3) *representational spaces* of lived experience, social imagery, and resistance (see also Brenner and Eldon, 2009, 2009, 2007; Merrifield, 2000). It is through the simultaneous operation of these three dimensions – physical, cognitive and lived – that space is intimately tied to the production of social relations, where space is not only part of the apparatus of social regulation but a instrument of political struggle and resistance (Lefebvre, 1991; Larsen, 2006; Merrifield, 2000).

There are many examples of this in the context of indigenous peoples and colonialism, ranging from the imposition of English common law on indigenous societies (for example

the creation of Indian Reserves in British Columbia), to more subtle operations of law that, through the production of space, order the manner in which indigenous people (and in fact all people) experience social life (see for example Egan, 2008; Harris, 2004, 2002; Brown, 2002; Brealey, 1995). Space, in this context, is also an instrument of struggle and resistance, which is often mobilized not only by the state and other powerful actors but by indigenous groups seeking to resist law or use it to their advantage (Larsen, 2006; Blomley, 2003; Morris and Fondahl, 2002; Silvern, 1999; Sparke, 1998). The long history of indigenous groups pressing their territorial claims in courts of law is an example of this, but one in which there is clearly an uneven distribution of power, where those with the capacity to shape and employ law are better able to mobilize it in the production and reproduction of space (Panagos, 2007; Borrows, 1999; Sparke, 1998).

The concept of land-as-property in particular exposes the fusion of law, space and power (Blomley, 2005; Delaney, 2005, 2004; Delaney et al., 2001). In Western societies the conventional understanding of property tends to dominate other understandings, where "property" is understood to mean "private property" owned by an individual or corporate entity. Certainly law, through the imposition of property categories and contractual relations, is implicated in the reproduction of the dominant conception of land-as-property (Butler, 2009; Blomley, 2005, 2003; Delaney, 2004). In this way space and law are simultaneously employed as an instrument that reproduces hegemonic order (through, for example, the taken-for-granted *representation of space* as private property), while at the same time serving as a medium for resistance (Lefebvre, 1991; see also Larsen, 2006). As discussed in more detail later, in one sense the phenomena of overlapping territorial claims can be understood as an implicit (and perhaps unintentional) challenge to the taken-for-granted practice of representing space as mutually exclusive property.

Boundaries

Boundaries are social constructs that occupy a crucial position in the production and maintenance of identity, just as identity is implicated in the production of space. The past two decades have witnessed renewed interest in socio-spatial identities, in which geographers and others have sought to understand the production of identities and boundaries and the relationships between them (Légaré, 2008; Newman, 2006; Fondahl and Sirina, 2003; Paasi, 2000, 1999; Herb and Kaplan, 1999; Newman and Paasi, 1998).

The word "boundary," to an English speaker, represents a constellation of ideas, "a schema for conceptualizing the very idea of distinction" which evokes images ranging from a line drawn on the ground to abstract distinctions of socio-spatial organization (Barth, 2000, p. 20). Barth (2000) argues that the concept of boundaries embodies three levels of abstraction: 1) literal boundaries that divide territories "on the ground"; 2) abstract boundaries that distinguish social groups from each other; and 3) cognitive boundaries that "provide a template for that which separates distinct categories of the mind" (Barth, 2000, p.17). The concerns of academic disciplines – themselves more or less segregated by disciplinary boundaries – have led scholars to emphasize one or more of these abstractions (Delaney, 2005).

Political geographers, for example, have often treated boundaries as physical and static outcomes of political processes, where territory is understood as an inert container reflecting the ability of one group, often the state, to produce and at times superimpose physical boundaries of separation on another (Newman, 2006; Delaney, 2005; Sack, 1986). More recently the concept of boundaries increasingly refers to symbolic distinctions between social groups which may or may not find spatial expression (Newman, 2006; Delaney, 2005; Newman and Passi, 1998).

Anthropologists and sociologists, for their part, have concerned themselves with understanding (and at times debunking) binary distinctions between "different" social groups across a range of social and physical scales (Poata-Smith, 2004; Barth, 2000, 1969; Cohen, 2000; Herb and Kaplan, 1999; Gupta and Ferguson, 1997). In this context the term "boundaries" is often used to describe distinctions of group belonging and as an analytical tool to expose the way in which inclusion and exclusion are institutionalized (Newman, 2006; Cohen, 2000; Paasi, 1999; Sibley, 1995). Boundaries thus have "their own internal dynamics, causing change in their own right as much as they are simply the physical outcome of decision-making" (Newman, 2006; p. 146). Boundaries, in this view, are as much perceived as they are visible manifestations of political will or force.

Boundaries are conditional aspects of collective identity often represented in terms of belonging or not belonging at a particular time, rather than based on intrinsic markers of distinction essential to a particular group (Poata-Smith, 2004; Niezen, 2003; Barth, 2000; Gupta and Ferguson, 1997). It has even been argued that there would be no identities without boundaries because boundaries are the means by which identity is enacted through processes of "othering" (Barth, 1969). Whether boundaries are internally enacted or externally imposed (or both), the concept is imbued with the notion that identities are produced through boundaries and boundaries are produced through the formation and maintenance of identities (Paasi, 2000; Barth, 2000, 1969; Cohen, 2000; Herb and Kaplan, 1999; Gupta and Ferguson, 1997). Boundaries and identities are two sides of the same coin (Paasi, 2000, 1999).

Boundaries reflect cultural experience and are contextually contingent. To understand the meaning of boundaries in different contexts requires distinguishing between the cognitive premises that produce boundaries – what Barth (2000), calls "acts of imposition

– and the sociology of people living and acting around that boundary" (p. 30).

Boundary narratives and discursive landscapes

Foucault (1980) argues that knowledge and power are irreducible, and that institutional power arises at least as much from the ability to shape discourse as it does from the use or threat of force (see also Nadasdy, 2003; Philo, 2000). By defining the domain of "reasonable" thought, powerful institutions (for example courts and universities) often do not need to resort to coercive force to shape conceptual understanding of boundaries and territoriality (Delaney, 2005; Paasi, 1999). Identity, boundaries and the connections between them may be active in a manner in which knowledge and power are practically invisible, which obscures the sources of social norms that frame such distinctions (Paasi, 1999). Boundaries are thus part of the "discursive landscapes" (Käkli, 1999) of social power, which if examined can expose contestations of meaning between socio-spatial actors (Thom, 2009; Paasi, 2000, 1999; Newman and Paasi, 1998; Gupta and Ferguson, 1997).

Boundaries, then, may be visible or invisible and are embedded within and shaped by explicit and implicit social norms. They are equally political, social, and discursive constructs often oriented toward actualizing a desired match between space and identity, and *vice versa*. Narratives such as those centered on nationalism and private property, for example, tend to express territorial identity in strongly essentialist terms that serve to legitimate the exclusion of "outsiders" and to affirm who "we" are (Blomley, 2005; Delaney, 2004; Newman and Paasi, 1998). Such simplified conceptions, however, obscure the contested nature of power and meaning, and are contrasted with those conceived not as a reflection of essential "facts" but as discursively created and subject to contingencies of social power.

Herb and Kaplan (1999) argue that bounded space is "the crucial element in the tension between power and identity," and that identity is "negotiated"[5] across a range of geographic scales (p. 10; see also Légaré, 2008; Delaney, 2005; Silvern, 1999; Knight, 1982). The conceptualization of territorial identities – that is, identities that are bounded by space and time – however, is challenged by a constant limitation. Identities are rarely if ever homogeneous and mutually exclusive, but rather are dynamic and contested products of the discursive landscapes within which they are produced. Gupta and Ferguson (1997), for example, contend that representations of space in the social sciences are remarkably dependent on problematic images of distinction. "The clearest illustration of this kind of thinking are the classic ethnographic maps that purport to display the distribution of peoples, tribes and cultures" (Gupta and Ferguson, 1997, p. 34). In this way, "space itself becomes a kind of neutral grid on which cultural difference, historical memory, and societal organization is inscribed" (Gupta and Ferguson, 1997, p. 34). Such assumed naturalisms are worthy of attention, in particular "the ethnographic habit of taking the association of a culturally unitary group (the 'tribe' or 'people') and 'its' territory as natural" (Gupta and Ferguson, 1997, p. 40).

The tendency to ascribe as natural what is in fact socially produced raises important questions in the context of overlapping territorial claims: how is socio-spatial identity defined for those who continually cross boundaries? How do we account for multiple "cultures" within one locality? How do we account for and represent cultural transformation within space and, of particular interest to this project, "does the colonial encounter create a 'new culture' in both the colonized and colonizing country?" (Gupta and Ferguson, 1997, p. 34-35)

[5] While identity is often said to be "negotiable," this characterization neglects inequalities between actors in such processes. In is certainly arguable, for example, that the ability of indigenous peoples in Canada to "negotiate" their identities was compromised when they were classified into *Indian Act*-defined Bands by the state without much regard for indigenous markers of distinction (see for example Harris, 2002; Cohen, 2000).

Overlapping orientations and allegiances

The conceptual vulnerability suggested by such questions is consistent with what Agnew (1995) calls the "territorial trap," a feint that social scientists and others have followed by taking territory as a prefatory given without consideration of processes implicated in its production. Socio-spatial identities are rarely "pure" even though they are often represented as such. Understanding discursive processes of "purification" - that is, how social groups and "their" territories are represented as "natural" and given - requires context-specific interrogation of the forces producing such narratives and how they operate across spatial and temporal scales (Silvern, 1999; Paasi, 1999; Herb and Kaplan, 1999; Newman and Paasi, 1998).

de Vos (1975), for example, contends that people employ nested priorities in the formation of identity allegiances. While there are innumerable axes along which identities are formed, here I reference just three of the orientations suggested by de Vos (1975): 1) allegiance to a *present-functional* identity based on a participatory relationship between the state and individuals or groups; 2) a *past-familial-cultural* allegiance that may well be tied to specific territory, whether currently occupied or not; and 3) a *future-ideological* identity, where dissatisfaction with past and/or present orientations may prompt identification with a cause or counter-hegemonic movement (de Vos, 1975; see also Knight, 1982). While there are myriad intervening variables, for example class, property ownership, law, gender, and so on, allegiances of these kinds often find expression in state, sub-state and regional spatialities (Larsen, 2006; Delaney, 2005; Kaplan, 1999; Paasi, 1999; Knight, 1982).

Identity allegiances can extend beyond the scale of the state, particularly where allegiance with political goals such as the pursuit of the rights of indigenous peoples crystallize to fit specific challenges. More often identity allegiances "nest within" state

apparatus, where regional or political affiliation finds purchase with individual loyalty. Added to this complexity is the fact that people have the ability to switch between levels of abstraction at particular points in time, where allegiance to an identity may be mobilized in pursuit of political goals both within and beyond state apparatus simultaneously (Larsen, 2006; Poata-Smith, 2004; Herb and Kaplan, 1999; Gupta and Ferguson, 1997; Knight, 1982).

Regional conflict occurring throughout the world exposes the variegated and scale-dependent nature of identity allegiances, for example where individuals may retain loyalty to multiple identities, particularly where the function of these identities are compatible (Delaney, 2005; Herb and Kaplan, 1999). This said, there are clearly cases where concurrent allegiance to multiple identities causes tension or even conflict between and within identity groups.

A stark example of this would be Palisraelestine, where the identity of Palestinians living within the state of Israel today is for some more closely aligned with *past-familial-cultural* and *future-ideological* allegiances rather than with a *present-functional* identity, even though all three of these identities overlap spatially and, to a lesser extent, socially (Delaney, 2005; Herb and Kaplan, 1999). Allegiance to a *past-familial-cultural* identity may be invoked as a form of moral or legal persuasion, combined with a *future-ideological* orientation to give direction to what is perceived to be in the best interest of particular identity groups. In the most extreme cases, those most loyal to a *future-ideological* orientation may even denounce *present-functional* allegiances (for example denouncing citizenship) and seek to destroy through acts of violence what is perceived to be in opposition to their *future-ideological* goals (Delaney, 2005; Herb and Kaplan, 1999; Knight, 1982). *Past-familial-cultural* and *future-ideological* identities may well be tied to specific territory, but these may be at odds with a *present-functional* identity, particularly where the spatialities associated with these allegiances overlap and conflict.

The BC treaty process is an example where *past-familial-cultural* and *future-ideological* allegiances have been simultaneously invoked by indigenous groups as both a legitimating discourse of claims-making and as a political strategy for actualizing rights and benefits. As discussed further in chapter 4, the territorial identities at work within (and beyond) the BC process can also oscillate between levels of abstraction and spatio-temporal scales. Key to understanding such flexibility is recognition of the hierarchical nature of territorial identities and their connection with the social norms, practices and discourses through which they are created and sustained (Paasi, 2000). Allegiances that span boundaries can become problematic when differently defined territorial identities come in contact, particularly when the spatialities associated with these identities overlap in incompatible ways. Important in examining such tensions is not only the demarcation of physical boundaries and the rules and narratives that delineate membership, but how such boundaries are created, institutionalized, and affirmed though cultural norms (Légaré, 2008; Newman, 2006; Paasi, 2000, 1999; Cohen, 2000). At stake here are not only "mechanical" issues of physical boundaries, but contestations over the *meanings* of boundaries and the forces implicated in their production.

Section summary

The intent of this section was to underscore the complexity of socio-spatial identities, to conceptualize the links between identity and territory that are produced and reproduced across axes of spatial and temporal scales, and to show that territorial identities are contingent aspects of social practice and discourse. The point to emphasize here is that space is a social product, and that the role of identity, discourse and law cannot be left out of a meaningful contemplation of the indigenous socio-spatial identities at work within (and

beyond) the BC treaty process.

Territories have meanings: they unify and differentiate and are powerful geopolitical tools in the hands of those who delineate them (Delaney et al., 2001). The meanings of territories are formed within discursive landscapes and are manifestations of power configurations that exist among and between social actors. Power in this context refers particularly to the role of discourse and law in defining and institutionalizing boundaries.

Section 2: Indigenous Boundaries: Toward an Understanding of Indigenous Territoriality and Tenure

The concept of boundaries serves analytic purposes, but it should not be assumed that all societies have such concepts (Thom, 2009; Barth, 2000; Ingold, 1987). Understanding territory in different contexts requires consideration of the ideological, political, and historical relationships of the people who define and live within territory, and whether in fact the dominant Western notion of territory is even applicable. This said, to be human is to have relationships, whether with others or the natural world, and all relationships embody elements of association and disassociation (Barth, 1969). From such a perspective, understanding territory "becomes an empirical question of what concepts and mental operations are used by a group of people to construct their world" (Barth, 2000, p. 34), be they territory, boundaries or other forms of cognitive and socio-spatial organization.

It would be equally inappropriate to assume that indigenous socio-spatial organization is not consistent with such concepts, for to do so may perpetuate essentialist ideas about indigeneity, such as those that portray indigenous peoples as strictly "traditional" and somehow beyond the influence of the forces that continually produce and reproduce identity and space. The colonial encounter has produced vast transformations to many facets of indigenous societies the world over, not least to their territorial identities (see for example

Larsen, 2006; Windsor and McVey, 2005; Harris, 2004, 2002; Fondahl and Sirina, 2003; Davies, 2003; Brown, 2002; Karppi, 2001). In British Columbia state-imposed physical boundaries such as those delineating Indian Reserves and regimes of resource management have undermined pre-colonial systems of indigenous governance and territoriality, inhibited group interaction, and provoked divergence of indigenous identities (Alfred 2009; Harris, 2004, 2002; Brown, 2002; Brealey, 1995). In many instances, however, customary systems of landholding and governance are not archaic relics but institutions that function to this day, and have the capacity to work as equals to the imported system of property law (see for example, Keyoh Huwunliné, 2011; Napoleon, 2009; Daly, 2005; Overstall, 2005; Borrows, 2005, 2002; Peeling, 2004).

While acknowledging that a distinction between "traditional" and "contemporary" forms of indigenous territoriality and governance is ambiguous and imperfect, the following discussion is nonetheless couched in the past-tense to avoid essentialist tendencies, and to provide a view of traditional systems of indigenous territoriality and landholding that existed prior to the influence of colonial law and discourse. The scope of this topic is large; hence much of much of this section is intended to suggest rather than be definitive, to highlight by example rather than exhaustively delve into the concepts and processes identified. By employing such an approach I undoubtedly open myself up to criticism for presenting abstractions that might seem timeless or placeless. In light of this concern, I will make my intent explicit. The goal of this section is not to attempt to define *the* indigenous connection to land, for such a task would be impossible, but to expose *an* understanding of how axes of time and geographic scale are contingent aspects of indigenous territorial identities, and by doing so provide context for the examination of overlapping and contested claims that follows.

Contested meanings and the faculty of language

If we are to arrive at meaningful generalizations about indigenous socio-spatial organization we must be reasonably confident of the meaning of the terms we employ. The terms "tenure" and "territory" are particularly relevant. In conventional use, the former denotes a greater degree of proprietorship than the latter, in that it refers to both an object and the social relationships that operate on and around the object. Tenure, in this sense, is conventionally understood as a form of property, whereas territory is bounded social space that may inscribe myriad other meanings. To extend this distinction to the context of an indigenous relationship with land would be to rely on a common understanding of the term "property." Indeed, the apparently endless debate over whether or not "hunting-gatherer societies"[6] owned the land they used and occupied hinges on, among other things, the meaning of the word "property," if such translation is possible at all.

A number of authors have suggested that property is best understood as a field of social relations, encompassing both symbolic and material elements, within which individual and collective identities are formed (Delaney, 2004; Nadasdy, 2003; Ingold, 1987; see also Thom, 2005; McLaren et al., 2005; Overstall, 2005; Blomley, 2005, 2003; Borrows, 1999). If we define property in such a manner, it follows that all people have, and have always had, property. Such a contention echoes Bell and Asch's (1997) assertion that "because they are human beings, Aboriginal people at the time of the assertion of British sovereignty did live in societies that were organized and had institutions respecting land ownership as well as jurisdiction over members and territory" (p. 72). Equally important to the meaning of property is the question of why and how people struggle over the meaning of property and

[6] While still widely used, the term "hunter-gatherer societies" may be an inadequate descriptor when considered in light of the growing body of scholarship indicating that indigenous peoples of what is now British Columbia not only occupied and used but in many instances *actively cultivated* land in ways not readily cognizable to colonial settlers (see for example Deur and Turner, 2005; Turner and Jones, 2000).

territory in the first place, and the contestations that are revealed through exploration of what territory and property "*do*" (Nadasdy, 2003).

Barth (2000), for example, argues that to appreciate the meaning of indigenous boundaries we need to "distinguish between the cognitive premises that construct the boundary," the subtleties of local language, and the "sociology of people living and acting around that boundary and thereby shaping an outcome" (p. 30-31). In this phenomenological view, territorial organization is understood as a set of concepts operating in the minds of those who animate boundaries: a constellation of ideas that function as a cognitive model for territorial behaviour (Barth, 2000; Ingold, 1987). What many nonhuman animals achieve by physical posturing, humans achieve through linguistic and symbolic communication (Barth 2000; Ingold, 1987). The word "territory," then, confers elements of both noun and verb, in that it communicates and *enacts* relationships among people and between people and land. Such processes depend upon the faculty of language, and particularly on the ability of language to animate agency and displacement by communicating to persons and locales remote in time and space (Barth, 2000).

In conventional (English-language) discourses, such as those centred on property, emphasis is on boundaries as markers of distinction and discrimination. According to authors such as Thom (2009, 2005), Egan (2008), Barth (2000), and Ingold (1987) indigenous boundaries are primarily a means by which *relationships,* and not property, are modulated and governed. The argument here is based on qualitative differences between cognitive categories and phenomenologically derived understanding, and the manner in which these understandings are reconciled within different cultures (Cohen, 2000). Such an approach sees indigenous territoriality as lived experience: as a system of understanding that comes from close connections between people and land and the identities that flow from such

connections.

