

# **Overlapping Claims: In Search of “A Solid Constitutional Base”**

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### A. INTRODUCTION

It is no secret that the courts have been reticent to provide binding decisions on claims to Aboriginal title, choosing instead to urge claimants and the Crown to negotiate on the solid constitutional base provided by s. 35 and to include affected Aboriginal groups in such negotiations. Less attention has been paid to whether subsequent negotiations have proceeded on this ground, and less still to how such negotiations are impacting the constitutional rights of Aboriginal peoples.

In this paper, the authors examine the overlapping claims procedures of the British Columbia Treaty Commission (“BCTC”) and three court decisions which arose as a result of overlap issues affecting the first three BCTC Final Agreements. The authors find that the BCTC’s failure to address proof of Aboriginal title exacerbates the challenge of resolving overlapping claims and increases the chances that modern Treaties may prejudice the constitutionally protected rights of neighbouring Aboriginal peoples. The authors then discuss the well known prospect of BC’s proposed *Recognition and Reconciliation Act* which may be designed to use a new Crown consultation scheme to entice First Nations to consolidate their political institutions, regardless of the proof or strength of their respective claims. The authors conclude that unless this proposal institutes formal mechanisms for proving claims and resolving overlaps, it will likely repeat and compound problems already experienced under the BCTC.

## B. THE JURISPRUDENTIAL BACKDROP

Despite historic acknowledgement of native title interests as early as the *Royal Proclamation of 1763*, the Canadian and British Columbian governments were reticent to recognize the existence of Aboriginal title until the latter part of the twentieth century.<sup>2</sup> In 1969, when the *Calder*<sup>3</sup> case was still at trial, the Canadian government released its *White Paper* calling for the abolition of the *Indian Act* and the legal assimilation of Aboriginal people. British Columbia remained openly hostile to even the notion of Aboriginal title, having refused to negotiate Treaties throughout most of the Province since its entry into the Confederation in 1871.

The Nisga'a claim to Aboriginal title in *Calder* reached the Supreme Court of Canada in 1973. Six of seven justices held that Aboriginal title did exist in Canadian law. However, the court split three-to-three on the legal basis for this right and on whether Nisga'a title had been subsequently extinguished. The seventh justice rejected the claim on the technical ground that the Nisga'a had not acquired a fiat from the British Columbian Crown. The ruling in *Calder* and the vehement rejection of the *White Paper* by Aboriginal peoples across the country gave rise to a significant reversal in Canadian policy. The federal government returned to the treaty table after a 50 year hiatus and began to negotiate land claims with First Nations under a new "comprehensive claims" policy.<sup>4</sup> British Columbia, however, dug in its policy heels for another two decades.

In 1991, the B.C. Supreme Court issued its decision in *Delgamuukw*,<sup>5</sup> rejecting not only the claim of the Gitksan and Wet'suwet'en hereditary chiefs to Aboriginal title, but the veracity of the doctrine itself. The trial judge further rejected the assertions of the hereditary chiefs of their legal jurisdiction, possession, ownership or control of their territories, instead holding that European settlement and occupation extinguished any exclusive rights that the First Nations may once have enjoyed. The court held that the hereditary chiefs did possess non-exclusive usufructory rights to their traditional territories.

The trial lasted 373 days. It was an exhaustive process. First Nations were outraged by the result. Although the case went on to appeal,<sup>6</sup> the common public sentiment was that

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<sup>2</sup> In fact, amendments to the *Indian Act* during the 1920s prohibiting the raising of funds for Aboriginal land claims were only repealed in 1951.

<sup>3</sup> *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313.

<sup>4</sup> Comprehensive land claims are based on the assertion of continuing Aboriginal title to lands and natural resources where such claims to Aboriginal title have not been addressed by treaty or through other legal means. However, the Comprehensive Claims Policy requires, as the second step of the process, an assessment by Canada of the validity of the claim. See: <http://www.brandonu.ca/Library/cjns/2.1/policy.pdf> Thus, the First Nation is required to submit a *prima facie* proof of the Aboriginal title or rights being claimed.

<sup>5</sup> *Delgamuukw v. British Columbia*, [1991] W.W.R. 97 (B.C.S.C.)

<sup>6</sup> *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 (B.C.C.A) - the appeal decision upheld the trial decision, although the majority took issue with some of the trial judge's reasons regarding the customs, traditions, and legal rights of the Gitksan and Wet'suwet'en. The majority concluded that the First Nations held unextinguished, non-exclusive Aboriginal rights which were protected by s.35(1) of the *Constitution Act, 1982*. Two members of the five-judge panel wrote strong dissents.

there had to be a different way to resolve the Indian land question in British Columbia. Accordingly, Canada, British Columbia and First Nations struck the British Columbia Claims Task Force. Its Task Force Report, released on June 28, 1991 (the “Task Force Report”) produced nineteen recommendations for resolving outstanding land claims in British Columbia, including the establishment of the BCTC, which was formed in September 1992. The BCTC adopted many of the Task Force Report’s recommendations, including the principle that “First Nations resolve issues related to overlapping traditional territories among themselves.”<sup>7</sup>

In the coming years, treaty negotiations at the BCTC proceeded slowly alongside an evolving body of Aboriginal jurisprudence.

The Supreme Court of Canada’s 1997 decision in *Delgamuukw*<sup>8</sup> overturned the lower court rulings, confirming the existence of Aboriginal title, defining its parameters, and setting out the legal test for proof. The court held that Aboriginal title is not merely usufructory or a proprietary right, but rather, a *sui generis* right to the exclusive use and occupation of the land itself, which includes an inescapable economic component.<sup>9</sup> However, the court created a strenuous test by which an Aboriginal group must prove Aboriginal title:

- The land was occupied prior to Crown sovereignty;
- Occupation was exclusive; and,
- If present occupation is relied on as proof of occupation prior to the assertion of Crown sovereignty, that there was continuity between present and pre-sovereignty occupation.