Such close connections are evident in the findings of authors such as Thom (2005), Overstall (2005), Turner et al. (2005), and Marsden (2002, 2001), who contend that some indigenous people see themselves as coming into existence in relation to land, where people are understood as descended from supernatural entities embedded within physical landscape. Such a conception of belonging invokes an image not of displacement but of cooperation, where territoriality flows from bonds of kinship, responsibility and reciprocity. In this way indigenous territoriality may not so much be based on imaging of physical boundaries as it is a means of ordering social relations and practical conduct in the use and care of land (Ingold, 1987).

Drawing on Ingold's (1987) metaphor of a meshwork of relations, for example, Thom (2009) argues that territoriality for the Coast Salish is best understood as a fabric of "permeable boundaries of paths and itineraries, structured not to physically impede movement or exclude others, but to provide for the social interaction of different social groups within common places" (p. 186). In this view, territorial identities were imbued with historical and affinal contingency based on what Bird-David (1999, p. 68) calls a "relational epistemology," where boundaries of territorial identity were enacted more as a way of knowing relations of kin and place than a way of ordering jurisdiction and property (Thom, 2009, 2005). In the context of the Coast Salish, Thom (2009) echoes Ingold's (1987) contention that indigenous boundaries are "more like sign posts than fences, comprising part of a system of practical communication rather than social control" (Ingold, 1987, p. 156-157).

This is not to say that all indigenous groups in what is now British Columbia employed these kinds of "boundaries." The point to underscore here is that the concept of property is only one of many ways that people understand their connection to the natural

world. As Overstall (2005) eloquently shows, affinal relations for the Gitksan of northern British Columbia extend beyond the human realm to include spiritual beings embedded in the land itself. "These relationships are not 'property' in the sense that any of us, I hope, think we own our partners, parents, or children. Yet, in some other sense, they are still 'ours' and we are 'theirs'" (Overstall, 2005; p. 23).

Indigenous boundaries: Patterns of indigenous territoriality and tenure

Appreciation of systems of indigenous territoriality requires understanding that goes beyond conventional notions of land as discretely bounded property. Such complexity has led many to mistake different ways of knowing land and "property" for there being no boundaries at all (Harris, 2004; Turner and et al., 2005). Within colonial discourse the self-serving conception of land-as-property was (and is) dominant, and conveniently affirmed the assumption that the indigenous inhabitants of what is now British Columbia (hereafter "the region") were not really using much of the land they occupied, and did not employ concepts of ownership to the land and resources they used (Turner et al. 2005, Harris, 2004; McLaren et al., 2005).[7]

In fact the lands and waters of the region were occupied, governed and sometimes cultivated by indigenous peoples thousands of years prior to European colonization (Turner et al. 2005; Turner and Jones, 2000; see also studies related to specific indigenous groups such as Napoleon, 2009; Larsen, 2006; Thom, 2005; Daly, 2005; Overstall, 2005; Brown, 2002; Marsden, 2002, 2001; Sterrit et al., 1998; Furniss, 1995; Marsden and Galois, 1995). Indigenous peoples throughout the region enacted varied forms of land tenure that governed resource use and distribution within and among communities, extended families, and other

[7] Philosophical justification for this reasoning is often traced to Locke's (1689/1952) idea of property being created through enclosure or application of agrarian labour (see for example McLaren et al., 2005).

forms of social organization.

Drawing on ethnographic and historical sources, as well as on oral histories of indigenous people, Turner and Jones (2000) argue that indigenous groups throughout the region generally employed one of two models of territoriality and tenure, "ranging from community control of territory at the tribal level [...] to more explicitly focused hereditary ownership and control of land" (p. 30). Within these systems, "ownership rights might be held by individuals, by culturally defined kinship groups (such as households, lineages, or clans), or by larger village and ethnic groupings" (Turner et al., 2005, p. 152).

The first model is generally typical of inland and southern coast areas where there were generally less strictly regulated controls on land use and occupancy for those identified as kin and allies within a tribal territory (Turner and Jones, 2000; see also Thom, 2009, 2005; Egan, 2008; Larsen, 2006). The second model was a more "strictly and rigorously defined social system of land use and ownership by specific descent groups, lineages, 'houses,' or clans, each headed by a hereditary chief and each laying specific claim to particular tracks of land with strictly defined boundaries, usually at the watershed scale" (Turner and Jones, 2000, p. 6; see also for example Napoleon, 2009; Daly, 2005; Overstall, 2005; Marsden, 2002, 2001; Sterrit et al., 1998).

I use the term "tenure" as a system of rights, obligations and protocol governing land and resource use and ownership,[8] including the right to control access to and use of land and resources (Turner et al., 2005). Such tenures reflected a high level of complexity and diversity throughout the region, as did the languages, cultures and economic systems of those

[8] The term "ownership" is here purposefully used to embody the meaning of proprietary rights in land and resources, while at the same time acknowledging that the widely understood meaning falls well short of more nuanced understandings of land and resources within indigenous world view generally. While admitting that much is lost in translation, not to use the term "ownership," especially in the context of claims making, may be to conceal the proprietary interest it confers.

who enacted them. Control of land and resources was irreducibly tied to the resource requirements and economic system of particular groups (Deur and Turner, 2005; Turner and Jones, 2000). In areas where territorial boundaries were less strictly defined for kin and allies, land and resource tenure was often held at the level of extended family, and nested within a broader territorial identity (Turner et al. 2005; Turner and Jones, 2000; Thom 2009, 2005). Such protocol varied from group to group, often in relation to the distribution, scarcity and value of particular resources (Deur and Turner, 2005). Access to some types of resources was sometimes more tightly controlled than others, where controls were more stringent for resources that were highly valued or intensively cultivated (Turner et al., 2005; Turner and Jones, 2000).

Exogamous marriage and diplomatic alliance extended networks of travel and resource harvesting. In such instances tenures were sometimes time-bound and restricted to particular resources without ownership of other resources at the same location (Turner at al., 2005; Turner and Jones, 2000). Thus specific harvesting areas were sometimes used by multiple indigenous groups in places where affinal and other types of social arrangement allowed shared and sanctioned use. Such rights were regulated by protocol, disputes over which were mediated though diplomacy or warfare (Turner et al., 2005; Turner and Jones, 2000).

In systems where territorial boundaries were more explicitly defined, territorial ownership was inherited or bestowed through customary protocol. Such rights and obligations were legally bestowed and transferred though institutional practices such as the potlatch, and affirmed though totemic poles, crests, songs and dances (see for example Daly, 2005; Turner and Jones, 2000; Overstall, 2005; Marsden, 2002, 2001; Sterritt et al., 1998). The ability to exclude and control access was an important dimension of tenure, where the

meaning of tenure was imbued with the responsibility for the care of the land and sharing of resources. In systems with more rigorously defined territories, the need for precise territorial boundaries was an aspect of the legal and spiritual reciprocity between a group and its territory, where boundaries defined the extent of responsibility for stewardship (Overstall, 2005). Rights and responsibilities of tenure were defined through indigenous legal order, "whether through communal territories with known boundaries in combination with ownership of key resources, or through strictly defined descent groups owning extensive tracts of land and multiple resources from which others were forcibly excluded" (Turner et al., 2005, p.176).

Indigenous territoriality and the axes of time and geographic scale

Boundaries mean different things in different cultural settings. Polities, linguistic groups, property and so on, can all be represented by different kinds of boundaries, just as the same category (say, tenure) can be delineated in different ways. While such complexity may make it tempting to conclude that many indigenous groups simply shared territories and resources, this kind of characterization oversimplifies the meaning of tenure in the context of pre-colonial indigenous societies. While it may also be an oversimplification to say that indigenous groups of the region "owned" territory, certainly indigenous groups of the region employed different forms of tenure respecting land and resources, and that the concept of tenure was imbued with the meaning of "belonging" or ownership. As a field of social relations, property (or perhaps better, "belonging") is an important node of connection between identity, history and space. The generalizations offered above suggest that for indigenous societies of the region such attachment operated along multiple axes: in some instances as discretely bounded territorial space, and in others as rights and responsibilities to specific areas or resources, nested within a broader territorial identity.

A salient distinction here again is between the meaning of the terms "territory" and "tenure." Ingold's (1987) imaging of geometric surfaces exposes tenure as having three patterns of spatialization: zero-dimensional, relating to specific sites or locations; one-dimensional, relating to routes of travel and harvesting "trails;" and two-dimensional, relating to explicitly bounded areas. In societies where two-dimensional areal tenure was the norm, such as those described by Turner and Jones (2000, p. 6) as having a "strictly and rigorously defined social system of land use and ownership [...] with strictly defined boundaries," territorial boundaries ascribed meaning of proprietorship, jurisdiction and territorial sovereignty (see for example Napoleon, 2009; Daly, 2005; Overstall, 2005; Marsden, 2002, 2001; Sterritt et al., 1998). In societies that had less strictly defined boundaries for kin and allies, territoriality can be understood to reflect a level of social organization beyond the family and village, for example the extent of a group's travel and ties of kinship, within which different forms of tenure were nested (see for example Thom, 2009, 2005; Egan, 2008; Turner et al., 2005). While it may well be appropriate to ascribe a broad territorial identity to these latter kinds of groups as well, it is clear that the meaning of the term "territory" in this context – the "something else" that territory describes – is very different from the "strictly defined boundaries" enacted by some other groups.

Chapter summary

The goal of the chapter has been to highlight a number of conceptual considerations that have utility for understanding the meaning and salience of territory in the context of overlapping and contested claims. Important concepts reviewed in the first section are the social production of space, the intertwining of law, space and social power, and ways that identity, narrative, and law are implicated in the production of boundaries across axes of

identity, time and geographic scale.

The second section of this chapter sought to provide a generalized explanation of "traditional" patterns of indigenous territorially and tenure in what is now British Columbia. I have attempted to clarify some of the key terms that this review required, and in doing so have also exposed the challenge of such cross-cultural translation. Given the culturally contingent nature of boundaries, it should be no surprise that indigenous territoriality has been produced in markedly different ways by different indigenous societies. The point to emphasize here is that territory and tenure were given meaning by indigenous legal orders – systems that in some instances remain vibrant to this day – and that such systems can provide a conceptual and legal framework for examining territorial claims.

Understanding such boundaries comes not through the imposition of the language of property, but through understanding geopolitical history, indigenous legal orders, and the ways that the territorial "sign posts" of each group have evolved over time. Throughout both sections of this review, the dimensions of time and geographic scale are crucially important to the production of space, where the formation of boundaries may give rise to a divergence of identities and the overlap of territories. Such territorial identities are not only of academic concern, for these identities and boundaries are potent realities in political and legal spheres. The conceptual framework presented in this chapter exposes the age-old problem at the heart of indigenous claims negotiation the world over, that of how best to give political recognition to these identities.

CHAPTER 3: INDIGENOUS TERRITORIAL IDENTITY AND THE "LENS" OF JURISPRUDENCE

An often repeated mantra of the BC treaty process is that it is not a forum for the assertion of legal rights, but a space for dialogue and the negotiation of "interests" (Egan, 2008; Penikett, 2006; Woolford, 2005; de Costa, 2002). This said, ultimately treaties are legal documents within the meaning of s. 35(1) of the Constitution of Canada[9] and their negotiation is compelled and shaped by the legal doctrine of aboriginal rights (Richmond, 2007; Scholtz 2006; Foster 2002; Borrows, 2001, 2000, 1999). As discussed in chapter 4, all of the modern treaty agreements reached in British Columbia have been challenged in court because of overlapping and contested claims. The goal of this chapter is to provide a jurisprudential backdrop for the discussion that follows, by addressing a set of questions concerning the legal dimensions of overlapping and contested claims: 1) what are the spatial dimensions of aboriginal rights?; 2) what legal principals have been employed by Canadian courts to define the bounds of indigenous territorial identity?; and 3) how and to what extent have Canadian courts recognized aboriginal rights in instances where asserted rights of different indigenous groups overlap spatially?

The doctrine of aboriginal rights is a body of Canadian common law[10] that defines the constitutional relationship between the Canadian state and the aboriginal peoples of Canada (Murphy, 2009; Borrows and Rotman, 2007; McNeil, 2002; Foster, 2002). There are a number of distinct branches of this body of law. The branch dealing specifically with aboriginal rights of territorial jurisdiction is the doctrine of aboriginal title (Newman and Schweitzer, 2008; Borrows and Rotman, 2007; Newman, 2007; Slattery, 2006, 2000; McNeil,

[9] In 1982, the Canadian Constitution was amended to, among other things, "recognize and affirm" the "treaty and aboriginal rights of the aboriginal peoples of Canada" (*Constitution Act, 1982*, s. 35(1)).

[10] By "Canadian common law" I mean the unwritten law applied by Canadian courts, whether in common or civil jurisdictions. In the sphere of aboriginal rights, the common law operates uniformly across Canada (Slattery, 2000).

2006, 2000; Borrows, 2000, 1999).

Indigenous territorial identity and *Delgamuukw v. British Columbia (1997)*

In *Delgamuukw v. British Columbia ("Delgamuukw", 1997)* the Supreme Court of Canada considered the Gitksan and Wet'suwet'en Nations' claim for ownership and jurisdiction over a large area of (what is now) northwestern British Columbia. On appeal the case was framed as a claim for "Aboriginal title and self-government" (at para. 72; see also Newman, 2007; Borrows and Rotman, 2007; Slattery, 2006, 2000; McNeil, 2006, 2000; Borrows, 2001, 1999). While "errors of fact made by the trial judge" (at para. 170) made it impossible for the court to make a declaration of whether aboriginal title exists in the claimed area (a new trial was ordered but not pursued), the court articulated some of the spatial dimensions of aboriginal title and provided guidance on how aboriginal title would be cognizable to courts in future cases.

Prior exclusive occupation

Aboriginal rights (including aboriginal title) are predicated on the principal of *prior occupation* (Newman, 2007; McNeil, 2006; Slattery, 2006, 2000). What makes aboriginal title a *sui generis* (legally unique) property right is that it arises from indigenous occupation and/or jurisdictional control of land prior to the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward (*Delgamuukw, 1997*, at para 114; see also for example Newman, 2007; Slattery, 2006, 2000; McNeil, 2000). While the *"prior"* component of *prior occupation* is sometimes equated with "original" occupation, the court has yet to engage in an instance where multiple indigenous groups claim to have occupied or controlled the same land at different times prior to the assertion of British sovereignty (discussed below). The *"occupation"* component of the doctrine of *prior occupation* is an equally problematic

criterion, and is discussed at length below.

In *Delgamuukw (1997)*, "[t]here was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim of aboriginal title" (at para. 146) but the parties to the litigation disagreed on whether proof of prior occupation should be predicated on proof of prior *physical* occupation (the Crown's argument) or whether proof of aboriginal title might be based, at least in part, on customary indigenous law (the plaintiffs' argument). In the principal judgment, Chief Justice Lamer (writing for the majority) found it instructive to conceptualize aboriginal rights as occurring along a spectrum according to their degree of connection with land:

> "At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. [...] In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. At the other end of the spectrum, there is aboriginal title itself" (at para. 138).

The court found that in order to make out a claim of aboriginal title, an indigenous group must satisfy the following criteria:

> "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive" (Delgamuukw, 1997, at para. 146, emphasis added).

Prior occupation can be established either by proof of physical occupation at the time of Crown sovereignty or in reference to indigenous customary law, or both (*Delgamuukw, 1997*, at para. 148, 157; see also Newman, 2007; Grant and Ross, 2006; Slattery, 2006, 2000; McNeil, 2006, 1999). If proof of physical occupation is employed as proof of occupation, "it

may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw, 1997*, at para. 149). In making such a determination, an indigenous group's "size, manner of life, material resources, and technological abilities, and the character of the lands claimed must be taken into account" (at p. 10, see also at para. 149). An indigenous groups' "[o]ccupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group" (at para. 128).

If, on the other hand indigenous customary law is advanced to make out a claim then prior occupation of lands "can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples. Relevant [indigenous] laws might include, but are not limited to, a land tenure system or laws governing land use" (*Delgamuukw, 1997*, at para. 148; see also Slattery, 2006; Grant and Ross, 2006; McNeil, 2006, 1999).

Embedded in the court's conception of aboriginal title is the notion that pre-existing systems of indigenous governance form the basis of an aboriginal right to jurisdictional control of land, a principle later characterized by the Supreme Court of BC in *Campbell et al. v. AG BC/AG Cda & Nisga'a Nation et al.* ("*Campbell*", 2000) as "governmental" in nature (at para. 114; see also McNeil, 2006). Chief Justice Lamer cautioned, however, that "[e]xclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution" [...and that...] "consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title" (at paras. 156-

157; see also Grant and Ross, 2006; Slattery, 2006; McNeil, 2006).

In making a determination of exclusivity, *Delgamuukw (1997)* affirmed that courts must "be sensitive to the realities of aboriginal society" and "rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each" (at para 156). The Court also found it "important to note that that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under such circumstances, exclusivity would be demonstrated by 'the intention and capacity to retain exclusive control'" (at para. 156, quoting McNeil, 1989).

"Shared exclusivity"

Reliance on the criterion of exclusivity, then, does not preclude a finding of "shared exclusivity" or joint aboriginal title, at least in theory. In fact the court in *Delgamuukw (1997)* addressed the issue of overlapping claims directly, saying that the

> "requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. As well, shared, non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved (at p. 11, emphasis added; see also at paras. 155-158, Grant and Ross, 2006; Slattery, 2000).

Exclusivity, then, may derive from an ability to exclude others. Shared exclusivity means the ability to exclude others except for those with whom prior occupation is shared (at para. 158). Especially important here is the characterization of shared, non-exclusive rights "*short of aboriginal title*," implying that courts may prefer to characterize spatially overlapping aboriginal rights as site- and resource-specific (as opposed to jurisdictional) where exclusivity is not established.

Justice La Forest (in separate but concurring reasons) would have preferred the judgment in *Delgamuukw (1997)* go further in clarifying distinctions of exclusivity. According to La Forest, it may be appropriate for the court to determine joint or shared aboriginal title where "one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society" (at para. 198). If this is true then what emerges as important (in the view of the court) is the timing of geopolitical events, and whether occupation was exclusive at the time of Crown sovereignty rather than at some point in time prior to the assertion of Crown sovereignty. Because the claim in *Delgamuukw (1997)* was not subject to overlapping claims of other indigenous groups, the majority choose not to engage in detail with the implications of such joint title, or how reconciliation of joint title and/or overlapping rights might be actualized (at para. 158).

Overlapping rights and the axes of time and geographic scale

Examination of the *Delgamuukw (1997)* decision exposes two important considerations salient to the issue of overlapping and contested claims, both related to the axes of time and geographic scale. The first concerns the concept of "shared exclusivity," which while not thoroughly explicated by the court, certainly left open the possibility of such a finding. As suggested by Justice La Forest, criteria important for distinguishing between exclusive and "shared exclusive" aboriginal title are the pre-colonial geopolitics of each instance and the timing of events. While the Supreme Court of Canada has yet to engage directly with competing claims for aboriginal title, the preceding discussion suggests that there may be instances where two indigenous groups may have valid claim for aboriginal title in the same area, where both group's claims derive from exclusive prior occupation (or

control) at different times prior to Crown sovereignty.[11]

A second important consideration flows from the courts' conception of aboriginal rights as occurring along a spectrum in relation to their degree of connection to land. At one end of this spectrum rights may be a specific and "free-standing" (such as fishing) which may or may not be tied to specific sites. At the other end there is the right of aboriginal title, a right to the land itself (*Delgamuukw, 1997,* at para. 138). Differing forms of rights occurring along this spectrum invoke different spatialities, be they site- and/or resource-specific, or broader rights of territorial jurisdiction. Aboriginal rights may be exclusive or non-exclusive, where the rights of one group may derive from exclusive occupation (or control) of land, while the rights of another group may derive from non-exclusive practices such as the exploitation of a particular resource (Slattery, 2000).