The court refused to make a declaration of Aboriginal title, remitting the case back to trial. The decision concluded with the following exhortation:

I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet’suwet’en will undoubtedly affect their claims as well. This is particularly so because aboriginal

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<sup>7</sup> British Columbia Task Force Report, available at:

[http://www.bctreaty.net/files/pdf\\_documents/bc\\_claims\\_task\\_force\\_report.pdf](http://www.bctreaty.net/files/pdf_documents/bc_claims_task_force_report.pdf)

<sup>8</sup> *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (S.C.C.)

<sup>9</sup> The increasing recognition of the right of Aboriginal self-government has also affected treaty negotiations at the BCTC. In 2000, the BC Supreme Court’s decision in *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 upheld the constitutionality of the self-government provisions in the Nisga’a Treaty (negotiated outside the BCTC process). The court held that Aboriginal title included rights “commonly described as governmental functions”. This is because Aboriginal title is a communally held right to exclusively determine the uses of title lands, and such decisions necessitate a governmental structure. For commentary on the relevance of *Campbell* to the inherent right of Aboriginal self-government, see Kent McNeil, “Judicial Approaches to Aboriginal Self-Government Since *Calder*: Searching for Coherence” in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*. Eds. Hamar Foster, Heather Raven, and Jeremy Webber. Vancouver: UBC Press, 2007.

title encompasses an exclusive right to use and occupation of land, i.e. to the exclusion of both non-aboriginal and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.

Finally, this litigation has been both long and expensive, not only in economics but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) “**provides a solid constitutional base upon which subsequent negotiations can take place**”. **Those negotiations should also include other aboriginal nations which have a stake in the territory claimed.** ... (emphasis in bold added)<sup>10</sup>

In subsequent years other Canadian courts have unfortunately (in the view of the authors) followed suit, rejecting claims to Aboriginal title either on the basis of insufficient evidence for proof of title (e.g. *R. v. Bernard*; *R. v. Marshall*)<sup>11</sup> or on procedural grounds (e.g. *Tsilhqot'in Nation*).<sup>12</sup> As examined below, subsequent negotiations have not proceeded on the “solid constitutional base” provided by the courts, nor have they sufficiently “include[d] other aboriginal nations which have a stake in the territory claimed.” Those negotiations and related court decisions have not produced or articulated a solid framework for reconciling issues related to overlapping claims of Aboriginal title and rights.

### C. BCTC POLICY RESPECTING OVERLAPPING CLAIMS

The BCTC treaty-making process is a departure from how Treaties have historically been made in western Canada. Generally speaking, new Treaties across Ontario, the Prairies and into the North were made congruously with existing or previously-entered Treaties. If all the First Nations of a particular Treaty area were not included as original signatories, their adhesion to the Treaty was sought, rather than a new Treaty made. This is particularly true of Treaties which purport to extinguish the Aboriginal title interest of the First Nations in question.

The BCTC process was conceived as an alternative to the costly and drawn-out court battles fought over claims to Aboriginal title and rights. Rather than assess the merits of the legal claims of First Nation participants to land or resources under negotiation (e.g. by requiring proof of Aboriginal title and rights per the test established in *Delgamuukw* or by submitting a *prima facie* proof of claim similar to the federal comprehensive claims

<sup>10</sup> *Delgamuukw supra*, at paras. 185 and 186

<sup>11</sup> *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220.

<sup>12</sup> In *Tsilhqot'in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112, the BC Supreme Court found that the *Tsilhqot'in Nation* had met the legal and evidentiary tests to prove Aboriginal title to approximately 200,000 square hectares, but dismissed the action because the plaintiff had, in their pleadings, sought a declaration of title to the *entire* claim area, rather than to *portions thereof*. Justice Vickers recited the familiar refrain in *Delgamuukw* and urged the parties to negotiate and “avoid endless appeals”.

process), the BCTC process offers a political alternative that sidesteps the tricky question of proof of claim in favour of forward-looking dispute resolution.

## 1. The Process: Negotiate Resolution of Overlap Before Finalizing Treaty

As of May 1, 2009, there are 60 First Nations engaged in modern Treaty negotiations, representing approximately two-thirds of the Aboriginal peoples in British Columbia.<sup>13</sup> There are six stages to negotiate a modern Treaty:

1. Statement of Intent to Negotiate
2. Readiness to Negotiate
3. Negotiation of a Framework Agreement
4. Negotiation of an Agreement-in-Principle
5. Negotiation to Finalize a Treaty, and
6. Implementation of a Treaty.<sup>14</sup>

The Statement of Intent is the initial “application” that a First Nation must submit to enter negotiations. According to BCTC policy, the Statement of Intent must, among other criteria, include a geographical description of the traditional territory with respect to which the First Nation wishes to negotiate, and a list of any First Nations whose claims overlap with that traditional territory. Applicants are not required to provide any proof of Aboriginal title or rights to the traditional territory identified.<sup>15</sup>

BCTC policy requires First Nations participants to attempt to resolve possible overlapping territorial claims with neighbouring First Nations early in the process,<sup>16</sup> but there are no penalties if they fail or refuse to do so. For example, 43 of 60 participants are currently at the fourth stage of negotiations (Agreement in Principle).<sup>17</sup> BCTC policy states that overlaps are expected to impact heavily upon negotiations at this stage, but the only requirement for a First Nation that fails to resolve overlap issues prior to Stage 4 is to provide a report on the nature of the overlap issue and its potential impact on negotiations.<sup>18</sup>

<sup>13</sup> See <http://www.bctreaty.net/files/updates.php>.