Added to this complexity is the courts' determination of different "threshold dates" for different kinds of rights. In *R v. Van der Peet (1996)* (following *R. v. Sparrow, 1990*), for example, the Supreme Court of Canada held that a specific aboriginal right is a "practice, custom or tradition integral to the distinctive culture" (at para. 45) of an indigenous group "that existed prior to contact with European society" (at p. 4-5, para. 45, emphasis added). In *Delgamuukw (1997)* it was held that the salient date for establishing the right of aboriginal title is the date immediately prior to Crown sovereignty (at para. 145, emphasis added). Considering the transformation of indigenous societies that occurred between these dates, this distinction may also give rise to overlapping rights and claims, where for example an indigenous group may have gained territorial control from another group in the intervening years (Slattery, 2000).[12]

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[11] See Waldron (2003) for a thoughtful discussion of "prior" and "original" occupation.

[12] The discrepancy between "threshold dates" may also give rise to instances where an indigenous group is not able to legally establish a specific right such as hunting (being based on a indigenous practice extant prior to the date of

Indigenous territorial identity and *Tsilhqot'in Nation v. British Columbia (2008)*

The BC Supreme Court action in *Tsilhqot'in Nation v. British Columbia ("Tsilhqot'in Nation", 2008)* was brought on behalf of all members of the Xeni Gwet'in First Nations Government and all the members of the Tsilhqot'in Nation. An initial claim sought an injunction to prevent the Crown from harvesting of timber in the claim area, an area totaling about 4,500 square kilometers in the Cariboo-Chilcotin region of British Columbia (at para. 62; see also Newman and Schweitzer, 2008). A subsequent claim of the same plaintiff sought a declaration of Tsilhqot'in aboriginal title to the same area. These two claims were consolidated in 2002 as *Tsilhqot'in Nation (2008).*

The ruling in *Tsilhqot'in Nation (2008)* has a significance that goes beyond the usual for a judgment emanating from a trial court. While no declaration of aboriginal title was made for procedural reasons,[13] *Tsilhqot'in Nation (2008)* is the closest any Canadian court has come to making a declaration of aboriginal title and will likely have implications for how indigenous territorial identity is conceptualized by courts in future cases (McNeil, 2010; Newman and Schweitzer, 2008). In addition to affirming the test of proof of aboriginal title posited in *Delgamuukw (1997)*, the decision *Tsilhqot'in Nation (2008)* engages with three issues important to overlapping and contested claims: 1) the contested spatial dimensions of aboriginal rights; 2) overlapping claims and strength of legal claims for aboriginal title; and 3) the characterization of a "proper rights holder."

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colonial contact) but may be able to prove a right of aboriginal title (being based on exclusive occupation prior to the date of British sovereignty) which paradoxically would include specific rights such as hunting (Slattery, 2000). See also especially Marsden and Galois (1995) for a thoughtful discussion of "fur trade era" geopolitical transformation in the northwest coast of British Columbia.

[13] Because the plaintiff had initially framed pleadings as an "all or nothing" claim, the court declined to make a declaration of aboriginal title to any of the claim area. Instead, Justice Vickers offered his obiter opinion that aboriginal title does exist in a portion of the claim area (at para. 794), and that the actions of the provincial government have in fact unjustifiably infringed upon Tsilhqot'in Aboriginal title and rights. The appeal was heard in the British Columbia Court of Appeal in November, 2010. As of this writing, the judgment has not been released.

Contested spatial dimensions of aboriginal rights in Tsilhqot'in Nation

In *Tsilhqot'in Nation (2008)* the Tsilhqot'in (the plaintiff) argued that "a declaration of Aboriginal title, providing a right to exclusive possession and the economic benefits of the land, is fundamental to the cultural and economic survival of Tsilhqot'in people as a distinct society" (at para. 603). The plaintiffs also argued that "a declaration of Aboriginal rights that does not include a declaration of Aboriginal title to the land would be insufficient to ensure Tsilhqot'in cultural security and continuity" (at para. 603).

The federal and provincial governments (the defendants) argued that such a "territorial approach" was not supported by the application of law (at para. 604). The defendants argued that the evidence "might support a declaration of Aboriginal title to smaller sites where specific Aboriginal activities or practices took place," but that these sites should be limited to discrete areas within the claimed area (at para. 608). In rejecting the defendant's geographically narrow characterization of Tsilhqot'in aboriginal rights, Justice Vickers found "no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence" (at para. 610). Justice Vickers was pointed in his reply to the arguments of the defendants:

> "What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries" (at para. 1376).

In *Delgamuukw (1997)* it was determined that prior occupation may be established by "the regular use of definite tracts of land for hunting, fishing or otherwise exploiting its

resources" (at para 149). In *Tsilhqot'in Nation (2008)*, it was held that "[a] tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people" (at para. 1377). Justice Vickers characterized the "regular use or occupancy of definite tracts of land" as a "high standard," and acknowledged the direction provided in *R. v. Marshal; R v. Bernard ("Marshall/Bernard", 2005)*: "[t]o say that title flows from occasional entry and use is inconsistent with [...] the approach to aboriginal title which this Court has consistently maintained" (quoting *Marshall/Bernard, 2005*, at para. 59). In *Tsilhqot'in Nation (2008)* this "high standard" of "regular use or occupancy" was applied by Justice Vickers to determine which areas were subject to exclusive prior occupation and which were not, ultimately finding that the Tsilhqot'in had proven aboriginal title to about half of the 4500 square kilometers claimed.

Overlapping claims and aboriginal title

With respect to overlapping claims, Justice Vickers found that the evidence presented at trial

> "demonstrates the obvious. Aboriginal groups had overlapping territories. They were constantly pushing the limits of their territories and this often resulted in fighting. These conflicts helped define areas that everyone accepted as 'belonging' to a particular Aboriginal group" (at para. 937, quotes on "belonging" in original).

In determining whether the evidence presented at trial demonstrated "a sufficient degree of exclusive occupation to support a finding of Aboriginal title," Justice Vickers found it necessary to determined whether "Tsilhqot'in people at the time of sovereignty assertion exercised effective control of this land [...or whether...] a reasonable inference be drawn that Tsilhqot'in people could have excluded others had they chosen to do so" (at para.

929). That Justice Vickers excluded areas for which there were overlapping claims (at para. 938) from the area over which he determined aboriginal tile, combined with the reasoning posited in *Delgamuukw (1997)* (notwithstanding the theoretical possibility of "shared exclusivity), suggests that overlapping claims in effect weakens the strength of legal claims for aboriginal title.

Territorial identity and the "proper rights holder"

Another aspect of the *Tsilhqot'in Nation (2008)* decision relevant to the issue of overlapping claims is the court's characterization of the "proper rights holder" (at paras. 437-472; see also Newman and Schweitzer, 2008). How the "proper rights holder" is conceptualized – that is, which modern indigenous collectives are (in the view of the court) appropriate representational bodies for communally-held aboriginal rights – bears significantly on how indigenous territorial identity is defined and, by extension, the degree to which territorial claims may overlap and be contested.

In *Tsilhqot'in Nation (2008)*, a declaration of aboriginal title was sought on behalf of the members of the Xeni Gwet'in First Nations Government and on behalf of all of the members of the Tsilhqot'in Nation. The Crown (the defendants), however, argued that the proper rights holder, if rights were established, should be the Xeni Gwet'in First Nations government, one of six contemporary Tsilhqot'in *Indian Act*-defined Bands (*Tsilhqot'in Nation, 2008,* at para. 427). The defendants supported their position by "referring to the evidence that, among the historic community of Tsilhqot'in people, decisions about the uses of particular locations were made at the band or encampment level" (at para. 450). In the view of Justice Vickers this argument placed too much emphasis on a single, localized indigenous decision-making body (at para. 445). Instead, Justice Vickers found that while Tsilhqot'in "have experienced shifts in their members' self-identification [...w]hat remains

constant are the common threads of language, customs, traditions and a shared history that form the central 'self' of a Tsilhqot'in person" (at para. 457). According to Justice Vickers,

> "the creation of bands did not alter the true identity of the people. Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people" (at para. 469).

In the view of Justice Vickers, relevant to establishing the "proper rights holder" for the purposes of s. 35(1) is the ancestral connection of a modern community to the relevant community in existence at the time of colonial contact (for free-standing rights) or Crown sovereignty (for aboriginal title) (at para. 445). If a claim of prior exclusive occupancy is based on the pre-sovereignty ability of an indigenous group to control access to and use of land by others groups (as opposed to physical occupancy), then critical to establishing the proper rights holder is a connection of the modern community to the community that historically exercised such control (at para. 439). Based on both historic evidence (at paras. 460-463) and the modern Tsilhqot'in conception of communal identity (at paras. 449, 468), Justice Vickers found no meaningful distinction between the rights of Tsilhqot'in people represented by the different *Indian Act*-defined Bands (at para. 449), and determined that "the proper rights holder," whether for aboriginal title or aboriginal rights, is the community of Tsilhqot'in people (at para. 470). As discussed in more detail later, the seldom addressed question of which modern indigenous collectives are the legal holders of rights may have implications for policy, if not for the BC treaty process, particularly with respect to how the

bounds of indigenous territorial identity are defined and delineated.[14]

Chapter summary: Overlapping claims and the lens of jurisprudence

This chapter has engaged with the common law doctrine of aboriginal rights, being a *sui generis* body of inter-societal law derived equally from customary indigenous laws and English common law. The goal here has been to scrutinize the territorial dimensions of aboriginal rights through the "lens" of Canadian courts, and in particular to examine how different conceptions of aboriginal rights are equated with dissimilar conceptions of indigenous territoriality. As in the previous chapter, here we see varied conceptions of indigenous territorial identity, ranging from site- and resource-specific rights to a more spatially broad territorial identity, where differently conceived forms of aboriginal rights invoke different forms of boundaries.

Analysis of the decisions in *Delgamuukw (1997)* and *Tsilhqot'in Nation (2008)* exposes a set of legal principles that frame how the spatial dimensions of aboriginal rights have been characterized by Canadian courts. Common law principles particularly relevant to the issue of overlapping and contested claims are summarized below.

Dissimilar rights give rise to overlapping rights

Constitutionally entrenched aboriginal rights occur along a spectrum in relation to their degree of connection with land (*Delgamuukw, 1997,* at para 138). At one end of the spectrum are aboriginal rights for which proof of prior exclusive occupation may not be sufficient to support a claim of aboriginal title, but may be recognized by the courts as specific aboriginal rights according to the "integral to a distinctive culture" test (*R. v.*

[14] For example, the proposed (and now apparently defunct) *BC Recognition and Reconciliation Act* of 2009 used the term "proper rights holder" to emphasize the recognition and "reconstitution" of indigenous Nations, as opposed to *Indian Act*-defined bands, and articulated a broad conception of indigenous territorial identity based on large, mutually exclusive territories of indigenous nations (First Nations Leadership Council, 2009).

Sparrow, 1990, at para. 27; *R v. Van der Peet, 1996*). At the other end of the spectrum is aboriginal title which confers a right to the land itself, including "governmental" authority to decide (with limits) to what use the land may be put (*Tsilhqot'in Nation, 2008; R. v. Marshal; R v. Bernard, 2005; Delgamuukw, 1997; Campbell et al. v. AGBC/AG Canada, 2000).* There are different spatialities associated with different rights occurring along this spectrum, where rights may range in geographic scale from the site-specific to a more broadly conceived territorial jurisdiction. Differently conceived aboriginal rights may give rise to overlapping rights, and to overlapping claims.

Prior exclusive occupation

Aboriginal title is predicated on the prior and exclusive occupation of land by an indigenous group immediately prior to the assertion of Crown sovereignty (*Tsilhqot'in Nation, 2008; R. v. Marshal; R v. Bernard, 2005; Delgamuukw, 1997).* Prior and exclusive occupation can be established either by proof of prior physical occupation or by establishing by reference to customary indigenous law that an indigenous group had the capacity to regulate access to and use of lands (*Tsilhqot'in Nation, 2008; R. v. Marshal; R v. Bernard, 2005; Delgamuukw, 1997).* What remains unclear is whether, and under what circumstances, courts may determine "shared exclusivity" between different indigenous groups, or what markers of differentiation courts might apply in determining such a distinction. While the courts have theoretically not precluded the possibility of finding that two (or more) groups might "share exclusivity," cases rendered to date show that claims to aboriginal title are stronger in instances where claims are exclusive to other groups (*Tsilhqot'in Nation, 2008; Haida Nation v. British Columbia, 2004; R. v. Marshal; R v. Bernard, 2005; Delgamuukw, 1997).*

Indigenous territorial identity and the "proper rights holder"

Where, according to indigenous law and custom, the rights of one indigenous group are not privileged over another indigenous group, the legal rights holder is a broader indigenous collective linked by ancestral lineage, language, custom, tradition, and shared history (*Tsilhqot'in Nation, 2007*). The term to which the courts ascribe this conception of communal identity is "Nation" (*Tsilhqot'in Nation, 2008; Delgamuukw, 1997*). Through its governmental authority, an indigenous Nation may decide to reconfigure the organization of its communal identity and institutions of governance (*Tsilhqot'in Nation, 2008; Campbell et al. v. AGBC/AG Canada, 2000;* see also McNeil, 2006). The division of indigenous people into *Indian Act-defined* Bands was not an act of indigenous governmental authority, and therefore *Indian Act-defined* Bands *may* not be recognized by the courts as a "proper rights holder." The reasoning applied in *Tsilhqot'in Nation (2008)* suggests that in instances where shared aboriginal title is claimed on the basis of "shared exclusivity," courts may be inclined to find a single aboriginal title ascribed to a broader indigenous territorial identity, particularly where the societal "threads of language, customs, traditions and a shared history" are common to both groups making the claim (*Tsilhqot'in Nation, 2008,* at para. 457). As shown in the next chapter, how indigenous communal identity is conceptualized has a profound effect on how claims are spatially defined, and goes directly to questions of exclusivity, and exclusivity to whom?

Consultation and overlapping claims

Aboriginal rights are not absolute, and may be infringed upon by the Crown provided such infringement is justifiable (*R. v. Sparrow, 1990*, at para 6; see also for example *Delgamuukw, 1997; Haida Nation v. British Columbia, 2004; R. v. Van der Peet, 1996; R. v. Gladstone, 1996*). The infringement of aboriginal rights may be partly or fully justified by

consulting with and, under some circumstances, accommodating, indigenous groups whose rights may be impacted by the actions of the Crown (Borrows and Rotman, 2007; McNeil, 2005; Christie, 2006; Lawrence and Macklem, 2000). The burden of justification extends to instances where there is a *prima facia* reasonable expectation that aboriginal rights may exist (*Haida Nation v. British Columbia, 2004).* As discussed in the next chapter, the Crown's duty to consult and accommodate is relevant to the issue of overlapping claims where there is a reasonable expectation that the settlement of a treaty (an action of the Crown) might impact or prejudice the aboriginal rights of indigenous groups not party to a treaty.

"The aboriginal perspective"

Courts are required to consider "the aboriginal perspective" when conceptualizing the nature and form of aboriginal rights (*R. v. Sparrow, 1990,* at p. 39*;* see also *Tsilhqot'in Nation, 2008; Haida Nation v. British Columbia, 2004; R. v. Marshal; R v. Bernard, 2005; Delgamuukw, 1997*). The indigenous perspective is particularly relevant to how indigenous territorial identity is conceptualized, where rights to land and resources occur across a range of geographic scales from the site-specific to a more broadly conceived territoriality. Within the case law reviewed there appears to be some disagreement between Justices with respect to the task of the court in this regard. Some have characterized the role of the Courts as one of "translating" pre-contact or pre-sovereignty indigenous practices to a corresponding legal right known in English common law, while others argue that "the aboriginal perspective" must be considered independently and given equal weight (see for example the majority and dissenting opinions in *R. v. Marshal; R v. Bernard, 2005,* see also *Slattery, 2006; Borrows, 2005).*

Such contestations reflect a friction at the heart of the courts' conceptualization of the spatial dimensions of aboriginal rights, and the challenge of simultaneously addressing the

goals of both *recognition* and *reconciliation* (Slattery, 2006, Penikett, 2006; Woolford, 2005). As in the BC treaty process, such principals do not sit well together, where principles of *recognition* necessitate consideration of "the aboriginal perspective" when determining the nature and scope of legal rights, and where the edict of *reconciliation* requires that "the aboriginal perspective" be cognizable to the court, as well as *reconcilable* with the interests of broader society. Aboriginal rights and their spatial dimensions are thus not strictly indigenous products, but rather derive from a nexus of laws in which both the traditional and the modern are represented, "negotiated" and often transformed.

CHAPTER 4: CAUSES AND IMPLICATIONS OF OVERLAPPING AND CONTESTED CLAIMS

In 1973 Canada announced it would negotiate modern treaties with indigenous groups "where their traditional interest in the lands concerned can be established" (Canada, 1973 as cited in Usher, 2003, p. 374; see also Freeman, 2011; Hurley, 2009; Scholtz, 2006). A requirement for clarity of indigenous jurisdiction was later underscored in Canada's Comprehensive Land Claims Policy of 1986, which stated that "where more than one claimant group utilizes common areas of land and resources, and the claimants cannot agree on boundaries, resource access or land-sharing arrangements, no lands will be granted to any group in the contested area until the dispute is resolved" (Canada, 1986, p. 12). A similar policy was adopted by the government of British Columbia, which stated that it "will not support a treaty settlement package where overlaps exist" (British Columbia, 1996, as cited in de Costa, 2002, p. 225). Until recently the incentive to address overlapping and contested indigenous claims was compelling: the federal and provincial governments would not settle treaties in contested areas.

In British Columbia the federal policy requiring "traditional interest in lands [...] be established" has not been implemented and the policy of not "granting" land in contested areas appears to have been ignored entirely. All of the modern treaties settled in British Columbia to date have been subject to overlapping and contested claims. Such an approach to treaty making might lead one to conclude that the issue of overlapping and contested claims is not really a problem in the context of the BC treaty process, or at least not sufficiently problematic to warrant delaying treaty settlement until contested territorial claims are addressed. Certainly there are some who argue that overlapping claims are simply a product of indigenous groups having historically shared territories and that modern treaty

agreements contain adequate provisions to safeguard the aboriginal rights of indigenous groups with overlapping claims (Arvey, 2007).

It is the conclusion of this thesis that the issue of overlapping claims is indeed problematic in the context of treaty negotiation in British Columbia, and that the Crown is implicated in the issue by default or design. The goal of this chapter is to make this case: to illustrate by example an understanding of the causes and implications of overlapping claims, and in doing so underscore the problematic nature of the issue. In the paragraphs that follow I argue that insufficient engagement of the Crown and the BC Supreme Court in the issue has combined to provide a powerful disincentive for some indigenous groups to reconcile territorial claims with their indigenous neighbours, and that the settlement of treaties in contested areas does indeed prejudice the rights of indigenous groups with overlapping claims.