<sup>14</sup> See: <http://www.bctreaty.net/files/sixstages.php>

<sup>15</sup> The BCTC website acknowledges that: “The Treaty Commission does not make any determination of the boundaries of a First Nation's traditional territory.” See: <http://www.bctreaty.net/files/sixstages-2.php>

<sup>16</sup> “Insofar as these overlaps may affect negotiations, First Nations are responsible for resolving them. As a general principle, these issues do not have to be resolved before negotiations start, but a process for resolution must be established in Stage 2.” See: <http://www.bctreaty.net/files/sixstages-2.php>

<sup>17</sup> See <http://www.bctreaty.net/files/updates.php>. :

Stage 1: Submission of Statement of Intent to Negotiate a Treaty (0)

Stage 2: Preparation for Negotiations (6)

Stage 3: Negotiation of Framework Agreement (3)

Stage 4: Negotiations of Agreement in Principle (43)

Stage 5: Negotiation of Final Agreement (7)

Stage 6: Implementation of Treaty (1)

<sup>18</sup> “Where overlaps are unresolved at the end of Stage 3, the First Nation must provide the Commission with a written report on the overlap. This report should generally describe the type of territory and traditional uses, identify the extent of the overlap in relation to the traditional territory, assess the potential

## 2. Overlap Agreements: Potential Implications

In general, First Nations participants at the BCTC who do grapple with overlapping claims tend to negotiate one of two basic types of agreements regarding boundary overlaps or conflicting claims.

The first type of boundary agreement is one in which the parties agree to exclude contested areas from the identified traditional territories that a First Nation intends to include in a final agreement. That is, disputed areas are simply “taken off the table”. Such areas then do not form part of a final agreement pursuant to the BCTC process. Effectively, by entering into this type of boundary agreement, the First Nation parties agree not to include the overlap area within the scope of the final agreement. To the extent that there may be unextinguished Aboriginal title and rights (or other existing Treaty rights) attached to that area, those rights are not directly affected by the new (or, in the very least, modified<sup>19</sup>) rights conferred by a final agreement.

This is important to note because, notwithstanding the inherent political nature of the BCTC process, the end results of the process are intended to be modern Treaties, for the purposes of sections 25 and 35 of the *Constitution Act, 1982*.<sup>20</sup> Thus a ratified final agreement confers Treaty rights to the territory defined in the final agreement. By not including areas of overlapping claims within the Treaty territory, a final agreement cannot purport to extend the Treaty’s section 35 rights of one First Nation over the same territory claimed by another.

In contrast, the second type of boundary agreements are those in which parties agree on terms for shared use, shared harvesting and/or joint resource management of an area subject to the respective claims of the parties. Rather than taking an overlap claim “off the table,” the shared area is instead included within the scope of the final agreement for at least one of the First Nation parties. To the extent that a modern Treaty confers new or modified section 35 rights, there is a legal effect on the exercise of Aboriginal title and rights to the overlap area in the sense that one First Nation now has new Treaty rights, constitutionally protected, to the same area to which another First Nation may have Aboriginal title or rights, or for historic Treaty rights, all of which are also protected by section 35.

If this second type of boundary agreement is included as an appendix to the final agreement in question, then the modern Treaty contains in effect an express shared use process. However, if it does not, then a potential hierarchy of agreements is created: the final agreement, which is expressly recognized as a modern Treaty for the purposes of sections 25 and 35 of the *Constitution Act, 1982*, and the boundary agreement, which is a private contract at best. There is no legal guarantee that the boundary agreement must be

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impact on the negotiations, and explain how its dispute resolution process is working and the potential for settlement.” See: <http://www.bctreaty.net/files/sixstages-11.php>

<sup>19</sup> See, for example, *Tsawwassen First Nation Final Agreement*, c.2, ss.13, 14 and 15

<sup>20</sup> See, for example, *Tsawwassen First Nation Final Agreement*, c.2, ss.1 and 12

honoured if its terms conflict with the terms of the final agreement (for example, with respect to wildlife harvesting in the overlap area).

As discussed below, procedural defects, poor legal footing, and insufficient judicial engagement have combined to reduce the incentives for forming these agreements, and may frustrate their enforcement as well.

## **D. THE FALLOUT: OVERLAP LITIGATION**

### **1. Introduction: Treaties Get Signed When Overlaps Remain**

As noted above, the BCTC process is a completely different model of treaty-making, one under which there may conceivably be multiple modern Treaties overlapping the same territory or geographic area. These modern Treaties no longer use the nomenclature of extinguishment, but instead “modify” the Aboriginal interests in a particular area, as expressly set out in the modern Treaty. What is left uncertain is how that can be done in regard to unextinguished Aboriginal title held by another First Nation, because Aboriginal title is an exclusive proprietary right in law.

Not surprisingly, given the novel approach to treaty-making in BC, just three BCTC modern Treaties have been initialed,<sup>21</sup> and only one has come into force (the Tsawwassen First Nation Final Agreement). British Columbia and Canada initialed each of these final agreements notwithstanding that they had notice of outstanding and unresolved overlap issues between the signatory First Nations and some of their First Nation neighbours. This has resulted in at least five pieces of litigation to date, four of which are discussed below.<sup>22</sup>

Justice Williamson of the BC Supreme Court once mused that...

... if the parties fail to deal with the conspicuous problem of overlapping claims, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated solutions.<sup>23</sup>

The reality, thus far, has been quite the opposite. The following three cases raise a number of concerns about the effect of modern Treaties upon the existing Treaty and Aboriginal rights of neighbouring First Nations. They illustrate the courts’ clear intent to usher issues of overlapping rights and title back to the negotiating table. But it is the authors’ respectful submission that the courts have done so without ensuring that these negotiations proceed on a “solid constitutional base” and sufficiently “include other

<sup>21</sup> In order to complete Stage 5, the final agreement reached must first be initialed by the chief negotiators of each party, and then be ratified by each party according to the procedures agreed to during negotiations.

<sup>22</sup> *Chief Allan Apsassin v. Attorney General of Canada*, 2007 BCSC 492; *Tseshah First Nation v. Huu-Ay-Aht First Nation*, 2007 BCSC 1141; *Semiahmoo First Nation v. Minister of Aboriginal Relations and Reconciliation*, S.C.B.C. Vancouver Registry No. S-074496; *Sencoten First Nations v. Minister of Aboriginal Relations and Reconciliation*, S.C.B.C. Vancouver Registry No. S-074887; *Cowichan Tribes v. Minister of Aboriginal Relations and Reconciliation*, S.C.B.C. Vancouver Registry No. S-076136.