Section 1: Examples and Causes of Overlapping and Contested Claims

The BC treaty process

A primary motivation of treaty negotiation in British Columbia is to achieve certainty (BCTC, 2011a; Penikett, 2006; Woolford, 2005). "Certainty" in this context means that "first and foremost, conflicts between Aboriginal and Crown title be resolved so that there is clarity with regard to who owns and has jurisdiction over lands in British Columbia" (Woolford, 2005; p. 2). In 1990 a task force comprised of representatives from leading indigenous groups and the provincial and federal governments was mandated to identify a way to achieve certainty through the reconciliation of Crown sovereignty with aboriginal rights (McKee, 2009; Penikett, 2006; Woolford, 2005). In 1992 the First Nations Summit (representing roughly 135 of 197 *Indian Act*-defined Bands in British Columbia), the

government of British Columbia, and the government of Canada formally adopted all 19 of the Task Force's recommendations (BC Claims Task Force, 1991). In 1992 the BC treaty commission was established to act as the neutral facilitator of the BC treaty process (*BC Treaty Commission Act*, 1995; BC Treaty Commission Agreement, 1992).

Two task force recommendations are of primary relevance to the issue of overlapping and contested claims. After almost twenty years of negotiation the policy of the parties to the BC treaty process remains consistent with Task Force recommendations 7 and 8: that "the organization of First Nations for the negotiations is a decision be made by each First Nation" and that indigenous groups are to "resolve issues related to overlapping traditional territories among themselves" (BC Claims Task Force, 1991, p. 19-20). There are now 59 different indigenous groups participating in 50 separate negotiations in the BC treaty process, close to three times as many as had been initially expected by the provincial and federal governments (BCTC, 2011b, 2010b, 2001, 1996). A third of British Columbia's aboriginal population is not represented in the BC treaty process (Canada, 2011a). The issue of overlapping claims involves most indigenous groups in the province, including those that have chosen not to participate in the BC treaty process (BCTC, 2010a, 2010b).

Territorial identity and statements of intent

Indigenous groups wishing to negotiate a treaty in British Columbia are required to submit to the BC treaty commission a "statement of intent" that describes, among other things, the organizational body representing the "claimant" group and the "general geographic area of the First Nation's traditional territory" (BC Treaty Commission Agreement, 1992, p. 4). The "traditional territories" of indigenous groups that have filed statements of intent with the commission as of January, 2010, are shown on Map 1 (BC ILMB, 2010). It is apparent from Map 1 that the asserted territories of indigenous groups

participating in the BC treaty process are not the mutually exclusive areas typical of ethnographic area maps but rather represent numerous overlapping claimed areas, and areas of blank space that silently confer the territories of indigenous groups not participating in the BC treaty process.

Consistent with the recommendations of the BC Claims Task Force (1991), the authority of the BC treaty commission is, among other things, to "*receive*" statements of intent, not to make determinations of their authenticity (BCTC, 2010b; BC Treaty Commission Agreement, 1992, p. 4). The term "traditional territory" is not defined in statutes enabling the commission and is only vaguely described in commission policy as the "distinct traditional territory that is generally recognized as being their own" (BCTC, 2011c, p. 1). The BC treaty process is not concerned with proof or strength of asserted territorial claims, but rather was conceived as an explicitly political alternative to the long and costly process of indigenous groups having to prove the scope of their rights in court (McKee, 2009; Penikett, 2006; Woolford, 2005; Usher, 2003). There is no requirement, in other words, for indigenous groups negotiating within the BC treaty process to lay out the factual content on which their claims to territory are based.

Expressions of indigenous territory submitted to the commission are "received" as presumptive territorial claims with the expectation that indigenous groups will "resolve issues related to overlapping traditional territories among themselves" (BC Claims Task Force, 1991, p. 20). If we accept that this expectation requires that indigenous groups be motivated and able to "resolve" overlapping claims among themselves, it follows that the Crown would provide some incentive to do so, or at least not tacitly discourage such efforts. The examples and discussion that follows suggest that this expectation may have been wishful thinking, particularly inasmuch as the Crown and the BC Supreme Court have

subsequently provided a powerful disincentive for some indigenous groups to reconcile contested territorial claims with their indigenous neighbours.

The "Nass Area": An example of "inter-national" overlapping and contested claims

The Nisga'a were the first indigenous group to finalize a modern treaty in British Columbia, an agreement that "exhaustively sets out Nisga'a section 35 rights [and] the geographic extent of those rights" (Nisga'a Final Agreement, 1999, p. 20). In doing so the Nisga'a treaty crystallized one of the most well-known instances of contested claims, one that has been vociferously contested in the media (Mickleburgh, 1999; Rinehart, 1999; Fournier, 1998), before the Senate Committee on Aboriginal Affairs (Canada, 1999), and in the BC Supreme Court (*Gitanyow First Nation v. Canada, 1999; Luuxhon et al. v. HMTQ Canada et al. and Nisga'a Nation,1998*).

Five indigenous groups claim territory in the Nass River watershed: the Tahltan, Gitksan, Gitanyow, Tsimshian, and Nisga'a peoples. While the Nisga'a treaty was negotiated within Canada's Comprehensive Claims process (i.e., was not subject to the policies of the BC treaty process), the Tsimshian, Gitksan and Gitanyow are all currently participating in the BC treaty process, and lessons learned (and not learned) from overlapping and contested claims in this example have significant implications for future treaty making in British Columbia. The focus of this section is on the contested territorial claims of the Gitanyow and Nisga'a and of the Gitksan and Nisga'a.[15]

Spatial dimensions of rights and benefits conferred by the Nisga'a treaty

The Nisga'a Final Agreement ("NFA", 1999) confers to the Nisga'a, among other

[15] A memorandum of understanding was reached between the Nisga'a and the Tsimshian concerning boundary definition, access to resources and common development activities (Wesley, 2007). See Sterritt et al. (1998) for a discussion of the Tahltan claim at the headwaters of the Nass watershed.

things, "Nisga'a Land" (in the estate of fee-simple), other fee-simple lands, economic opportunities, access to natural resources, and rights of shared decision-making (with the provincial government) concerning natural resources over a significant portion of the Nass River watershed (NFA, 1999). Land rights and benefits conferred by the Nisga'a treaty and the territorial claims of the Tsimshian, Gitksan and Gitanyow (as submitted to the Commission) are shown on Map 2, and summarized in table 1, below.

Table 1. Land rights and benefits conferred by the Nisga'a Final Agreement (1999) and overlapping and contested territorial claims in the "Nass Area."

Nisga'a Nation ownership of "Nisga'a Lands" (in the estate of fee simple) and other fee simple parcels in areas also claimed by the Gitanyow, Gitksan and Tsimshian (NFA, 1999, p. 11, 31, appends. A, D);
Nisga'a Nation ownership of a "Nisga'a Commercial Recreation Tenure," with a guarantee that British Columbia will not issue another commercial recreation tenure that conflicts with the tenure of the Nisga'a for 27 years, in an area also claimed by the Gitanyow (NFA, 1999, p. 46-47, append. E);
Nisga'a wildlife harvesting and rights of co-management (with the provincial government) within the "Nass Wildlife Area," an area encompassing almost the entire area claimed by the Gitanyow, and part of which falls within territory claimed by the Tsimshian and Gitksan (NFA, 1999, appendix J);
A provision to record in the British Columbia Geographic Names System Nisga'a language place names in territory claimed by the Gitanyow, Gitksan and Tsimshian (NFA, 1999, p. 47 and appendix F-2); and,
Nisga'a wildlife and fish harvesting privileges (for some species) over the entire "Nass Area" (NFA, 1999, p. 9-10, p. 148 and appendix I).

Conferral to the Nisga'a of these rights and benefits was, arguably, based on the assertion that "the Nisga'a Nation has lived in the Nass Area since time immemorial" (NFA, 1999, p. 1). According to the Nisga'a Final Agreement (1999, p. 9-10 and p. 148), the term "Nass Area" refers to the entire Nass River watershed, as shown on Map 2.

Contested claims in the "Nass Area"

The Nisga'a-Gintanyow instance is an example where a claim to territory (the Nisga'a claim) engulfs almost the entire territory claimed by a neighbouring group (the Gitanyow). Another striking aspect of this example, though certainly not unique, is the degree to which this dispute led to outrage on the part of those involved and even overtures of violence (Mickleburgh, 1999; Gitanyow Hereditary Chiefs, 1999).

The Nisga'a, Gitanyow, Gitksan and Tsimshian form a distinct and closely related group sharing many commonalities of culture, society, and language (Halpin and Seguin, 1990). While there are some cultural differences among these groups, they share a customary (i.e., pre-colonial) legal system that defines ownership of territory and rights of access to land and resources. The "house" (or *wilp*) is the fundamental political and land-owning unit of these groups (Napoleon, 2009; Daly, 2005; Overstall, 2005; Marsden, 2002, 2001; Turner and Jones, 2000; Sterritt et al., 1998; *Delgamuukw, 1997*; Weinstein, 1994).

According to the Gitanyow, "[t]he documentary record clearly states that the Gitanyow Houses have and continue to have aboriginal title and rights to the Mid-Nass River Watershed in Northwest British Columbia, and no certainty will be achieved in this [the Nisga'a] treaty" (Gitanyow Office of Hereditary Chiefs, 1999, p.1; see also Canada, 1999 statements of the Gitanyow and Gitksan to the Senate Standing Committee of Aboriginal Affairs).

Nisga'a elder and former MLA Frank Calder,[16] on the other hand, contends that Nisga'a "boundaries are defined by the water that flows down from all the heights of land to the valleys below. This is Nisga'a territory: [f]rom mountaintop to mountaintop[,..] everything that flows into the Nass" (quoted in Hume, 2000, p. 60). According to Calder, the

[16] Frank Calder is best known for his role in the seminal Supreme Court of Canada case *Calder vs. Attorney General of British Columbia (1973)*, a ruling that affirmed the existence of aboriginal title in Canada.

troubles with neighbouring groups began when the land began to be understood in terms of private property. Prior to the arrival of settlers, says Calder, relationships among indigenous groups were not between nations, but between "Houses" and governed by the reciprocal obligations of kin and mutually respected rights (Frank Calder as cited in Hume, 2000; see also Napoleon, 2009; Daly, 2005; Overstall, 2005; Weinstein, 1994).

The Gitksan and Gitanyow, for their part, argue that the settlement of the Nisga'a treaty breaches indigenous customary law and federal claims policy, and prejudices the negotiating position of the Gitanyow and the Giktsan (Sterritt et al., 1998; Sterritt, 1998). Indigenous law and orally recorded history in this context derives from the continuing tradition of recounting and validating through "potlatch feast" the geopolitical history of a groups' ownership of territory, where the institution of the "potlatch" requires the witnessing and validation of rights of ownership and tenure (Napoleon, 2009; Daly, 2005; Overstall, 2005; Marsden, 2002, 2001; Weinstein, 1994).[17]

Written by Gitksan and Gitanyow researchers who prepared testimony for the *Delgamuukw* case, *Tribal Boundaries of the Nass Watershed* (Sterritt et al., 1998) is a scholarly challenge to the territorial claims of the Nisga'a, wherein oral history is supported by documentary records and presented as proof of Gitanyow and Gitksan ownership of land in the mid- and upper Nass River watershed (see Map 2). Sterritt and others (1998) argue that valid claim to territory can occur in one of two ways, either by occupying an area after it has been abandoned, or by cession through war or formal conferral as reparation for transgression or service. Such land-cession on is only valid when recognized through a formal and specific ceremony (called *xsiixw)* and validated by potlatch (Sterritt et al., 1998;

[17] Oral records are called "*adawk*" (sometimes spelled "*adaawk*") in the language of the Nisga'a, Gitksan and Tsimshian, which provide account of the "historical events of collective political, social, and economic significance, such as migration, territorial acquisition, natural disaster, epidemic, war, and significant shifts in political and economic power" (Marsden, 2001, p. 102).

see also Daly, 2005; Overstall, 2005).

Sterritt and others (1998) suggest that the Nisga'a claim to what the Gitanyow contend is their territory may have arisen because "about half" of the chiefs and members of a Gitanyow village (Kitwancool) moved to Nisga'a villages between 1890 and 1910 (Sterritt, 1998, p 84; see also Canada, 1999). These Gitanyow leaders became members of the Nisga'a Land Committee who organized the now famous Nisga'a land claim petition of 1908, submitted to the British Privy Council, which included the Gitanyow and their claimed territory (Sterritt et al., 1998). The political alliance between the Gitanyow and Nisga'a was short lived, however, as the Gitanyow made a separate claim to the McKenna-McBride Commission[18] in 1915 and have since pursued their land claims independently (Sterritt et al. 1998; Sterritt, 1998).

A possible cause of contested claims in this instance, then, may derive from an assumption that Gitanyow-claimed territory was subsumed by the Nisga'a when Gitanyow chiefs moved to Nisga'a villages (Sterritt et al. 1998; Sterritt, 1998). According to Sterritt and others (1998), however, only in some circumstances (e.g., exogamous marriage) does relevant indigenous law permit people to carry title in land with them when they move, and then only according to specific protocol (Sterritt et al. 1998; see also Daly, 2005; Overstall, 2005). According to Sterritt and others (1998), however, there has never been a *xsiixw* ceremony for the transfer of Gitanyow and Gitksan land title to the Nisga'a, and Gitanyow chiefs still resident at their ancestral village have continued to assert a separate claim from 1910 to the present day (Sterritt at al., 1998).

The Gitanyow and Gitksan contend that the Nisga'a treaty is prejudicial to their

[18] The McKenna-McBride Commission (formally known as the Royal Commission on Indian Affairs for the Province of British Columbia) was established in 1912 to resolve the "Indian Reserve question" in British Columbia. In 1916, the Commission recommended an exchange of Indian Reserve land that resulted in Indian Reserves occupying land of significantly less value (Harris, 2002).

aboriginal rights (Canada, 1999; Sterritt et al., 1998, Sterritt, 1998). After repeated attempts on the part of the Gitanyow and Gitksan to address the overlap dispute failed (Canada, 1999), and prior to the ratification of the Nisga'a treaty, the Gitanyow sought remedy from the BC Supreme Court. This case and others related to modern treaties and contested claims are discussed later in this chapter.

The "Lheidli T'enneh Area": An example of "inter- and intra-national" overlapping and contested claims

The Lheidli T'enneh were the first indigenous group to "initial" a modern treaty within the framework of the BC treaty process, an agreement that if ratified would "modify and continue as modified" the aboriginal rights of the Lheidli T'enneh according to the terms of the Lheidli T'enneh Final Agreement (LTFA) (2006, p. 1). If ratified the LTFA would confer to the Lheidli T'enneh, among other things, "Lheidli T'enneh Lands" (in the estate of fee-simple), "private fee-simple lands," commercial opportunities, rights of resource harvesting and shared decision-making (with the provincial government) respecting natural resources within the "Lheidli T'enneh Area" (LTFA, 2006).

Summary of overlapping claims in the "Lheidli T'enneh Area"

No less that 12 indigenous groups claim aboriginal rights in the "Lheidli T'enneh Area," the extent of which is based on the statement of intent boundary of the Lheidli T'enneh Band (LTFA, 2006, p. 9; BCTC, 2011b).[19] The statement of intent boundaries of groups participating in the BC treaty process, assertions of aboriginal rights made by groups not participating in the BC treaty process, and the spatial extent of rights and privileges that would be conferred by the LTFA are shown on Map 3. Indigenous groups claiming

[19] Estimating the number of "different" indigenous groups asserting aboriginal rights in the Lheidli T'enneh Area is imprecise where indigenous groups are organized differently, and where for example a tribal council may represent multiple member groups for which only some claim rights in the "Lheidli T'enneh Area."

aboriginal rights in the Lheidli T'enneh Area, their cultural group association, and their organization in respect the BC treaty process (if any) are listed below:

Table 2. Overlapping claims and Lheidli T'enneh treaty rights in the "Lheidli T'enneh Area"

Lheidli T'enneh ownership of "Lheidli T'enneh Lands" (in the estate of fee-simple) and "private fee simple lands" (LTFA, 2006, p. 49, append. A) in areas also claimed by:	
	Nazko Indian Band and Nakazdli Indian Band.
Requirement for the government of British Columbia and Lheidli T'enneh to negotiate an agreement respecting planning, management, and economic opportunities related to 7 provincial parks in the Lheidli T'enneh Area (LTFA, 2006, p. 142), including:	
	Bowron Lake Park, an area in which rights are also claimed by the Lhtako Dene Nation, Xats'ull First Nation and the Tsilhoqot'in Nation; and,
	Kakwa Park, an area in which rights are also claimed by indigenous groups of Treaty 8.
Provision to establish a Lheidli T'enneh commercial recreation tenure in the Bowron River watershed, with a guarantee that the government of British Columbia will not issue a conflicting tenure for a fixed term (LTFA, p. 143, append. L) in an area also (partially) claimed by:	
	Lhtako Dene Nation, Xats'ull First Nation and Tsilhoqot'in Nation.
Rights of resource harvesting, allocation and shared decision-making respecting wildlife and fish within the "Lheidli T'enneh Area" and the "Lheidli T'enneh Fish Area," respectively (LTFA, 2006, p. 99, 120-124, append. K), significant portions of which are also claimed by:	
	Carrier Sekani Tribal Council (Carrier and Sekani cultural-linguistic groups) representing eight indigenous groups in the BC treaty process (not all of which may claim aboriginal rights within the "Lheidli T'enneh Area," but one of which, the Nakazdli Band, has asserted rights outside the BC treaty process that extend beyond the statement of intent of the Carrier Sekani tribal council);
	Northern Shuswap Treaty Society (northern Secwepemc cultural-linguistic group) representing four groups in the BC treaty process (not all or which may claim aboriginal rights within the "Lheidli T'enneh Area," but two of which, the Canim Lake Indian Band and Xats'ull First Nation, claim rights extending beyond the statement of intent of the Northern Shuswap Treaty Society);
	Nazko Indian Band (southern Carrier cultural-linguistic group), participating in the BC treaty process independently;

	McLeod Lake Indian Band (Sekani cultural-linguistic group), participating in the BC treaty process independently (also "adhered" to Treaty 8);
	Treaty 8 Tribal Association (Cree and Dunne-Za cultural-linguistic groups), representing eight indigenous groups, six of which claim rights in the "Lheidli T'enneh Area;
	Lhtako Dene Nation (southern Carrier cultural-linguistic group), not participating in the BC treaty process;
	Simpcw First Nation (Secwepemc cultural-linguistic group), not participating in the BC treaty process; and,
	Shuswap Indian Band (Secwepemc cultural-linguistic group), not participating in the BC treaty process.

Causes of overlapping claims

Contested discourses of aboriginal rights and their spatial dimensions

The Lheidli T'enneh are of the central Carrier (*Dakelh*) cultural-linguistic sub-group, whose traditional systems of territoriality and tenure were/are based on the concept of "*keyoh*" (or "*keyah*" in western *Dekelh* dialects). A *keyoh* is a territory "belonging" to an extended family or clan (Larsen, 2006; Brown, 2002; Furniss, 1995). The central institution through which *keyoh* were/are "owned" and managed was the potlatch, or "*bahlats.*" The *keyoh* and *bahlats* together are a customary system of indigenous territoriality and governance that in some instances is still known and actively managed/practiced to this day (see for example Keyoh Huwunliné, 2011; Brown, 2002).

As throughout the province, the colonial encounter brought considerable change to traditional Carrier systems of territoriality and governance (Larsen, 2006; Windsor and McVey, 2005; Brown, 2002; see also Harris, 2004, 2002). The division of *keyoh* territories into registered trapping areas in the 1920s and 1930s in particular diluted the authority of customary systems by conferring exclusive property rights to individual trap line owners

regardless of rank in the *bahlats* system (Brown, 2002, see also for example Larsen, 2006; Harris, 2004). Traumatic events such as epidemics, intentional flooding, and forced relocation and acculturation, including the legal prohibition of the *bahlats* system, had a profoundly dislocating effect on Carrier society, where customary systems of organization and territoriality sometimes "blurred" as communities were fractured and reorganized to accommodate such disasters (Larsen, 2006; Windsor and McVey, 2005; Brown, 2002).