<sup>23</sup> *Gitanyow v. Canada*, [1998] B.C.J. No. 1453 (B.C.S.C.) para 41

aboriginal nations which have a stake in the territory claimed”, as urged by the former Chief Justice in *Delgamuukw*.

## 2. Lheidli T’enneh Final Agreement: Treaty No. 8 Litigation

The Lheidli T’enneh Final Agreement was initialed in October 2006 and began ratification in March 2007. The traditional territory identified in the Lheidli T’enneh’s 1993 Statement of Intent became the “Lheidli T’enneh Area” under the final agreement. The Lheidli T’enneh Area overlapped with 5,700 square kilometres of territory within Treaty No. 8, a historic Treaty entered by Canada and the Cree, Beaver, Slavey, Chippewayan peoples in 1899.

In February 2007, six of the eight Treaty No. 8 First Nations in British Columbia commenced an action seeking an injunction against Canada and British Columbia to prevent approval of the initialed final agreement.<sup>24</sup> The plaintiff First Nations argued that the ratification of the final agreement would deprive them of their constitutional right to be consulted and of several accommodations that would otherwise be available. The court expressed surprise that the overlap issues had not yet been resolved at the late stage of negotiation:

Given the recommendations of the report of the British Columbia Claims Task Force of 28 June 1991, and the policies and procedures of the B.C. Treaty Commission of 11 April 1997, addressing the problem of overlapping claims, it is astonishing that this matter has been allowed to come this far without resolution.<sup>25</sup>

The court nevertheless dismissed the application, holding that the Lheidli T’enneh would suffer greater harm if the injunction were granted. The underlying action, however, did not proceed as the community voted not to ratify the final agreement in March 2007.<sup>26</sup>

The overlap between the Lheidli T’enneh and Treaty No. 8 territory may have been the tip of the iceberg. Nine First Nations<sup>27</sup> currently in the BCTC process have asserted traditional territory within the boundaries of Treaty No. 8<sup>28</sup> according to their Statements of Intent filed with the BCTC.

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<sup>24</sup> *Chief Allan Apsassin et al v. Attorney General (Canada) et al*, 2007 BCSC 492 (“*Chief Allan Apsassin*”). The plaintiff First Nations were the West Moberly, Saulteau, Halfway River, Doig River, Prophet River and Ft. Nelson First Nations.

<sup>25</sup> *Chief Allan Apsassin*, *supra* at para. 37

<sup>26</sup> For a study of why the Final Agreement was not ratified, see:

[http://www.bctreaty.net/files/pdf\\_documents/Lheidli\\_Tenneh\\_Ratification\\_Final.pdf](http://www.bctreaty.net/files/pdf_documents/Lheidli_Tenneh_Ratification_Final.pdf). None of the potential reasons for rejecting the Final Agreement noted in the study referred to the overlap litigation.

<sup>27</sup> Lheidli T’enneh, Yekoochie Nation, Kaska Dena Council, Carrier Sekani Tribal Council, Tsay Key Dene Band, Acho Dene Koe First Nation, Teslin Tlingit Council, McLeod Lake Indian Band, Gitksan Hereditary Chiefs.

<sup>28</sup> The location of the Western Boundary of Treaty 8 is currently under litigation. Six of the eight Treaty 8 First Nations in British Columbia allege that the western boundary of Treaty No. 8 is along the Arctic-Pacific watershed. Although Canada has agreed with the plaintiff First Nations, British Columbia asserts that the boundary is much further to the east, along the easterly flanks of the Rocky Mountains, a difference

### 3. Tsawwassen First Nation Final Agreement Litigation

The Tsawwassen First Nation Final Agreement was initialed in December 2006. The traditional territory identified in the Tsawwassen First Nation's 1993 Statement of Intent became the "Tsawwassen Territory" (and, with obvious differences respecting land and sea, the "Tsawwassen Wildlife Harvest Area", "Tsawwassen Fishing Area" and the "Tsawwassen Intertidal Bivalve Fishing Area") under the final agreement. The Tsawwassen Territory overlaps with most of the traditional territory of the Semiahmoo First Nation located in Boundary Bay near White Rock, the Saanich Tribes located on southern Vancouver Island, and a significant portion of the traditional territory of the Cowichan Tribes, also located on southern Vancouver Island. In addition, the Saanich Tribes are signatories to one of the historic "Douglas Treaties" of the 1850s, in which the Crown promised, in part, that they could continue "to hunt and fish as formerly."

On July 16, 2007, the Semiahmoo, Tsawout, Tsartlip and the Pauquachin First Nations (collectively "Sencot'en") brought two judicial review applications seeking to prohibit the provincial Minister of Aboriginal Relations and Reconciliation from signing the final agreement until he had meaningfully consulted with them respecting the potential effects of the final agreement on their Aboriginal and Douglas Treaty rights. Sencot'en also sought an order compelling the Minister to consult them through a structured consultation process to be supervised by the court, in light of the lack of consultation to date.

The petition was dismissed on November 29, 2007.<sup>29</sup> Surprisingly, the court held that Sencot'en had not made out a *prima facie* case for Aboriginal rights and title in the overlapping areas, despite some of the petitioners' Douglas Treaty rights and the case law acknowledging the priority of those rights.<sup>30</sup> The court relied on the "non-derogation clause" in the final agreement to dismiss the petitioners' claim that there would be immediate or irretrievable damage suffered if consultation did not occur before the treaty was signed.<sup>31</sup>

The court held that there is generally no constitutional duty on the Crown to suspend treaty negotiations to consult with neighbouring First Nations,<sup>32</sup> and further that it was not dishonourable for the Crown to urge First Nations to reach their own agreements on overlaps.<sup>33</sup> Prior to initialing the final agreement, the Crown needed only to provide

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of opinion amounting to over 100,000 square kilometres. For a summary of the proceedings, all the pleadings filed to date, and other information about this litigation, see <http://www.devlingailus.com/links.html> (click "Willson" litigation).