Contemporary indigenous territorial identities are not strictly indigenous products, but rather are outcomes of such "negotiations" in which both the "customary" and the "contemporary" are represented, contested and sometimes transformed (Thom, 2009; Egan, 2008; Larsen, 2006). Such socio-spatial identities are often products of interaction between customary identification and colonial dislocation, where territoriality may be enacted as a flexible political strategy within and beyond the BC treaty process (Thom, 2009; Larsen, 2006). While the boundaries of the Gitksan and Gitanyow shown on Map 2 are said to reflect an explicitly pre-colonial form of territoriality (Daly, 2005; Overstall, 2005; Sterritt et al. 1998), territories converging on the "Lheidli T'enneh Area" (Map 3) are more likely a reflection of such "negotiations," where indigenous groups have politicized their connections with land as a strategy for legitimizing and actualizing claims.

The related issue of how indigenous groups are politically organized within and beyond the BC treaty process is equally complex, often involving an interplay between customary forms of territorial identities (for example, "*keyoh*," "*wilp*," "clan," "tribe," and "nation") and the externally imposed *Indian Act*-defined Band Council system. Crosscutting these may also be varied forms of modern political agency representing the interests of multiple indigenous groups within (and beyond) the BC treaty process, such as tribal councils and treaty societies (BCTC, 2011b; Thom, 2010). Some groups negotiating within the BC

treaty process, like the Lheidli T'enneh, have distinguished themselves (in their statements of intent) as *Indian Act*-defined Bands. Others are said to be formed in accordance with indigenous customary law, while still others are political alliances of multiple groups that sometimes crosscut linguistic or other cultural boundaries (BCTC 2011b; Thom, 2010, 2009).

The spatial dimensions of these identities are not easily defined spaces but rather are, to use Lefebvrevian terminology (discussed in Chapter 2), *representational spaces* that simultaneously reproduce hegemonic order (through, for example, the spatial practice of representing territory as discretely bounded space) while at the same time serving as a medium for contestation and resistance (Lefebvre, 1991; see also Larsen, 2006; Delaney, 2004). Ancestral connections between people and place are employed as a legitimating discourse of claims making, where the spatial practice of map-drawing itself can be understood as both a cause of overlapping claims and a site of contestation between different ways of knowing land and kin-based relations (Thom, 2009). Here again the role of space is central, where preference for exclusivity (e.g., a "resolution" to the overlap "problem") reproduces the hegemonic order of mutually exclusive property, and where overlapping claims can in one sense be understood as a challenge to the taken-for-granted spatial practice of representing territories as mutually exclusive and discretely bounded (Lefebvre, 1991; see also Larsen, 2006; Delaney, 2004).

The flexibility of such socio-spatial identities is particularly evident where indigenous groups exhibit dissimilar spatialities in different contexts, as in the "Lheidli T'enneh Area" where for example the Nakazdli Indian Band, the Xats'ull First Nation, and Lhtako Dene Nation have, in land management processes outside of the BC treaty process, made spatial assertions of aboriginal rights substantively larger than the extent of their claims within the BC treaty process (see Map 3). For some groups at least, it appears that territory may be

shaped to fit the purpose for which it is enacted.

Overlapping claims and the axes of law and time

One key source of tension among such boundary-meanings is between what I will call here "aboriginal title community" and "residential community,"[20] where each invokes different allegiances, legitimating discourses, and representations of space. An "aboriginal title community" is a broad conception of territorial identity ascribed to what the BC Supreme Court in *Tsilhqot'in Nation (2008)* calls a "proper rights holder" (at paras. 437-472), an identity derived from "common threads of language, custom, traditions and a shared history" (at para. 457). To use the framework suggested by de Vos (1975) (discussed in Chapter 2), emphasis here is on a *past-familial-cultural* allegiance, where *historical* antecedent and indigenous law are a dominant discourses for legitimating claims (Knight, 1982; de Vos, 1975, see also Larsen, 2006; Sparke, 1998).

At the other end of the conceptual spectrum there may be employed a territorial identity predicated on the socio-spatial ambitions of contemporary "residential communities," where allegiance is primarily with a *present-functional* identity derived from present day occupation, often based on *Indian Act*-defined Band membership (Knight, 1982; de Vos, 1975; see also Thom, 2010, 2009). The legitimating discourse here is primarily political (although legal discourses of aboriginal rights may also be strategically invoked) and targeted to the political actualization of rights.

A *present-functional* identity may give rise to the territorialization of specific aboriginal rights, based for example on recent and contemporary indigenous occupancy and land use. The spatial dimensions of this kind of identity allegiance may be varied as well,

[20] Davies (2003) has applied a similar framework to analysis of overlapping territorial claims in Australia.

where territory may encompass a fairly discrete and localized area or, at the other extreme, may include infrequent or "far-flung" trips of community members to obtain animals and plants, perhaps even with the permission of adjacent indigenous groups (see for example Usher, 2003; Tobias, 2000). The spatial dimensions of a *past-familial-cultural* allegiance (an "aboriginal title community") on the other hand, derive from antecedents of a qualitatively different order, such as an intimate knowledge of indigenous genealogy and vibrant customary systems of territoriality and governance (e.g., "House," or "*Keyoh*").

It would of course be an empirical leap to suggest that indigenous groups that have expressed their identity (in their statements of intent) as "nations" or as constituted by customary indigenous law would be more likely associated with an "aboriginal title community" or have a stronger allegiance with a *past-familial-cultural* identity. Certainly there is an element of hybridity within individual claimant groups, where for example a group describes its organization as an "amalgamation, based on traditional law, of the *Indian Act* Band Council for legal and financial purposes and [a customary hereditary organization] for cultural and heritage purposes" (BCTC, 2011b, Allied Tsimshian Tribes of Lax Kw'alaams statement of intent). This said, if we accept that claims-making at least to some extent requires a *historic* (that is, pre-colonial) connection between an indigenous group making a claim and a specific area, it follows that the way territory is represented flows from the manner that such identities are defined. The organization of indigenous groups for claims-making purposes defines who "they" are and thus the specific area to which "they" are historically and/or contemporarily connected. The expressed territories of contemporary "residential communities" are contrasted with the "aboriginal title communities" not because one identity is more authentic than the other, but simply because they differ fundamentally in the "something else" that boundaries defined.

My intent in this project is not to explore in any depth the constitution of such identities or to call into question the legitimacy of such expressions. The point to underscore here is that each of the expressions of indigenous socio-spatial identity at work within (and beyond) the BC treaty process has its own antecedents which overlap across multiple axes of difference. It is not just physical boundaries that overlap -- it is the criteria used to define their meanings and bounds.

The ghosts of the BC Claims Task Force (1991)

BC treaty commission policies require that indigenous groups indicate, in their statements of intent, the "general geographic area of the First Nation's traditional territory" (BC Treaty Commission Agreement, 1992, p. 4). The term "traditional territory" is only vaguely defined as the "distinct traditional territory that is generally recognized as being their [the claimants] own" (BCTC, 2011c). When considered in light of long-standing federal and provincial policy that treaties would not be settled in areas of overlapping claims, one interpretation of the commission's directive on the meaning of "traditional territory" is that the intent was for territory to be exclusive to the group making the claim (or at least *generally recognized* as being *their own*). Exclusivity of claims is consistent with the history of treaty making in Canada, where treaties have almost always been made congruously with existing treaties - that is, discretely bounded and mutually exclusive (Miller, 2009; Canada, 2004). Where an indigenous group was not included in a historic treaty, an "adhesion" agreement was sought to include omitted indigenous groups instead of a new treaty made in an area where a treaty already exists (Miller, 2009).

Self-defined indigenous organization for treaty purposes has a number of implications for the issue of overlapping claims, no least that makes defining who "they" are and the

extent of "their" territory difficult, particularly where the organization of indigenous groups has and continue to evolve. There are now close to three times the expected numbers of indigenous groups participating in the BC treaty process (BCTC, 2009, 1996), with a further third of British Columbia's indigenous population choosing not to participate. Indigenous groups not participating in the BC treaty process are also making territorial claims and, as discussed in the second section of this chapter, are contesting the settlement of treaties because of overlapping claims.[21]

Section conclusion

The causes of overlapping claims are varied and complex. Different forms of indigenous organization in particular reveal a significant cause of overlapping claims as well as a wedge into broader contestations over which forms of indigenous organization are most appropriate for the assertion and actualization of indigenous rights and interests (Thom, 2010).[22] Without a clear definition of "traditional territory" it is impossible to know the meanings that indigenous groups had in mind when they delineated their claims, whether based on exclusivity, shared exclusivity, or other markers of distinction such as language, *historic* land use and occupancy, *contemporary* land use and occupancy, and so on. Overlapping claims can be understood as a product of these kinds of varied boundary-meanings, conceptions that are in some contexts congruent, and in others, incompatible.

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[21] For example, the BC Government maintains a "Consultation Areas Database" that houses close to two hundred different indigenous boundaries, roughly equivalent to the number of *Indian Act*-defined Bands in British Columbia. Given that roughly 135 Bands are represented in the BC treaty process (as 50 separate negotiations), it follows that there may be as many as 62 additional groups (depending on if and how they aggregate) either joining or making territorial claims outside of the BC treaty process.

[22] While Canadian courts have yet to hear a case directly on this point, it is certainly conceivably that an "aboriginal title community" (based on the legal authority of prior exclusive occupation and the "proper rights holder") might contest the political authority of a "residential community" to negotiate the modification of communally held aboriginal rights through a treaty (see for example Overstall, 2004; Alfred, 2000).

Section 2: The Fallout: Implications of Overlapping and Contested Claims

The Supreme Court of Canada has stated that the common law doctrine of aboriginal rights "provides a solid constitutional base upon which subsequent negotiations can take place[, ..] that negotiations should also include other aboriginal nations which have a stake in the territory claimed [...and that...] the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith" (*Delgamuukw*, 1997, at para. 186). In this section I argue that modern treaty negotiations in British Columbia have not adequately "include[d] other aboriginal nations which have a stake in the territory claimed," and that the settlement of treaties in contested areas prejudices the aboriginal rights of indigenous groups not party to such negotiations. I argue that the Crown's recent practice of settling treaties in contested areas has combined with insufficient judicial engagement on the issue to provide a powerful disincentive for some indigenous groups to address overlapping and contested claims. Such an approach to treaty-making undermines two principal goals of the BC treaty process: to avoid aboriginal rights litigation and to promote certainty of jurisdiction.

The BC treaty process: "A legal wolf in political clothing"

The issue of overlapping claims has long been a concern of the BC treaty commission (BCTC, 2010a, 2010b, 2009, 1996). This said, the commission has no coercive powers to compel indigenous groups to reconcile their contested claims (Arvey, 2007; BCTC, 2010b; *BC Treaty Commission Act, 1995*). Where territorial disputes remain unresolved at latter stages of treaty negotiation, the policy of the commission is that it "assess the nature of the [overlap] conflict and the efforts made to resolve it, and report its findings to all the First Nations parties as well as Canada and BC" (BCTC, 2010b, p. 9). As of June, 2010, the commission had not issued such a report, though all of the agreements reached under the

auspices of the BC treaty process have been contested because of overlapping claims (BCTC, 2010b). The commission itself admits that because of "lack of resources" and "lack of incentive" the "commission's policies and procedures for reporting on overlapping and shared territory disputes have not been widely utilized" (BCTC, 2010b, p. 9). While such deviation from policy is regrettable, it should be seen in light of the commission's role in respect to the issue. The commission has no authority to compel resolution of overlapping claims, but rather is only required to monitor and report to the parties on the issue and may engage in meeting facilitation only when requested by First Nations participating in the BC treaty process (BCTC, 2010b, 1996).

The Crown, on the other hand, is profoundly implicated in the issue. Contrary to long-standing policy, federal and provincial governments have proven willing to settle treaties in contested areas, which not only decreases incentive for First Nations nearing treaty settlement to address contested claims but in fact provides a powerful disincentive for some groups to do so. The Nisga'a treaty, for example, confers to the Nisga'a both exclusive and non-exclusive treaty rights in contested areas. Had the Nisga'a been required to reconcile their territorial claims with those of their indigenous neighbours, or submit to binding arbitration as the Gitksan and Gitanyow had requested, it is likely that the Nisga'a treaty would look quite different than it does today. In particular exclusive fee simple lands in areas claimed by Gitksan and Gitanyow may not have been conferred to the Nisga'a, and the "Nass Wildlife Area" would likely have been significantly reduced or provisions for shared resource allocation and management made part of the Nisga'a treaty (see Map 2). By settling the Nisga'a treaty in a contested area the Crown removed what little incentive there was for the Nisga'a to reconcile with their indigenous neighbours (Sterritt, 1998; Canada, 1999).

It is often said that treaty-making in British Columbia is not a legal process, but rather

is a forward-looking process for the negotiation of "interests" (Egan, 2008; Penikett, 2006; Woolford, 2005; de Costa, 2002). Such an approach is certainly evident in the lack of scrutiny given to territorial claims, where self-identified indigenous groups and "their" traditional territories are received for negotiation without being questioned. While some may choose to characterize treaty-making in British Colombia as an explicitly political process, the legal implications of such an approach are particularly profound for groups with overlapping claims. The underlying contention of the legal actions brought because of contested claims is that modern treaties are conferring treaty rights in areas for which groups signing treaties do not have legitimate or exclusive claim, and that settlement of treaties in contested areas in effect prejudices the rights of groups with overlapping claims.

The "overlap cases"

The Nisga'a treaty and Gitanyow First Nation v. Canada, 1999; Luuxhon v. HMTQ, 1998 ("Luuxhon")

As discussed earlier, the Nisga'a treaty overlaps with the territorial claims of the Gitanyow and Gitksan (see Map 2). After efforts of the Gitanyow, Gitksan, and Nisga'a to address contested claims in the "Nass Area" failed, the Gitanyow sought remedy from the BC Supreme Court. In the case generally known as "*Luuxhon*" (*Gitanyow First Nation v. Canada, 1999; Luuxhon et al. v. HMTQ Canada et al. and Nisga'a Nation, 1998*) the Gitanyow sought clarification on two questions: are federal and provincial governments *legally* bound to a duty to negotiate with the Gitanyow in good faith and, if so, does the negotiation and settlement of the Nisga'a treaty violate such a "good faith" standard by failing to adequately account for overlapping claims (*Luuxhon*, 1999, at paras. 2-3)?

The court in *Luuxhon* held that the governments of Canada and British Columbia are indeed "obliged to negotiate in good faith with the Gitanyow" (*Luuxhon*, 1999, at para. 75)

but did not rule of the second question. The Crown's appeal was eventually suspended (Hurley, 2001). Canadian courts have yet to rule definitively on the question of whether negotiating with multiple indigenous groups concerning the same territory can be considered "good faith" negotiation, or if the practice of settling treaties in contested areas is consistent with the Crown's legal duty to act honorably in its dealings with indigenous peoples.

The Lheidli T'enneh treaty and Chief Allan Apsassin et al. v. Attorney General (Canada) et al., 2007 ("Apsassin")

The Lheidli T'enneh Final Agreement (LTFA) was initialed in October, 2006, and began a process of community ratification in March, 2007 (BCTC, 2007). As shown on Map 3, the "Lheidli T'enneh Area" overlaps with territory covered by Treaty 8, a historic treaty entered into by Canada and groups of Cree, Beaver, Slavey, and Chippewayan peoples in 1899 (Devlin and Thielmann, 2009). In February, 2007, six indigenous groups of Treaty 8 commenced legal action seeking an injunction to prevent ratification of the Lheidli T'enneh treaty. In the BC Supreme Court case general known as "*Apsassin*" (*Chief Allan Apsassin et al.* v. *Attorney General (Canada) et al., 2007*), the plaintiffs argued that

> "... the provisions of the Lheidli T'enneh Final Agreement that confer wildlife and migratory bird harvesting, plant gathering, and wildlife and parks management rights to the Lheidli T'enneh within the territory of Treaty No. 8 are unconstitutional [...] and are of no force and effect [...] until there is adequate consultation and accommodation of the existing Treaty No. 8 rights of the plaintiffs by Canada and British Columbia" (at para. 17; see also plaintiff's amended writ of summons, p. 12).

The concern of the Treaty 8 group (the plaintiff) was that settlement of the Lheidli T'enneh treaty would in effect prejudice the plaintiff's treaty and aboriginal rights. The plaintiff argued that rights conferred to the Lheidli T'enneh by the LTFA would increase

hunting and gathering pressure in the contested area, and that conferral to the Lheidli T'enneh of the right to participate in the wildlife and parks management (while the Treaty 8 had no such explicit rights) would privilege the Lheidli T'enneh to the detriment of the plaintiff treaty 8 groups (*Apsassin, 2007,* amended writ of summons, p. 8).

The federal and provincial governments and the Lheidli T'enneh (the defendants) argued that Lheidli T'enneh exercise of rights conferred by the LTFA would not conflict with Treaty 8 rights, and that the plaintiff had failed to prove that the ratification of the LTFA would result in *immediate irreparable harm* to the plaintiff (*Apsassin, 2007*, see also outline of the Attorney General of Canada, p. 8). The defendants argued that the plaintiff's claim was based on a speculative assumption of long term harm, rather than potential immediate harm that might result from the ratification of the Lheidli T'enneh treaty *per se*. The defendants argued that even if the Lheidli T'enneh treaty were to cause long-term harm to the plaintiff, the non-derogation clauses[23] contained in the LTFA provide adequate protection to the aboriginal and treaty rights of groups with overlapping claims (*Apsassin, 2007*, see also outline of the Attorney General of Canada).

Specifically, the defendants argued that if the plaintiffs could prove in court that their aboriginal and/or treaty rights are adversely affected by a provision of the LTFA, "those provisions would continue to operate and have effect only to the extent that they do not affect

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[23] All of the modern treaties reached in British Columbia contain the same so-called "non-derogation clauses":

> "51. Nothing in this Agreement affects, recognizes or provides any rights under section 35 of the Constitution Act, 1982 for any aboriginal people other than Lheidli T'enneh.
>
> 52. If a superior court of a province, the Federal Court of Canada or the Supreme Court of Canada finally determines that any aboriginal people, other than Lheidli T'enneh, have rights under section 35 of the Constitution Act, 1982 that are adversely affected by a provision of this Agreement:
>
> a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
>
> b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or
>
> replace the provision" (Nisga'a Final Agreement, 1999, p. 22-23; Lheidli T'enneh Final Agreement, 2006, p. 27; Tsawwassen Final Agreement, 2007, p. 29; Maa Nulth Final Agreement, 2006, p. 10-11).

the [proven] rights of the plaintiff, and if the provisions cannot so operate, Canada, BC and the Lheidli T'enneh will make best efforts to amend the LTFA" (*Apsassin*, 2007, outline of the Attorney General of Canada, p. 9).

While the court in *Apsassin* found it "astonishing that this [the overlap] matter has been allowed to come this far without resolution" (at para. 37), it nevertheless dismissed the application, holding that the Lheidli T'enneh would suffer greater harm than the Treaty 8 plaintiff if an injunction were granted to stop ratification of the treaty (at para. 38). The underlying action did not proceed as the Lheidli T'enneh community voted not to ratify the LTFA in March, 2007 (BCTC, 2007).[24]

The Tsawwassen treaty and Cook v. The Minister of Aboriginal Relations and Reconciliation, 2007 ("Cook")

The Tsawwassen First Nation Final Agreement (TFNFA) was initialed in December 2006. The traditional territory identified in the Tsawwassen First Nation's statement of intent became the "Tsawwassen Territory" under the Tsawwassen treaty (BCTC, 2011b; TFNFA, 2006, p. 19). The "Tsawwassen Territory" overlaps with the claimed territories of over fifty different indigenous groups (*Cook, 2007,* affidavit of Tsawwassen chief Kim Baird) including the Semiahmoo, located near White Rock, and the Tsawout, Tsartlip and Pauquachin, located on southern Vancouver Island (*Cook, 2007*). The Tsawout, Tsartlip and the Pauquachin are parties to a historic "Douglas Treaty" of the 1850s, in which the Crown promised, in part, that they could continue "to hunt and fish as formerly" (*Cook, 2007*; see also Devlin and Thielmann, 2009). These four groups (collectively the "Sencot'en") are not participating in the BC treaty process.

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[24] A second legal action seeking an injunction to block the ratification of the Lheidli T'enneh treaty was initiated by the Secwepemc Nation but, like the *Apsassin* case, was later suspended when the Lheidli T'enneh community chose not to ratify the treaty (*Chief Keith Mathew and others v. HMTQ and others, 2007;* see also Map 3).

In July, 2007, prior to the initialing of the TFNFA, the Sencot'en brought the BC Supreme Court case known as "*Cook*" (*Cook v. The Minister of Aboriginal Relations and Reconciliation, 2007),* which sought to prevent the provincial Minister of Aboriginal Relations and Reconciliation from initialing the Tsawwassen treaty until the provincial government had meaningfully consulted with the Sencot'en regarding the potential impact of the Tsawwassen treaty on Sencot'en aboriginal and treaty rights (*Cook, 2007*, at paras. 3 and 12). The Sencot'en (the petitioners) relied on the legal doctrine of the duty to consult established in *Sparrow* (*1990*) and later elaborated on in cases such as *Delgamuukw* (*1997*) and *Haida Nation* (*2004*). As was discussed in chapter 3, *Haida Nation (2004)* held that the Crown is required to consult with and, in some circumstances, accommodate indigenous groups, where the government has "knowledge, real or constructive, of the potential existence of Aboriginal rights or title and [contemplates] conduct that might adversely affect them" (*Haida Nation, 2004*, at para. 64).

The crux of the plaintiff's argument was that meaningful consultation on the overlap issue should occur *prior to* settling the TFNFA and that no consultation had occurred. The plaintiff argued that settling the treaty "effectively precludes any meaningful consultation as the Crown's representatives have effectively decided that there will be no necessity for any modification or change to the Tsawwassen Final Agreement ..." (*Cook*, 2007, at para. 124). Once initialed, modern treaties negotiated within the framework of the BC treaty process allow for only "minor changes" to be made to the treaty documents (TFNFA, 2006, p. 211; see also LTFA, 2006; MNFNFA, 2006).

As in the *Apsassin (2007)* case, in *Cook (2007)* the defendant (the provincial government) and the interveners (the Tsawwassen and the federal government) argued that the plaintiff (the Sencot'en) had failed to make out a case of immediate irreparable harm

sufficient to warrant stopping the provincial government from initialing the treaty. The defendant (and interveners) based their argument on three suppositions: 1) the TFNFA conferred only non-exclusive rights in the contested area that would be compatible with the non-exclusive rights of the Sencot'en (at para. 110); 2) "the time to engage in consultations is after the First Nations themselves have had an opportunity to try to resolve disputes internally, and after a Final Agreement has been initialled thereby ensuring that the consultations have utility" (at paras. 87 and 110); and 3) that even if the TFNFA did constitute an infringement of Sencot'en rights, the non-derogation clauses contained in the TFNFA adequately protect the interests of any and all indigenous groups that have overlapping claims (at para. 132).

I will return to these arguments shortly. At this juncture it will suffice to underscore the underlying cause of all of the "overlap cases": the contention that through the BC treaty process some indigenous groups are being conferred rights to land for which they do not have legitimate or exclusive claim. In *Cook (2007)*, the Sencot'en in particular submitted to the court voluminous anthropological and historical studies to support such an argument which, as in all other overlap cases, the BC Supreme Court declined to consider for procedural reasons (at para. 74). Ultimately the court in *Cook (2007)* declined to make a finding of fact on the strength and scope of Tsawwassen and Sencot'en territorial claims (at para. 151) and thus did not reach specific conclusions as to long-term potential impact of the Tsawwassen treaty on Sencot'en rights (at para. 52). In doing so the BC Supreme Court accepted the arguments of the defendants to find that consultation undertaken after initialing the treaty could still be meaningful. While the court allowed that "there may be some situations where the alleged infringement and the contemplated terms of a treaty are such that the claims of the overlapping group cannot be put off until the treaty is initialed" (at para.

192) it was not persuaded that the rights of Sencot'en would be irretrievably harmed by ratifying the treaty, "particularly having regard to the non-derogation clauses contained in the TFNFA" (at para. 199; see also at para. 186 for the court's emphasis on non-derogation clauses). Prior to ratifying a treaty the Crown is only required to provide notice to potentially affected indigenous groups, but "deeper consultation" is required prior to a treaty being implemented (at paras. 186-187). In addition to the non-derogation clauses, important in the court's reasoning was a pragmatic consideration of the Crown: the supposed "impossibility of ever concluding a treaty if every overlap had to be concluded before the TFNFA was finalized" (at para. 185).

The Maa Nulth treaty and Tseshaht First Nation v. Huu-ay-aht First Nation, 2007 ("Tseshaht First Nation")

Indigenous groups wishing to reach agreement with their indigenous neighbours concerning overlapping claims generally try to negotiate one of two types of agreements. The first is one that excludes contested areas from treaty areas until overlap issues are addressed. The Yukon Umbrella Agreement is an example of a treaty that contains such provisions to "sever" contested areas from treaty agreements (Council for Yukon Indians, 1993; *Yukon First Nations Land Claims Settlement Act, 1994*).

A common type of "overlap agreement" in British Columbia are those in which indigenous groups with overlapping claims agree to adhere to the terms of a bilateral contract respecting, for example, boundary locations and shared use and management of an area (see for example Wesley, 2007; Krehbiel, 2004). Under this scenario, and where a treaty is given effect over an area covered by such a bilateral overlap agreement, both groups conceivably retain their s. 35(1) rights, but one (or more) group's rights are "modified and continue" as treaty rights once treaties are settled. In the event that such overlap agreements become part

of treaties, modern treaties would contain constitutionally entrenched provisions concerning overlapping claims. Where bilateral overlap agreements are not included in the language of a treaty, as with all modern treaties in British Columbia, a hierarchy of agreements is potentially created from which conflict can result (Devlin and Thielmann, 2009). Such conflict gave rise to the BC Supreme Court case generally known as "*Tseshaht First Nation*" (*Tseshaht First Nation* v. *Huu-ay-aht First Nation, 2007*) which sought an injunction to prevent the ratification of the Maa Nulth First Nations Final Agreement (MNFNFA, 2006).

In 2000 the Tseshaht and the Huu-ay-aht were represented together within the BC treaty process, and negotiated a bilateral overlap agreement respecting the shared use and management of an area of overlapping claims (*Tseshaht First Nation, 2007,* at para. 4). The bilateral overlap agreement specified, among other things, that there would be "no contest to the interests of the [respective parties] with regard to [treaty] land selection and resource management" within their respective territories (at para. 6). In 2001 there was a reorganization of indigenous groups for claims-making purposes, during which the Huu-ay-aht and five other groups formed the Maa-Nulth First Nations (*Tseshaht First Nation, 2007,* at para. 5). The Tseshaht chose not to join the Maa Nulth group. The Maa Nulth treaty was reached and began a process of community ratification in 2006.

In *Tseshaht First Nation* (2007) the Tseshaht (the petitioners) sought an injunction to prevent community ratification of the Maa Nulth treaty on the grounds that the treaty contravened the bilateral overlap agreement. The Tseshaht argued that the intent of the overlap agreement was to mark a mutually agreed boundary between territories, and that subsequent treaties would not prejudice the rights of the respective groups within their respective territories (*Tseshaht First Nation, 2007*, at para. 8). Specifically the Tseshaht argued that the Maa Nulth treaty contravened the bilateral overlap agreement because it

conferred to the Huu-ay-aht rights respecting wildlife harvesting, shared decision-making (with the provincial government) and the option to transform lands within the area covered by the overlap agreement into Huu-ay-aht fee simple property (*Tseshaht First Nation, 2007*, at para. 8).

The court ultimately held that "[t]here is no appreciable harm to the interests of the Tseshaht that will occur if the Huu-ay-aht ratification vote proceeds" (at para. 29). In so ruling the court accepted the argument of the defendant that in entering into the bilateral overlap agreement the Huu-ay-aht did not relinquish its rights within the "Tseshaht area" (as specified by the overlap agreement). Decisive in the court's reasoning was its acceptance of the defendant's argument that the non-derogation clauses set out in the Maa Nulth treaty provided a "complete answer" to the argument that implementation of the Maa Nulth treaty would cause infringement of Tseshaht rights (at para. 25).

Summary of the "overlap cases": Judicial (dis)engagement and "bad faith" expectations

The Supreme Court of Canada has determined that section "35(1) of the *Constitution Act, 1982*, provides a solid constitutional base upon which subsequent negotiations can take place, and affords aboriginal peoples constitutional protection against provincial legislative power" (*Sparrow, 1993*, at p. 35). Such negotiations, the court tells us, "should also include other aboriginal nations which have a stake in the territory claimed" (*Delgamuukw, 1997*, at para 186). The four "overlap cases" reviewed above demonstrate that the reality has been quite the opposite. Treaties have been negotiated without involvement of indigenous groups that also "have a stake in" territory covered by treaties, and the protection afforded by s.35(1) has not prevented the Crown from exercising its legislative power to settle treaties in contested areas.

In the "overlap cases" the BC Supreme Court has in effect sidestepped the underlying question at the root these actions: *Does the settlement of a modern treaty prejudice or infringe upon the rights of groups with overlapping claims?* In each instance the court has not made a finding of fact on this question, and has focused instead on short-term potential for ratification of treaties to cause *immediate* and *irreparable harm* to groups with overlapping claims. In doing so the BC Supreme Court appears to have been persuaded by the argument that the issue can and should be addressed through political processes and, short of this, through litigation based on the supposed "complete answer" of the non-derogation clauses. In the following paragraphs I argued that the court has done so without sufficient regard to the "solid constitutional base" of the doctrine of aboriginal rights by: 1) diluting the duty of the Crown to negotiate and consult with indigenous peoples in good faith; 2) placing an ethically inappropriate burden on indigenous groups with overlapping claims to prove their rights in court; and 3) downplaying the extent to which treaty conferral of so-called non-exclusive rights may impact the rights of groups with overlapping claims.

Too little too late: Denying the duty and ex ante potential of consultation

Haida Nation (2004) held that the Crown has a duty to consult and at times accommodate indigenous groups where it *contemplates* actions which might impact aboriginal rights. Aboriginal rights do not need to be proven in court in order for the Crown's duty to consult to be triggered (*Haida Nation, 2004,* at para. 41). The extent of the duty owed by the Crown depends on both the strength of the claim of rights (at paras. 39, 44) and the seriousness of the potential infringement of rights (*Haida Nation, 2004,* at para. 72; see also Christie, 2006). All that is required to trigger the duty is for the Crown to be aware of the *potential* existence of aboriginal rights, after which the Crown is obliged to inform itself of the extent and scope of rights that might be impacted (*Haida Nation, 2004,* at paras.

27 and 35).

In *Cook (2007)* and *Apsassin (2007)* the position of the Crown was that the duty to consult and accommodate should principally apply after treaties have been settled. This argument is based on the contention that the content of treaties and thus the extent of potential impacts to the rights of groups with overlapping claims cannot be known until after treaties are settled. To accept this argument, however, is to accept that governments are only required to engage in consultation after treaties have been settled and only "minor changes" may be made to the treaty document – a "catch 22." In weighing the balance of harm between potential for infringement of rights and the harm that might result from delaying ratification of treaties, the court focused primarily on a strict test for immediate irreparable harm, the theoretical "complete answer" of the non-derogation clauses, and the supposed "impossibility of ever concluding a treaty if every overlap had to be concluded before the agreement was finalized" (*Tseshaht First Nation*, 2007, at para. 25; *Cook, 2007,* at para.185).

With respect to the court, I submit that such reasoning misrepresents the intent of the doctrine of consultation and accommodation. The plaintiffs in *Cook (2007),* for example, argued that the government had a duty to accommodate their interests, and that the Crown had a duty to consult to determine the scope of rights that might be impacted. As stated in *Haida Nation (2004)*, "there is no duty to agree; rather the commitment is to a meaningful process of consultation" (at para. 42; see also Prowse, 2009; Christie, 2006). The plaintiffs in *Cook (2007), Apsassin (2007), and Tseshaht First Nation (2007)* argued that *meaningful* consultation requires delaying the settlement of treaties until the scope of potential infringements is determined.

The approach of the court in these cases focused instead on whether initialling the treaties would cause immediate irreparable harm to the plaintiffs which 1) conveniently

(from the perspective of the Crown and the interveners) sidestepped the underlying cause of action, and 2) by relying on the supposed "complete answer" of the non-derogation clauses, effectively shifted the onus of proof of rights to indigenous groups seeking redress.

To delay consultation until "First Nations themselves have had an opportunity to try to resolve disputes internally" also misrepresents the Crown's duty to consult, as well as assumes that the indigenous parties to the dispute have the *means and incentive* to reconcile their territorial claims. Here again the decision in *Haida Nation (2004)* is instructive: "the ultimate legal responsibility for consultation and accommodation rests with the Crown" (at para. 54). There is no legal duty for indigenous groups to consult with each other on overlapping claims or any other issue, and the few and apparently inconsistently followed policies of the BC treaty commission concerning overlapping claims are only applicable to groups participating in the BC treaty process (BCTC, 2010b). Had the plaintiffs in *Cook (2007)* and *Apsassin (2007)* been participating in the BC treaty process it is certainly arguable that the commission's policies would have provided an incentive to reconcile territorial claims, as well as treaty-related funding to support such efforts. This said, if we accept that the BC treaty process is voluntary, it follows that there is at least a tacit "good faith" expectation that groups that choose not to participate will not have their rights compromised as a result of their choice.

The Supreme Court of Canada has provided clear guidance on the Crown's duty to consult and accommodate: "consultation that excludes from the outset any form of accommodation would be meaningless. The contemplative process is not simply one of giving [an indigenous group] an opportunity to blow off steam before the [government] proceeds to do what [it] intended to do all along" (*Mikisew Cree First Nation v. Canada, 2005*, at para. 54). While it may be technically correct to say that treaties may be amended to

accommodate the rights of groups with overlapping claims (Arvey, 2007), such an argument does not acknowledge the very low likelihood of this ever happening. Once treaties are initialled, only "minor changes" can be made, and such changes almost certainly exclude redefining the extent and scope of land rights conferred by a treaty in order to accommodate the rights and interests of groups with overlapping claims. Even in the case of the Nisga'a treaty, which envelopes almost the entire territory claimed by the Gitanyow (see Map 2), no such amendment has been made.

The supposed "complete answer" of non-derogation clauses: placing the onus of proof where it doesn't belong

The overlap cases demonstrate the BC Supreme Court's reluctance to disturb the terms of a treaty in response to the claims of another indigenous group. Determinative in its reasoning is acceptance of the argument that so-called non-derogation clauses provide adequate protection to the rights of indigenous groups not party to treaties. Non-derogation clauses, however, only allow for consideration of overlapping claims where the aboriginal rights of the group seeking redress have been determined by a superior court. Such an approach leaves unacknowledged the practical difficulties with turning to the courts for relief in such situations, and effectively shifts what is purported to be a political process to one that is litigious.

Indigenous peoples are of course familiar with being in a position of disadvantage. Until the mid-1990s, the policy of the provincial government was that the only aboriginal rights it was legally required to recognize were those that had been affirmed by courts or defined by treaty (Foster, 2002; British Columbia, 1995). The rulings in *Delgamuukw (1997)* and *Haida Nation (2004)* rejected this position. By relying on non-derogation clauses, the BC Supreme Court is essentially telling indigenous groups with overlapping claims the same

thing the provincial government was telling them over a decade ago: "prove you rights in court if you can, and then prove that your rights are being impacted, and then we'll see if the court orders us to accommodate your rights." When put in such stark terms, it is difficult to imagine that such an approach is consistent with the notion of "good faith" negotiation and the Crown's legal obligation to act honorably in its dealings with indigenous peoples. When the legality of such an approach was questioned in *Luuxhon (1998, 1999),* the BC Supreme Court in effect declined to answer.

Modern treaties are conferring exclusive and non-exclusive rights that are prejudicial to the rights of groups with overlapping claims

Counsel for the First Nations interveners in *Apsassin (2007)* and *Cook (2007)* echoes the position of the Crown: "as long as treaties continue to deal with harvesting of resources on a non-exclusive basis, then the treaties themselves can overlap and operate perfectly well" (Arvey, 2007, p. 14). The underlying presumption here is that modern treaties do not confer exclusive rights in areas of contested claims and that treaty conferral of non-exclusive rights does not infringe on the aboriginal rights of groups not party to modern treaties. The plaintiffs in the four "overlap cases" strongly disagree. The BC Supreme Court, for its part, has not ruled on the substance of the question: *does the settlement of treaties in contested area prejudice the rights of groups with overlapping claims?* The conclusion of this thesis is that it does.

Treaty conferral of exclusive rights

The Nisga'a treaty confers to the Nisga'a *exclusive* fee simple lands within territory claimed by the Gitanyow and Gitksan (see Map 2; Sterritt et al., 1998; NFA, 1999). The Lheidli T'enneh treaty if settled would confer to the Lheidli T'enneh exclusive "treaty settlement land" (in the estate of fee simple) in an area also claimed by the Nazko Indian

Band (see Map 3; LTFA, 2006)[25] as well as an option to acquire *exclusive* "private fee simple land" in an area claimed by the Simpcw First Nation and the Northern Shuswap Treaty Society (see Map 3; LTFA, 2006). The Maa Nulth treaty confers to the Huu-ay-aht an option to transform contested lands into Huu-ay-aht owned *exclusive* fee simple property in an area also claimed by the Tseshaht even though, according to the Tseshaht, a bilateral overlap agreement explicitly prohibited such conferral (*Tseshaht First Nation, 2007*, MNFNFA, 2006). The Tsawwassen treaty confers to the Tsawwassen *exclusive* "treaty settlement land" (in the estate of fee-simple) and an option to acquire *exclusive* "private fee-simple land" in areas claimed by numerous other indigenous groups, including the petitioners in *Cook* (*Cook, 2007*; TFAFA, 2006).[26] The contention that modern treaties do not confer *exclusive* treaty rights in areas subject to overlapping claims is simply not true.

Many bilateral overlap agreements have been reached (BCTC 2010b). This said, the overlap cases demonstrate that this has not always been the case. It would also be inappropriate to conclude that indigenous groups with overlapping claims that have not sought judicial intervention do not contest the conferral of such treaty rights. Not every indigenous group is in a position to litigate. What is certain is that conferral of *exclusive* rights is prejudicial to the rights of groups with overlapping claims simply by virtue of the fact that once land is conferred *exclusively* to one group it is no longer available to another as part of future treaty settlement.

Treaty conferral of non-exclusive rights

Modern treaties also confer a plethora of non-exclusive rights and benefits in

[25] The Lheidli T'enneh and Nazko have entered into a bilateral agreement concerning overlapping claims (Krehbiel, 2004).

[26] According to Tsawwassen Chief Kim Baird, the Tsawwassen have established overlap protocol or reached overlap agreements with the majority of their indigenous neighbours (*Cook*, 2007, affidavit of chief Kim Baird).

contested areas. The presumption of the Crown (and the First Nations interveners) in the overlap cases is that conferral of such rights does not prejudice the rights of indigenous groups with overlapping claims. It is the conclusion of this thesis that conferral of such rights may indeed have profound implications for indigenous groups with overlapping claims, particularly where two (or more) groups have different visions and objectives for a contested area.