<sup>29</sup> *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 ("Cook")

<sup>30</sup> See, for example, *R. v. Bartleman* (1984), 55 BCLR 78 (BCCA) and *Saanichton Marina Ltd. v. Claxton* (1989), 36 BCLR (2d) 79 (BCCA)

<sup>31</sup> As argued below, simply stating that an agreement does not affect existing Aboriginal or Treaty rights does not necessarily guarantee that the modern Treaty will not in fact do so.

<sup>32</sup> To require such negotiations, in the court's view, would create an "endless ping pong of negotiations" over conflicting claims which would ultimately render treaty negotiations impossible (para. 185).

<sup>33</sup> *Cook*, *supra* at para. 166

notice to potentially affected First Nations, but “deeper consultation” was required before the treaty was implemented.<sup>34</sup>

On July 25, 2007, a community vote of the Tsawwassen First Nation approved the final agreement. The BC government, on November 22, 2007, passed settlement legislation to approve the final agreement, and on June 26, 2008, federal legislation received royal assent. The modern Treaty came into force on April 3, 2009.<sup>35</sup>

To the authors’ knowledge, no accommodation measures were reached between British Columbia and the Sencot’en First Nations or the Cowichan Tribes and, if some mitigation measures were indeed reached, none resulted in changes being made to the final agreement. It appears that the concerns raised by the petitioners with respect to conflicting rights to land and water resources will need to be sorted out at a later date, after the final agreement has constitutional protection.

#### 4. Maa-Nulth First Nations Final Agreement Litigation

In 2000, the Tseshah First Nation (“Tseshah”) and Huu-ay-aht First Nation (“Huu-ay-aht”)<sup>36</sup> negotiated an agreement respecting shared use of overlapping traditional territories, called the Western Overlap Agreement (“WOA”). The WOA set out the parties’ intentions regarding land and resource management interests in those areas of overlapping claims. Of interest for this paper, the WOA signatories acknowledged that there would be “no contest to the interests of Tseshah with regard to land selection and resource management” on the western side of Tzartus Island. The WOA also provided that the First Nations would form a joint resource management board to manage issues and disputes regarding the traditional food resources over the entire island.<sup>37</sup>

When Tseshah and other several other member First Nations left the Nuuchahnulth Tribal Council in 2001, Huu-ay-aht and five other members formed the Maa-Nulth First Nations, which then reached and initialed the Maa-Nulth First Nations Final Agreement on December 9, 2006. The “First Nations Area” designated for the Huu-ay-aht in the final agreement includes the whole of Tzartus Island, encompassing areas to the west of the boundary line drawn in the WOA.

As a result, Tseshah sought an interlocutory *quia timet* injunction to restrain the Huu-ay-aht from holding a vote to ratify the final agreement.<sup>38</sup> Tseshah alleged that the final agreement violated the terms of the WOA regarding resource management, harvesting, and land selection rights—including that the final agreement would enable Huu-ay-aht to transform contested lands designated in the First Nations Area on the west of the island

<sup>34</sup> Cook, *supra* at para. 186

<sup>35</sup> See: <http://www.gov.bc.ca/arr/firstnation/tsawwassen/>

<sup>36</sup> The Uchucklesaht Tribe was the third signatory to the WOA.

<sup>37</sup> The WOA appears to have been in the nature of the second type of boundary agreement discussed above (i.e. one in which parties agree on terms for shared use, shared harvesting and/or joint resource management of an area subject to the respective claims of the parties).

<sup>38</sup> *Tseshah First Nation v. Huu-ay-aht First Nation*, 2007 BCSC 1141, [2007] B.C.J. No. 1691 (“*Tseshah First Nation*”)

into Huu-ay-aht fee simple property.<sup>39</sup> Huu-ay-aht argued that there was no conflict between the two agreements and that even if there were, the WOA was merely a political protocol intended to guide negotiations at the BCTC.

The court rejected the defendant's argument that the WOA was a political protocol, holding that the WOA was a binding agreement and finding that the two agreements could co-exist without conflict.<sup>40</sup> He held that the ratification vote on the final agreement would not therefore result in anticipatory breach of the WOA and did not warrant an injunction.<sup>41</sup>

In finding that the WOA and final agreement were not inconsistent, the court accepted the defendant's argument that the Huu-ay-aht did not, by acknowledging the Tseshah't's interests in the western portion of Tzartus Island, relinquish their own interests to that area. The court observed that if it were to grant an injunction until the final agreement was amended to reflect the boundaries drawn in the WOA (as sought by Tseshah't), Huu-ay-aht would be forced to cede their interests on the west side of the Island.<sup>42</sup> But rather than grappling with the effect of ratification on Tseshah't's claim to the west side of the Island, the court instead assured the parties that potential infringements could be handled at a later date. The court stated that the continued existence of the Tseshah't's legal action regarding the enforceability of the WOA provided an ongoing incentive to reach a settlement. The court also held that the final agreement's non-derogation clause was a "complete answer" to Tseshah't's concern regarding the potential infringement of their Aboriginal rights and title in the western half of Tzartus Island.<sup>43</sup>

Huu-ay-aht had also contended a Band Council Resolution passed on June 19, 2007 stating its intention not to implement the final agreement inconsistently with the WOA provided evidence that Huu-ay-aht would not anticipatorily breach the WOA.<sup>44</sup> The court, however, sympathized with Tseshah't's concern about the enforceability of this

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<sup>39</sup> *Tseshah't First Nation, supra*, at para. 8. In particular, the plaintiff argued that four provisions of the MFA contravened the WOA: (a) the exclusive right granted to the Maa-Nulth Nations to harvest inter-tidal bivalves off the western shore of Tzartus Island which is wholly within the Huu-ay-aht First Nation Area; (b) resource management rights and opportunities throughout the Huu-ay-aht First Nation Area; (c) the opportunity to add land from the First Nation Area to the First Nation lands in fee simple; and (d) resource revenue sharing.

<sup>40</sup> *Tseshah't First Nation, supra*, at para. 13.

<sup>41</sup> The court also held that even if there was a serious issue to be tried regarding breach of the WOA by the ratification vote, the balance of convenience heavily favoured the defendants: *supra*, paras. 21 and 23.

<sup>42</sup> *Tseshah't First Nation, supra*, at para. 30

<sup>43</sup> *Tseshah't First Nation, supra*, at para. 25. Like the Tsawwassen Final Agreement, the Maa-Nulth Final Agreement contained a non-derogation clause that stated that the final agreement did not affect the rights of other Aboriginal peoples, and that if a court held that the final agreement adversely affected such rights, the parties would amend the final agreement as necessary. The clause also provided that if subsequent Treaties adversely impacted rights under the final agreement, Canada or BC would provide the Maa-Nulth First Nations with "additional or replacement rights or other appropriate remedies." See Maa-Nulth First Nations Final Agreement 1.12 "Other Aboriginal Peoples"

[http://www.gov.bc.ca/arr/firstnation/maa\\_nulth/down/final/mna\\_fa.pdf](http://www.gov.bc.ca/arr/firstnation/maa_nulth/down/final/mna_fa.pdf)

<sup>44</sup> *Tseshah't First Nation, supra*, at para. 14.

Band Council Resolution, especially because the Band would be dissolved when the modern Treaty came into effect.<sup>45</sup>

It is the authors' respectful view that this case illustrates the unsettling inclination of courts to downplay the potential impact of modern Treaties on existing Aboriginal or Treaty rights, and to delay the resolution of such issues until final agreements are ratified as modern Treaties. For example, the court in *Tseshah First Nation* reasoned that there was no potential infringement because the final agreement ...

...does not confer authority over resources to the Huu-ay-aht and they are provided only with an opportunity to make recommendations and offer input to federal and provincial decision-making bodies.

The underlying presumption here is that due to the non-exclusivity of the resource rights or shared decision-making roles conferred in such final agreements, there is no infringement of existing Aboriginal or Treaty rights. With respect, one cannot be so sure. Typically, modern Treaties provide the signatory First Nation(s) with a right to participate in land use planning and resource management with the government. The right to access and participate in shared decision-making respecting resource development may be exercised by a signatory First Nation with profound implications on the Aboriginal and Treaty rights of other First Nations without such expressly recognized constitutional rights.<sup>46</sup> In this case, the potential for Huu-ay-aht to transform contested land into fee simple property was an issue that appears to have been ignored in the reasons for judgment.

In obiter, the court suggested that instead of seeking to amend the final agreement, the parties should obtain a consent order clarifying and validating the WOA.<sup>47</sup> Further clarification, however, would have been useful, notwithstanding that the obiter comments were given in the context of an injunction application. The court's suggestion falls short of providing guidance on how conflicts between the WOA and the final agreement would be resolved (e.g. should Huu-ay-aht move to transform shared lands on the Island into fee simple property). A binding agreement between two private parties may be one thing, but a modern Treaty protected by the *Constitution Act, 1982* is quite another creature in law. If and when a direct conflict arises, where the two agreements cannot be read together, it is difficult to imagine that the modern Treaty would not trump the WOA. In such a situation, the overlap issue would likely be resolved by hierarchy of laws, not by agreement between the First Nations. If, however, the parties agreed, either during BCTC

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<sup>45</sup> *Tseshah First Nation, supra*, at para. 15

<sup>46</sup> For example, a modern Treaty First Nation could participate in long-term planning of forestry, such that certain parts of its "First Nation Area" are selected or zoned for intense industrial harvesting while other parts are protected. However, a neighbouring First Nation has an overlapping claim of Aboriginal title to the part that happens to be "zoned" for intense industrial logging by the mutual agreement of the signatory First Nation and the province. It is not difficult to imagine the inherent conflict between the exercise on one hand of the express right to participate in shared decision making of the signatory First Nation with the unproven yet asserted Aboriginal title of the neighbouring First Nation.

<sup>47</sup> *Tseshah First Nation, supra*, at para. 27.

negotiations or by a consent order, to have a boundary agreement “read into” or appended as a schedule to a modern Treaty, this hierarchy of laws problem might be overcome.

In the respectful opinion of the authors, the three decisions above illustrate the shortsightedness of refusing to address overlap issues early in the negotiation process and prior to the ratification of treaties. BCTC modern Treaties legally confer, without formal requirement of proof, a plethora of rights to contested and often scarce land and resources. As anyone that has watched the disappearance of BC’s forests, the depletion of salmon stocks, or the decline of northern caribou herds can attest, such lands and resources are often in short supply. Taking the long view, the granting of legal, constitutionally protected rights through modern Treaties without proof of entitlement appears to jeopardize the existing Aboriginal title and rights, or the historic Treaty rights, of other First Nations that lawfully rely on such resources. In light of this scarcity, one wonders how non-derogation clauses can provide a “complete answer” to this issue.

Perhaps more disturbingly, the injustice to existing rights-holders is compounded by the judiciary’s apparent unwillingness to acknowledge the potential infringement posed by such modern Treaties. Rather than scrutinize modern Treaties under the rubric of legal principles related to proof of Aboriginal title or rights (i.e. to see if they are negotiated on a “solid constitutional base”), the courts seem to be as persuaded as the general public that treaty-making on the basis of political agreement is the way to settle overlap issues.

## **E. RECOGNITION AND RECONCILIATION ACT: BEWARE THE GHOSTS FROM THE BC CLAIMS TASK FORCE REPORT**

Early in 2009, the First Nations Leadership Council and the government of British Columbia outlined a proposed *Recognition and Reconciliation Act* (the “RRA”) in a discussion paper (the “Discussion Paper”).<sup>48</sup> The RRA aims to reconfigure the relationship between First Nations and the Crown according to “principles of recognition” of Aboriginal rights and title.<sup>49</sup> But, like the BCTC before it, the RRA purports to do so *without regard to proof of claims to Aboriginal title and rights*.