Modern treaties, for example, typically confer to the signatory First Nation a right to participate in shared decision-making with the provincial government respecting natural resource harvesting, management and planning (NFA, 1999; LTFA, 2006; MNFNFA, 2006; TFNFA, 2006). Such shared decision-making typically includes a right for a treaty First Nation to provide input on the designation of land use zones in contested areas, such as for mining or intensive forest harvesting. Indigenous groups with overlapping claims, on the other hand, may have different visions and objectives for the contested area, such as the designation of a conservation zone. Under such a scenario, it is not difficult to imagine that conflicts may arise, which essentially pit the explicitly defined treaty rights of one group against the unproven and largely undefined aboriginal rights of another.

The Tsawwassen treaty, for example, confers to the Tsawwassen a non-exclusive right to harvest crab with few restrictions for the first 11 years of the treaty in the "Tsawwassen Fishing Area" (TFNFA, 2006, p. 78; *Cook, 2007*, plaintiff's petition to the court at para. 44). The Tsawwassen Fishing Area encompasses Boundary Bay, an area also claimed by the Semiahmoo, one of the petitioners in *Cook (2007)*. The Semiahmoo would like to place a moratorium on the crab fishery in Boundary Bay to allow stock to recover (*Cook, 2007*, plaintiff's petition to the court). The Semiahmoo contend that the Tsawwassen treaty in effect negates such efforts, in "that work, effort and costs that Semiahmoo will incur

will be for the benefit of Tsawwassen as they will have access to the crab resources right up to the doorstep of the Semiahmoo Reserve" (*Cook*, 2007, affidavit of Douglas Cook, at para. 58).

Treaty conferral of commercial recreation tenures is another example of supposedly *non-exclusive* treaty rights that would likely impact the rights of groups with overlapping claims. The Nisga'a and Lheidli T'enneh treaties, for example, confer (or would confer, in the case of the Lheidli T'enneh) commercial recreation tenures in contested areas, with a guarantee that no conflicting commercial recreation tenure will be issued for a specified period of time (NFA, 1999, LTFA, 2006). Treaty conferral of such benefits effectively precludes conferral of similar commercial recreation tenures to groups with overlapping claims.

Modern treaties legally confer non-exclusive rights to increasingly scarce natural resources. In the overlap cases the BC Supreme Court has taken a short-term approach to the issue and in doing so has downplayed the potential for non-exclusive treaty rights to impact the aboriginal rights of groups with overlapping claims. A longer-term view exposes a number of serious problems with this approach, not least that such rights may not be compatible with the interests and goals of indigenous groups with overlapping claims. The conferral of treaty rights in contested areas at best limits treaty settlement options available to indigenous groups who come later to their treaty, and at worst, in the event that treaty rights of shared decision-making lead to increased resource exploitation (for example wildlife harvesting, mining or logging), may significantly prejudice the rights of groups with overlapping claims.

CHAPTER 5: CONCLUSION

The goal of this thesis has been to further the understanding of the causes and implications of overlapping and contested territorial claims in the context of the BC treaty process. Three questions were posed in the introductory chapter: 1) Does the Crown's practice of negotiating with multiple indigenous groups in areas of contested claims have the potential to privilege some indigenous groups to the detriment of others? 2) Does the settlement and implementation of treaties in contested areas prejudice the constitutionally protected aboriginal rights of indigenous groups that are not party to such treaties? And 3) are overlapping and contested claims a barrier to the ethical settlement of treaties, and if so what can and should be the role of the Crown and the courts in effecting reconciliation of overlapping territorial claims in the context of treaty negotiation in British Columbia? The goal of this concluding chapter is to summarize the findings of this project and to identify potential areas of research focused on the reconciliation of contested territorial claims.

Thesis summary

Conceptual considerations

Chapter 2 exposed a number of conceptual considerations that have utility for understanding the meaning and salience of territory in the context of the BC treaty process. Relevant concepts reviewed were the social production of space, the intertwining of law, space and social power, and ways that identity, narrative, and law are implicated in the production of boundaries across axes of time and geographic scale. Particularly salient to this project is the idea that socio-spatial identities are rarely if ever homogeneous and mutually exclusive, but rather are dynamic and contested products of the discursive landscapes within which they are produced. Territories should not be taken as "natural" or

intrinsic to particular groups, but rather are social products formed within social norms and discourse.

Chapter 2 also engaged with "traditional" forms of indigenous territoriality and tenure in (what is now) British Columbia, which were produced in markedly different ways by different indigenous societies. Where two-dimensional areal tenure was the norm, such as for those groups with rigorously defined system of tenure and explicitly defined boundaries, territory ascribed the meanings of proprietorship, jurisdiction and sovereignty. For societies that had less strictly defined boundaries for kin and allies, territory reflected a level of social organization beyond the family and village, for example the extent of a group's travel and ties of kinship, within which different forms of tenure were nested. While it may be appropriate to ascribe a broad territorial identity to these latter kinds of groups as well, it is clear that the meaning of the term "territory" in this context – the "something else" that territory describes – is very different than the strictly defined boundaries enacted by other groups. Understanding such complexity comes not through the imposition of the language of property, but through an understanding of geopolitical history, indigenous legal orders, and the ways that the territorial "signs posts" of each group have evolved over time. A point worth underscoring here is that indigenous territory and tenure were/are given meaning by indigenous legal orders. Where such systems remain vibrant, they provide a conceptual and legal framework for the examination and reconciliation of contested territorial claims.

Spatial dimensions of aboriginal rights and the "lens" of jurisprudence

Treaties fall within the legal meaning of s. 35(1) of the Constitution of Canada and are compelled and shaped by the common law doctrine of aboriginal rights. Salient to the issue of overlapping rights and claims is the court's conception of aboriginal rights as occurring along a spectrum in relation to their degree of connection with land. There are

different spatialities associated with different aboriginal rights, where rights may range in geographic scale from resource- and site-specific to more broadly conceived territorial jurisdiction. There is disagreement between some Supreme Court justices with respect to the task of the court in determining the nature and scope of aboriginal rights. Such contestations reflect a friction at the heart of the court's conceptualization of the spatial dimensions of aboriginal rights, and the challenge of simultaneously addressing the goals of both recognition and reconciliation. As in the BC treaty process, these goals do not sit well together, where the axiom of recognition necessitates consideration of the aboriginal perspective when determining the nature and scope of legal rights, but where the edict of reconciliation requires that the aboriginal perspective be cognizable to the court, as well as reconcilable with the interests of broader society.

Causes of overlapping and contested claims

The colonial encounter brought considerable change to indigenous systems of territoriality and governance. Traumatic events such as epidemics, displacement and forced acculturation, including the legal prohibition of indigenous institutions of governance, had a profoundly dislocating effect on indigenous societies. Customary indigenous systems of organization and territoriality sometimes "blurred" as communities were fractured and reorganized to accommodate such disasters. The contemporary socio-spatial identities at work within (and beyond) the BC treaty process are not easily defined spaces but rather are, to use Lefebvrevian (1991) terminology, flexibly enacted representational spaces that simultaneously reproduce hegemonic order and function as an instrument of resistance. As shown in the "Lheidli T'enneh Area" example (Map 3), the flexibility of such socio-spatial identities is particularly evident where indigenous groups exhibit different expressions of territory in different contexts. One key source of tension among such boundary-meanings is

between what I have called "aboriginal title communities" and "residential communities," where each may invoke different allegiances, legitimating discourses and representations of space. The territories of contemporary "residential communities" are contrasted with those of "aboriginal title communities" not because one is more authentic than the other, but simply because they differ fundamentally in the "something else" that boundaries define. It is not just physical boundaries that overlap - it is the criteria used to define their meanings and bounds. Overlapping claims can be understood as a product of these kinds of varied boundary-meanings, conceptions that are in some contexts congruent, and in others, incompatible.

Implications of overlapping and contested claims

The examples presented in Chapter 4 demonstrate that modern treaties in British Columbia have (or would) confer to their indigenous signatories both exclusive and non-exclusive rights and benefits in contested areas. Conferral of exclusive rights is prejudicial to the rights of groups with overlapping claims simply by virtue of the fact that once land is conferred exclusively to one group it is no longer available to another as part of future treaty settlement. Treaty bestowal of so-called non-exclusive rights and benefits may also have profound implications for indigenous groups with overlapping claims, particularly where two (or more) groups have different visions and objectives for a contested area. Conveyance of treaty rights in contested areas at best limits treaty settlement options available to indigenous groups who come later to their treaty, and at worst may significantly prejudice the rights of groups with overlapping claims.

The underlying contention of the plaintiffs in the "overlap cases" is that modern treaties are conferring treaty rights in areas for which groups settling treaties do not have legitimate exclusive claim. In these cases the BC Supreme Court has not addressed the

underlying cause of these actions, but instead appears to have been persuaded by the argument that the issue can and should be addressed through political processes and, short of this, through litigation based on the supposed "complete answer" of the non-derogation clauses. It is the conclusion of this thesis that the court has done so without sufficient regard to the doctrine of aboriginal rights by: 1) diluting the duty of the Crown to meaningfully consult with indigenous groups where its action might impact the rights of groups with overlapping claims; 2) downplaying the extent to which treaty bestowal of so-called non-exclusive rights may impact the rights of groups with overlapping claims; and 3) placing an ethically (if not legally) inappropriate burden on indigenous groups with overlapping claims to prove their rights in court.

Simply including non-derogation language in modern treaties does not in itself prevent impacts on the rights of groups with overlapping claims. Reliance on non-derogation clauses, like "after the fact" consultation, simply postpones the underlying issue and effectively shifts a purportedly political process to one that is litigious. The potential for injustice is compounded by the BC Supreme Court's apparent inability to address the underlying question at the root of all of the overlap cases: does the practice of settling and implementing treaties in contested areas prejudice the rights of groups with overlapping claims? While it may be an overstatement to suggest that the BC Supreme Court's intent in the overlap cases was to subjugate legal doctrine to Crown policy, that is the result: treaties are being settled without regard to strength of respective claims and insufficient concern for the long-term implications for indigenous groups that contest such treaties.

The BC Supreme Court has in effect sanctioned the Crown's approach to the issue, which if nothing else undermines incentive for the Crown and its indigenous treaty partners to substantively address the issue. Given the Crown's reluctance or inability to proactively

engage, meaningful accommodation of groups with overlapping claims may indeed require amending the land rights conferred by treaties, some of which have been under negotiation for close to two decades. The prospect of complicating such negotiations provides a powerful disincentive for the Crown and its treaty partners to "open the Pandora's box" of overlapping claims, let alone to attempt to accommodate the rights and interests of groups who contest such treaties. When considered in light of the overlap cases, and these provoked by only four of potentially over a hundred modern treaties in British Columbia, the unfortunate and somewhat ironic reality is that the BC treaty process, with the help of the BC Supreme Court and the polices of the Crown, is fostering the very thing it was intended to avoid: continued jurisdictional ambiguity and the potential for a plethora of future litigation related to the question of who actually has rights to the land.

Towards reconciliation

It is frankly surprising to me that the issue of overlapping claims has received so little attention from the academy, especially considering the enormous financial and social investment in the BC treaty process and the extent to which the issue is a significant barrier to the ethical settlement of treaties (BCTC, 2010a, 2010b, 2009). The dearth of scholarship on the issue has potentially profound implications for the future of treaty negotiation in British Columbia, particularly inasmuch as the Crown, in its ignorance of indigenous legal systems, risks becoming complicit in settling treaties that defy indigenous laws concerning territoriality, and in doing so may undermine the ethical and perhaps legal legitimacy of the BC treaty process itself.

Sterritt and others (1998) have given a serious consideration to the territorial dimensions of indigenous law in the context of contested claims in the "Nass Area." Such

scholarship that makes indigenous law "visible" across cultures has tremendous utility for furthering our understanding of indigenous territoriality and tenure, and for working through the issue of overlapping and contested claims (see for example Napoleon, 2009; Thom, 2005; Daly 2005; Overstall, 2005; Turner et al., 2005; Brown, 2002; Turner and Jones, 2000; Marsden, 2002, 2001; Sterritt et al., 1998). This said, scholarship alone is not sufficient to effect the reconciliation of overlapping and contested claims. Research compiled by Sterritt and others (1998) did not prevent the Nisga'a treaty from being passed into law, even though it presented compelling evidence that that bounds of the Nisga'a treaty encompass the ancestral territories of other indigenous groups (see Map 2). Without the Crown or the courts providing some incentive, there was nothing to compel the Nisga'a to reconcile territorial claims with their indigenous neighbours. Such an approach to treaty-making may be seen as potentially coercive, where groups that progress more quickly through claims negotiation may be rewarded with the "spoils" from contested areas, and where groups whose progress in the treaty process is slower (or that opt not to participate in the treaty process at all) may find their territory compromised.

A significant number of bilateral agreements concerning overlapping territory have been reached between and among indigenous groups (BCTC, 2010b). Such agreements have ranged from an acknowledgement that there is no overlapping territory between two groups, to contract agreements concerning boundary definition, access to resources and common development activities (BCTC, 2010b; see also for example *Tseshaht First Nation, 2007;* Wesley, 2007; Krehbiel, 2004). In some instances such agreements have resulted in "statement of intent" boundaries being redrawn (BCTC, 2010b). As indicated by the *Tseshaht First Nation (2007)* case, not all these bilateral agreements have proven durable (BCTC, 2010b). In the event that bilateral overlap agreements are included in the language

of treaties, they would likely contain constitutionally entrenched provisions concerning the sharing of territory. Where they do not become part of treaties, as with all modern treaties settled in British Columbia to date, a hierarchy of agreements is potentially created from which conflict can result (Devlin and Thielmann, 2009).

While it is perhaps too early to know with any certainty the long-term efficacy of bilateral overlap agreements, is seems reasonable to conclude that should the terms of bilateral overlap agreements conflict with the terms of treaties (as was argued in *Tseshaht First Nation, 2007)*, courts will likely give greater weight to treaties. Clarifying the relationship between treaties and bilateral overlap agreements is a key element of working through the issue of contested territorial claims. Indigenous groups entering into bilateral agreements concerning overlapping claims are likely well served by the inclusion of such agreements within the terms of treaties, as was the case with the Council of Yukon Indians (1993), the Inuit of Nunavut (1993) and the Inuit of Labrador (2005).

The "overlap cases" make it clear that not all indigenous groups will be able to reach bilateral agreements concerning overlapping claims, particularly inasmuch as court decisions and Crown policy have combined to provide a disincentive to do so. The result in the overlap cases is symptomatic of a judicial system that seldom goes beyond what is necessary to decide the question, and only the question, that is put to it. Certainly the court in these cases would have rendered a valuable service had it provided a more constructive remedy. In fairness, it should also be noted that in the overlap cases the court to a large extent was required to respond to the way the cases were plead, which required it to examine the issue through the "lens" of a legal test for interlocutory relief, including placing emphasis on potential for immediately irreparable harm and an outcome that favoured a balance of convenience. Such an outcome aptly demonstrates the rigidity of the conventional legal

system, and that an ethical solution is not likely to be found in litigation. The BC Supreme Court itself has suggested that if it is forced to deal with contested claims, indigenous groups "may well face court imposed settlements which are less likely to be acceptable to them than negotiated solutions" (*Gitanyow First Nation v. Canada, 1998,* at para 41).

The BC treaty process was founded on the recommendations of the BC Claims Tasks Force (1991) which were formally adopted by Canada, British Columbia and indigenous groups that agreed to participate. Salient to this project is the recommendation specifying that "First Nations resolve issues related to overlapping claims among themselves" (BC Claims Task Force, 1991, p. 20). In some instances, this expectation has proven to be wishful thinking. If we accept that this expectation requires that indigenous groups be motivated and able to address contested claims among themselves, it follows that the Crown would provide some incentive to do so, or at least not tacitly discourage such efforts. The "agreement" for First Nations participating in the BC treaty process to resolve overlaps among themselves is only part of the story. The Crown's recent practice of settling treaties in contested areas discourages the reconciliation of territorial claims simply because it removes the necessity to do so. By settling treaties in contested areas, and through its legal obligation to consult with potentially impacted groups, the Crown is implicated in the issue by default or design. The issue is not a strictly indigenous polemic.

While the ability of the Crown to act unilaterally on the issue may be somewhat limited by its agreement for First Nations to resolve contested claims among themselves, there are a number of strategies available, not least that the Crown could reinstate its policy of not settling treaties until contested claims are addressed. Under such a scenario, "addressing" (as opposed to "resolving") contested claims might mean requiring the parties to a dispute to agree on a binding process of reconciliation prior to treaty settlement. Putting

in place an incentive to address the issue would open up a range of possibilities for reconciliation.

While thorough treatment is beyond the scope of this thesis, it is worth briefly touching on three possible strategies for the reconciliation of contested claims: 1) enhancing the role of the BC treaty commission; 2) empowering indigenous institutions; and 3) establishing a tribunal or other form of quasi-judicial process. My intent here is not to provide an exhaustive review, but to identify some areas of inquiry that warrant scholarly attention.

Enhancing the authority of the BC treaty commission

As was discussed in chapter 4, the BC treaty commission has virtually no authority concerning overlapping claims. The BC Claims Force Report (1991), the Treaty Commission Agreement (1992), and the *Treaty Commission Act (1995)* are largely silent on the issue, and only require the commission to encourage indigenous parties to come to agreements on overlapping claims, and to assist in obtaining dispute resolution services when requested. The Task Force Report (1991) foresaw that indigenous groups might require funding from the commission to carry out studies to assist in addressing contested claims. Commission reports released over the past several years indicate that the commission is not sufficiently funded to fulfill this modest role (BCTC, 2010a; 2010b; 2009). Proposals for enhancing the role of the commission generally fall into two categories: 1) increased funding for the commission to support research and non-binding mediation (BCTC, 2010b); and 2) amendment of the *Treaty Commission Act (1995)* to provide the commission with more authority concerning overlapping claims (Arvey, 2007).

While increasing funding for the commission may support the reconciliation of contested claims in some instances, the commission's inability to adjudicate disputes may

limit the efficacy of such an approach, particularly where indigenous groups fundamentally disagree on the scope of territorial rights and/or appropriate forms of political organization. The proposal for enhanced statutory authority raises another set of issues. It may be possible for the commission to build the capacity to answer the kinds of legal and political questions at the root of contested claims, provided it had sufficient resources. Such an approach, however, would in effect shift the role of the commission from facilitation to adjudication and possibly even enforcement. Given its current role as an advocate of the BC treaty process, the commission may not be seen by some groups (particularly those not participating in the BC treaty process) as being sufficiently impartial to perform such a role.

Several questions worthy of scholarly attention arise from this line of reasoning: in what way would the commission need to build its capacity to play a more authoritative role in the resolution of contested claims; would the commission be seen as a legitimate arbiter of contested claims given the degree to which it is vested in the BC treaty process; and finally, would enhancing the authority of the commission be preferable to establishing some sort of new institutional mechanism independent of the commission?

Indigenous institutions

A discussion paper prepared by the First Nations Leadership Council[27] summarised an indigenous perspective on the issue of overlapping claims as follows:

> The predominant understanding from a non-Aboriginal perspective, of the shared territories/overlap issue, is that it is a "map drawing" exercise ... to identity a definitive boundary between where the territory of one Nation ends and that of the other begins. This is

[27] The First Nations Leadership Council is comprised of political executives of the First Nations Summit, the Union of BC Indian Chiefs, and the British Columbia Assembly of First Nations. The mandate of the Council is to "represent the interests of First Nations in British Columbia and develop strategies and actions to bring about significant and substantive changes to government policy that will benefit all First Nations in British Columbia" (First Nations Leadership Council, 2006, p. 2).