The RRA promises to create an Indigenous Nation Commission (the “INC”) to facilitate the “reconstitution” of First Nations into large regional political collectives called Indigenous Nations. Indigenous Nations would be comprised of the proper title-holders in a given region, as determined according to the four factors employed in *Tsilhqot’in Nation*: language, culture, traditions, and shared history.<sup>50</sup>

<sup>48</sup> See: [http://www.gov.bc.ca/arr/attachments/implementing\\_the\\_new\\_relationship\\_0309.pdf](http://www.gov.bc.ca/arr/attachments/implementing_the_new_relationship_0309.pdf)

<sup>49</sup> At the time of writing (May 15, 2009), such legislation had not been introduced in the BC legislature nor had draft legislation been released publically for comment. However, with the re-election of the BC Liberal Party to government on May 12, 2009, the authors expect some version of the RRA to be part of the legislative agenda for the session of the provincial legislature.

<sup>50</sup> This concept raises numerous issues, perhaps chief among them being the constitutional validity of provincial legislation regarding Aboriginal rights and title, which are matters within the exclusive jurisdiction of the federal government per section 91(24) of the *Constitution Act, 1867*. In the view of the authors, it is highly unlikely that the RRA, as presently conceived in the Discussion Paper, would pass

Additionally, the INC would facilitate the resolution of boundary disputes between First Nations, though the precise nature of its role is not clearly defined.<sup>51</sup> However, the Discussion Paper appears to presume resolutions facilitated by the INC would *not* be based on proof or strength of claims to Aboriginal title. This is evident from the Discussion Paper's list of the purposes of the proposed legislation, the first of which is to "recognize that Aboriginal rights and title exist in British Columbia throughout the territory of each Indigenous Nation that is the proper title and rights holder, **without requirement of proof or strength of claim**".<sup>52</sup> Equally of interest, it does not appear that the RRA would require boundary conflicts to be resolved as a prerequisite to the "reconstitution" of an Indigenous Nation.<sup>53</sup>

Thus, the recognition of the title-holding entity—and *not* the resolution of relevant boundary disputes—appears to be the only prerequisite for the "reconstitution" of an Indigenous Nation, and thus gains access to the prize of "comprehensive engagement" by the province for the suitably reconstituted Indigenous Nation.<sup>54</sup>

The risk to such an approach should be obvious. Not unlike the BCTC process, the resolution of overlapping claims will be dealt with by the INC without reference to the strength of claim of the respective First Nations. There appears to be an express incentive built into the RRA for First Nations to constitute as Indigenous Nations - the prospect of "comprehensive engagement" with the province (i.e. revenue sharing and collaborative decision-making about lands and resources). Again, not unlike the BCTC process in which the inconvenience of resolving overlapping claims can be ignored seemingly without consequence when a final agreement is on the verge of conclusion, so too could the resolution of overlapping claims by the INC be side-tracked in the drive to

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constitutional muster, especially since it proposes to create a provincial commission (the Indigenous Nation Commission) with authority to decide matters of Aboriginal title. However, for the purpose of this paper, the constitutional question of jurisdiction is set aside in order to focus on the substantive recommendations of the Discussion Paper.

<sup>51</sup> The Discussion Paper only offers a single line that directly addresses the INC's role in boundary dispute resolution: "The Commission could also work with Indigenous Nations to resolve issues of overlaps and shared territories." See:

[http://www.gov.bc.ca/arr/attachments/implementing\\_the\\_new\\_relationship\\_0309.pdf](http://www.gov.bc.ca/arr/attachments/implementing_the_new_relationship_0309.pdf)

<sup>52</sup> See: [http://www.gov.bc.ca/arr/attachments/implementing\\_the\\_new\\_relationship\\_0309.pdf](http://www.gov.bc.ca/arr/attachments/implementing_the_new_relationship_0309.pdf)

<sup>53</sup> This proposition seems to flow from the following statement in the Discussion Paper (page 2):

Where the proper title and rights holders of an Indigenous Nation are represented by one political structure with a mandate to enter into shared decision-making and revenue and benefit sharing agreements with the Crown, the Indigenous Nation will be considered to be reconstituted for the purposes of this Act.

<sup>54</sup> The RRA would also introduce a three-tiered approach to Crown consultation and accommodation, rebranded as "engagement". *Comprehensive* engagement would be available only to reconstituted Indigenous Nations which would negotiate agreements with the Province regarding planning, management, tenuring and revenue and benefit sharing. An *interim* level of engagement would authorize similar agreements with reconstituted Indigenous Nations, but only with respect to certain categories of development projects and strategic decisions. For all other First Nations, that is, those that are not constituents of an Indigenous Nation, the default level of engagement would apply. The Discussion Paper states an intent to improve the *status quo* regarding current implementation of the Crown's constitutional duty to consult, but does not point to any substantive or procedural changes to achieve this aim.

reconstitute First Nations as Indigenous Nations in order to participate in the benefits proffered by “comprehensive engagement”.

Moreover, the relationship between “engagement” with Indigenous Nations and other Aboriginal rights-holders remains opaque. How would this scheme affect First Nations who are signatories of Treaties that purport to extinguish (or “modify”, to use the modern jargon of final agreements) their Aboriginal title? Would they qualify as constituents of Indigenous Nations? And what of the existing Aboriginal title and rights, or historic Treaty rights, of Aboriginal peoples that do not agree to be “reconstituted” into larger Indigenous Nations? Would the comprehensive engagement on areas subject to outstanding claims to Aboriginal title and rights, or to historic Treaty rights, not repeat the same shortsightedness of the BCTC process, compounding the injustice? Furthermore, there is as yet no indication about how the RRA proposals would relate to the BCTC process. Are they intended to replace modern Treaty negotiations or simply function as an interim consultative process prior to the completion of modern Treaties? Perhaps these questions will be answered once draft legislation is available for review.

## **F. TOWARDS A MODEL FOR RESOLVING BOUNDARY DISPUTES**

It is far beyond the reach of this paper to detail the features of a new model for resolving overlapping claims, but the following recommendations may point to options for productive resolution of overlapping claims, given the jurisprudence to date.

### **1. Reforming Negotiation and Consultation Schemes**

As the former Chief Justice Antonio Lamer wrote in *Delgamuukw*, resolution of Aboriginal claims—whether through modern Treaty negotiation or revamped Crown consultation schemes, should:

- (1) be based on the “solid constitutional base” of the proof of Aboriginal rights and title; and,
- (2) include Aboriginal groups who are potentially affected by the claim.

In practical terms, this could mean that First Nations that are unable to resolve overlap issues would be required to submit such issues to an independent claims-tribunal for a binding decision, before either could proceed to ratify a modern Treaty that “constitutionalizes” new Treaty rights over a disputed area. Of course, such a tribunal would need to be properly authorized and equipped to answer the factual and legal questions at issue, and have legitimacy in the eyes of both First Nations participants and the broader Canadian public.

If First Nations are able to reach overlap agreements (by whatever process), such agreements could be appended to the respective modern Treaties to ensure that the overlap resolution measures are legally enforceable. This would prevent the types of potential conflicts inherent in the Maa-Nulth First Nations Final Agreement.

Similar solutions are currying favour in other jurisdictions dealing with overlapping indigenous claims. For example, Robert French, Chief Justice of the High Court of Australia, recently recommended that Australia's National Native Title Tribunal use *inquiries* to allow facilitators to elicit oral history and expert evidence to assist parties in mediation with the factual and legal issues pertaining to their overlapping claims.<sup>55</sup> And, as Alison Vivian argues, a two-stage procedure of flexible mediation followed by binding arbitration could alleviate some of the strains placed on indigenous peoples due to a lack of control or preparedness over the claims resolution process.<sup>56</sup> Furthermore, such a model would balance the need to allow indigenous peoples to mold dispute resolution processes into shared cultural values and historically suitable forms, without sacrificing the constitutional footing needed for such procedures to endure in Canada's legal landscape.

## 2. A Call for Judicial Intervention

The courts have had three recent opportunities to enjoin the ratification of modern Treaties that were formed, in the authors' opinion, without sufficient regard for existing Aboriginal or Treaty rights of neighbouring First Nations. Instead, in each case, the court downplayed the potential threat to existing rights and reassured the parties that the resolution of such issues could and should wait until another day. But given the scarcity of many of the land and resources to which Aboriginal peoples lay conflicting claims, it seems undeniable that refusing to address such conflicts prior to the granting of new rights creates the risk that parties with weak or even illegitimate claims may benefit at the expense of those with strong and legitimate claims to the same lands and resources.

The authors respectfully submit that the courts need to consider the immediate and long-term effects that modern Treaties will likely have on existing Aboriginal or Treaty rights *before* final agreements become constitutionally protected documents difficult to amend. Rather than accepting the premise that negotiation of land claims cannot, at least in British Columbia, be predicated on any notion of proof of claim, the courts ought to question the legal (as opposed to political) legitimacy of any process that results in the conveyance of constitutionally protected rights without any assessment or verification of the rights so claimed. The *Delgamuukw* principle of "solid constitutional base" of the proof of Aboriginal rights and title needs to be the lodestar by which overlaps are resolved, legally speaking. Any treaty-making or claims resolution process by which claims to Aboriginal title and rights are not assessed or verified to some degree will not result in the necessary incentives for the actual resolution of overlapping claims, as the BCTC process has demonstrated.

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<sup>55</sup> Robert French, "Lifting the Burden of Native Title: Some Modest Proposals for Improvement." *Australian Law Reform Commission* 93 (2009), available at:

<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/index.html>

<sup>56</sup> Alison Vivian, "Conflict Management in the Native Title System: A Proposal for an Indigenous Dispute Resolution Tribunal." *Australian Law Reform Commission* 93 (2009), available at: <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/index.html>

## G. CONCLUSION

The BCTC process was formed to facilitate the resolution of Aboriginal title claims and to avoid lengthy and costly litigation. To that end, the BCTC process involves political negotiations that do not require First Nations claimants to substantiate their claims to any measure. Although the BCTC process urges First Nations to address conflicting or overlapping claims, boundary agreements negotiated between First Nations may not be enforceable against constitutionally protected modern Treaties nor are such agreements preconditions to achieving a modern Treaty. Further, the courts have refused to enjoin the ratification of final agreements where there are outstanding overlap issues. These factors have *reduced* the incentive for proactive and collaborative resolutions to conflicting claims.

The proposed *Recognition and Reconciliation Act* purports to take a different approach by collectivizing the incentive for resolving conflicting claims. The RRA promises enhanced levels of “engagement” (shared decision making and resource-sharing), but the highest levels are to be offered only to Aboriginal groups that form large regional political units called Indigenous Nations. To facilitate this consolidation, an Indigenous Nation Commission would identify proper title-holders and assist in resolving issues of overlaps. It appears that the RRA will not require proof or strength of claim to resolving boundary conflicts, nor is it clear that such resolutions are prerequisites for the formation of the Indigenous Nations which stand to benefit from the promised Crown “engagement”.

Both the BCTC process and the proposed RRA are designed to reconfigure Crown/Aboriginal relations on a principled recognition of Aboriginal rights and title, but ironically both processes operate in denial of the legal definitions of these rights. Aboriginal rights and title depend on the unique practices and histories of each Aboriginal people, yet both the BCTC and RRA eschew questions of the *proof* or *strength* of such claims. When faced with the predictable result of such processes—litigation to enjoin the ratification of modern Treaties subject to overlapping claims—the courts have upheld the legal consequences of such inherently political processes, sometimes even in the face of proven or existing section 35 rights.

Where does this leave Aboriginal peoples that have strong, yet unproven claims? Where does it leave First Nations with established, historic Treaty rights? It would seem that such structural defects undermine the legitimacy of newly negotiated relationships between Aboriginal Peoples and the Crown. In all likelihood, the failure to address proof of claim and overlap issues will simply add another layer of lengthy and expensive litigation, which is exactly what these processes were created to avoid in the first place.