> problematic and reflects a common law and Eurocentric concept of what the issue is and what it means to resolve it. First Nations did not historically manage complex interrelations through clarification and adoption of borders. Rather, a range of mechanisms were employed which ordered how members of Nations would interact with each other in certain areas, and the types of activities that were permissible. When the issue is viewed from an Aboriginal perspective, the range of options and opportunities for resolution greatly expands" (First Nations Leadership Council, 2008, p. 2-3).

In general terms, such an approach envisages some form of council of indigenous elders that would hear the details of contested claims, articulate relevant indigenous laws, and help guide the indigenous parties to the dispute towards a bilateral overlap agreement. Two proposals for establishing indigenous institutions have been suggested. An Indigenous Legal Lodge was proposed to address overlap issues arising from the Lheidli T'enneh treaty (Napoleon, 2007). The proposed Lodge would be comprised of a three-member panel from neutral indigenous groups, a legal expert in Canadian law, facilitators, and representatives of the indigenous groups involved. The approach would be for groups involved to share knowledge of the overlap area, how the relationship between and among indigenous groups was historically managed, and how indigenous law might inform a resolution to the dispute (Napoleon, 2007). Perhaps because of the delay of the Lheidli T'enneh treaty, the proposed Lodge was not funded, although it is apparently still being considered by the federal government (BCTC, 2010b).

Another proposal for an indigenous institution was made in the context of British Columbia's intended (and now apparently defunct) *Recognition and Reconciliation Act,* which would have established a province-wide Indigenous Nations Commission to "facilitate the identification, formation or reconstitution of the political structures of indigenous nations"

and work with indigenous groups to "resolve issues of overlaps and shared territories" (First Nations Leadership Council and BC, 2009, p. 3). The intent was for the Indigenous Nations Commission to engage with the issues of whether the current organization of indigenous groups is consistent with the notion of a "proper rights holder" and to address related instances where the membership of one group overlaps with another (First Nations Leadership Council and BC, 2009). For at least some indigenous groups, the political implications of such an approach were likely part of the reason for their resistance to the proposed legislation (Thom, 2010; BCTC, 2010b).

With the indefinite postponement of the legislation, the proposal for an Indigenous Nations Commission has gone no further to date. If such an approach were to be pursued, questions worthy of scholarly consideration would relate to the political and financial implications of reorganizing the political structures of indigenous groups: what criteria would be used to define the membership and territory of "indigenous nations;" would such a reorganization include groups that have already settled treaties; how would such a reorganization impact ongoing treaty negotiations; and, if such a reorganization were to involve the aggregation of smaller groups currently participating in the BC treaty process, which groups (if any) would be responsible for repaying the close to half-billion dollars in treaty support funding already loaned to indigenous groups participating in the BC treaty process?

A quasi-judicial institution

Though not detailed, there have also been proposals for a quasi-judicial tribunal intended to address overlapping and contested claims, perhaps in addition to other treaty-related issues (BCTC, 2010b; First Nations Leadership Council, 2008; Sterritt, 1998). A quasi-judicial approach would be predicated in part on the notion that there will continue to

be instances where indigenous groups fundamentally disagree on the scope of territorial rights, and that such intractable disputes may ultimately require binding arbitration. A tribunal would be distinguished from other processes in that it would likely have powers similar to a superior court and be able to make determinations and law and fact that could be binding on the parties. The advantage of a tribunal, as opposed to conventional courts, is that be that it would be comprised of justices with specialized expertise on the issue, would likely not be bound by conventional judicial rules, and might employ a flexible process of information gathering, mediation and, as a last resort, adjudication.

Under such a scenario, indigenous groups would be invited or required to refer contested claims to a tribunal prior to treaties being settled in contested areas. Provided that the tribunal were seen as impartial and legitimate, it may even be possible for indigenous parties to a dispute to agree prior to treaty settlement for their dispute to be addressed within a tribunal process after treaty settlement. While Canada has little experience with quasi-judicial institutions in the context of indigenous issues,[28] such strategies have been applied to the issue of overlapping claims in other jurisdictions, such as in Australia and New Zealand (see for example French, 2009; Dawson, 2004; Davies, 2003; Jones, 2002).

The long-term efficacy of any process designed to effect the reconciliation of contested claims will likely depend on its ability to find solutions at the nexus of common law, indigenous laws, and political realities. Canadian common law is capable of evolving to recognize "new" and more sophisticated understandings of indigenous territoriality than have been articulated by the courts to date. Relative to other options, a quasi-judicial institution

[28] An exception is the new Canadian Specific Claims Tribunal, which is an adjudicative body created to decide specific claims related to Indian Reserves and settled treaties only. The Specific Claims Tribunal has all the powers of a superior court of record to determine questions of law or fact, and may receive and accept any evidence it sees fit. The Specific Claims Tribunal accepted its first claim on June 7, 2011 (Canada, 2011b).

would likely have a greater degree of perceived political and legal legitimacy, and thus may be better suited to inform the evolution of common law aboriginal rights.

The critical evaluation of options concerning contested claims would be well served by scholarly inquiry into questions concerning the efficacy of quasi-judicial institutions in indigenous contexts: what principles and processes have been applied to effect the resolution of contested claims in New Zealand and Australia; which approaches and policies have worked and not worked, for whom and why; and finally, what are the merits and limitations of quasi-judicial institutions in the contest of contested claims, and would the kinds of tribunals employed in New Zealand and Australia have utility for addressing contested claims in British Columbia?

Concluding comments

The Crown has sought to frame treaty negotiation in British Columbia as a "forward-looking" process, rather than one that also engages in detail with the legal geographies of indigenous groups and the difficult stories of colonization (Egan, 2008; Penikett, 2006; Woolford, 2005). The issue of contested territorial claims is symptomatic of a treaty process that pays little attention to the particulars of indigenous law and history. This is not to say that common and indigenous laws hold all of the answers to the issue of contested claims. Beyond practical limitations are broader issues related to extant configurations of indigenous political power and agency, and the extent to which the application of legal principle might challenge such arrangements. The conception of a "proper rights holder" is particularly challenging in that its application – perhaps actualized through the aggregation of smaller indigenous groups (for example *Indian Act*-defined Bands) into broader indigenous collectives (for example "Nations") – may require smaller groups to give up some local

political autonomy (Thom, 2010).

This said, the application of legal principle – perhaps employed through some sort of quasi-judicial process – is likely preferable to the alternative: a continuation of a potentially coercive approach to treaty-making that may privilege some indigenous groups to the detriment of others, continued uncertainty with respect to the durability of bilateral overlap agreements, and a continuation of indigenous groups fighting among themselves and in conventional courts for recognition of territorial jurisdiction and rights. What is required is focused research on alternatives, and particularly on how the nexus of common and indigenous laws might inform the resolution of contested territorial claims in the context of treaty negotiation in British Columbia.

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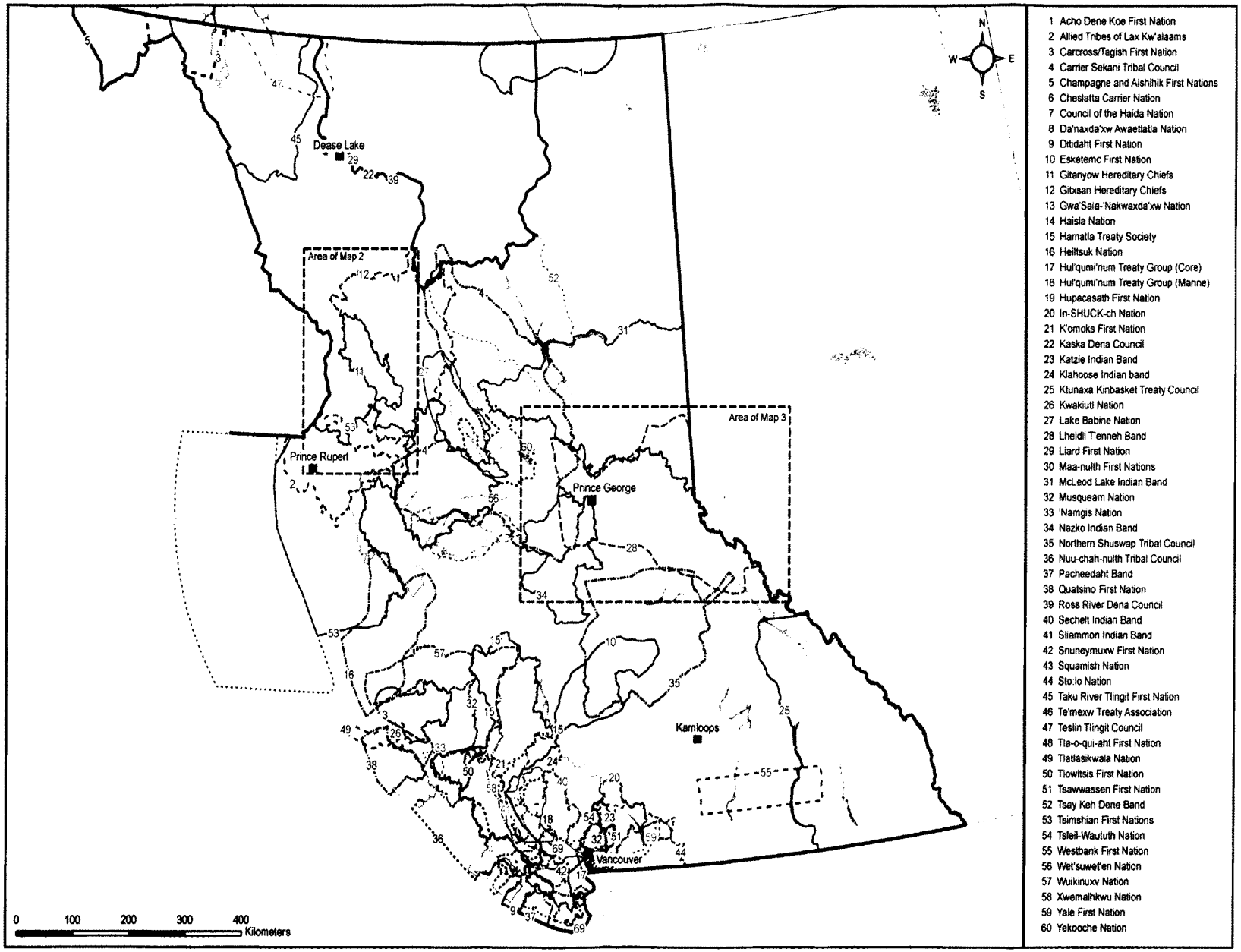
APPENDICES

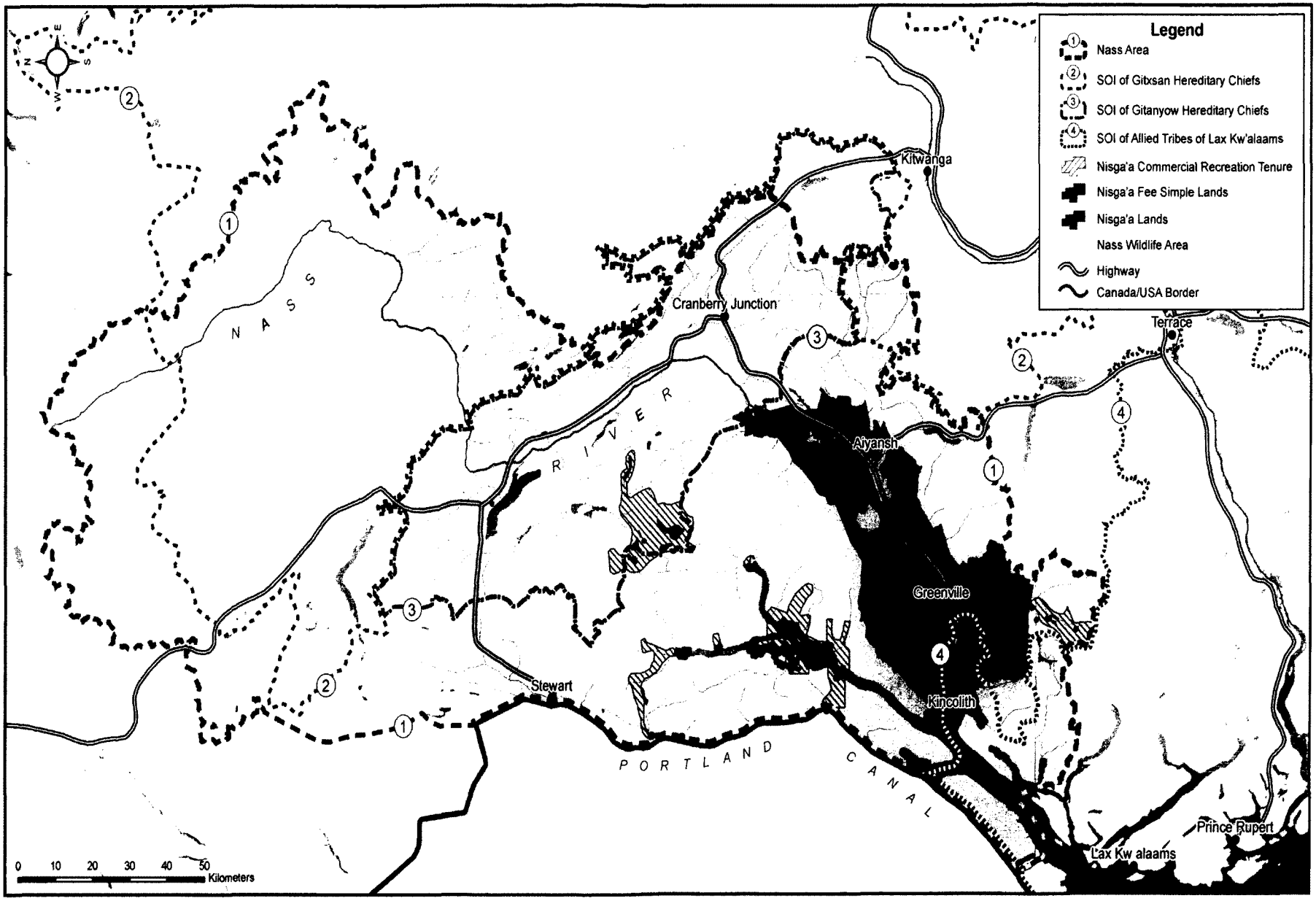
Map 1: "Traditional Territories" of First Nations participating in the BC treaty process 123

Map 2: Overlapping claims in the "Nass Area " 124

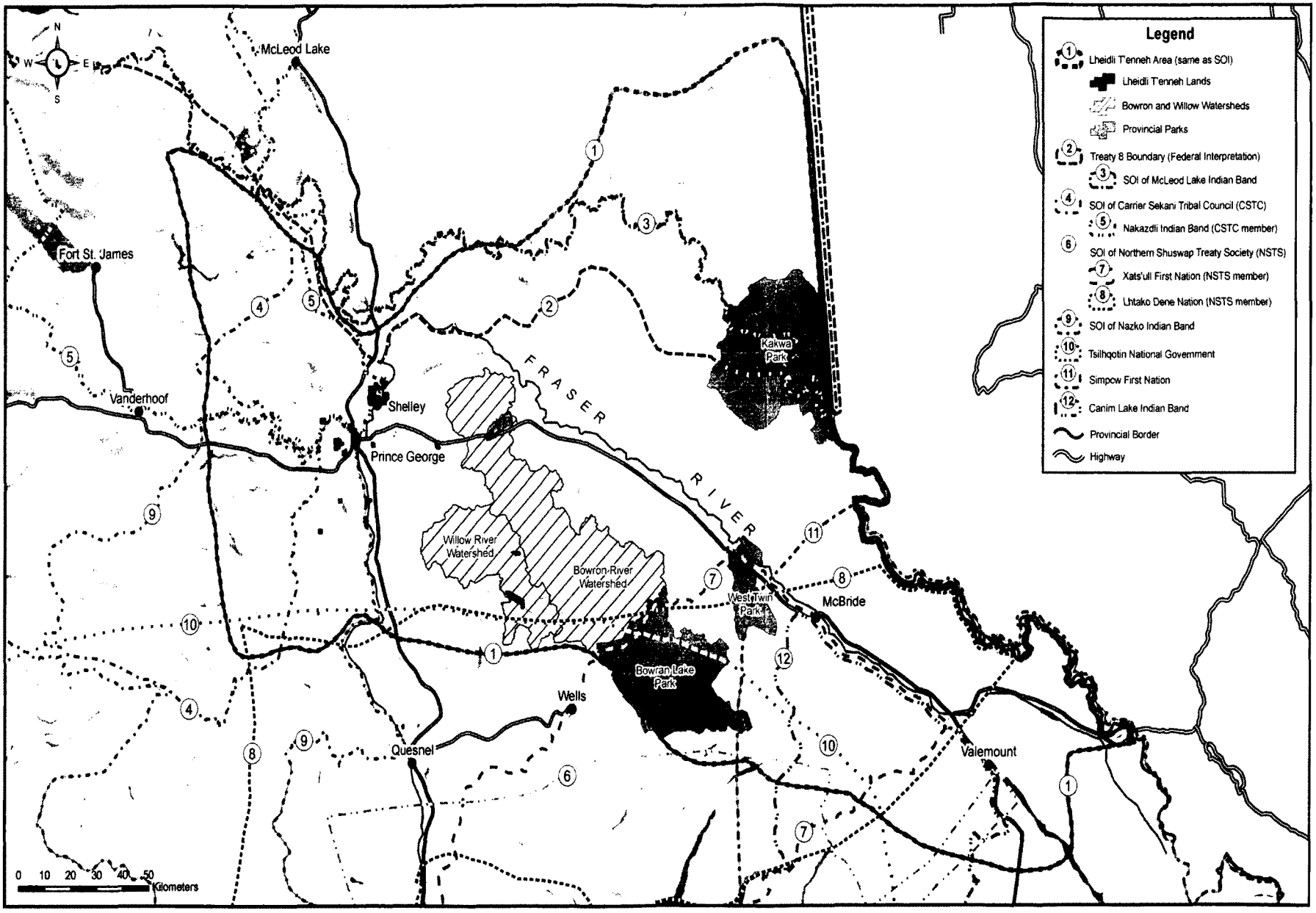
Map 3: Overlapping claims in the "Lheidli T'enneh Area" 125



Map 1: "Traditional Territories" of First Nations participating in the BC treaty process. Boundaries shown represent the approximate boundaries of traditional territories described in First Nation Statements of Intent (SOI) submitted to and received by the BC treaty commission (BC ILMB, 2010). Publication of SOI boundaries does not imply that the First Nations, the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown.



Map 2: Overlapping claims in the "Nass Area." Boundaries of the Tsimshian, Gitanyow and Gitksan First Nations are the traditional territories described in First Nation Statements of Intent (SOI) submitted to and received by the BC treaty commission (BC ILMB, 2010). Publication of SOI boundaries does not imply that the First Nations, the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown. Boundaries related to the Nisga'a treaty are from the appendices to the Nisga'a Final Agreement (NFA, 1999). The "Nass Area" refers to "the entire Nass watershed" (NFA, 1999, p. 9).



Map 3: Overlapping claims in the "Lheidli T'enneh Area." Boundaries of First Nations participating in the BC treaty process, including the "Lheidli T'enneh Area," are the traditional territories described in First Nation Statements of Intent (SOI) submitted to and received by the BC treaty commission (BC ILMB, 2010). Publication of SOI boundaries does not imply that the First Nations, the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown. The Treaty 8 boundary is based on the federal interpretation of the Treaty 8 boundary. Other boundaries are from publically available agreements between indigenous groups and the provincial government, such as Forest and Range Agreements and Strategic Engagement Agreements.