A GEOGRAPHY OF RECONCILIATION: AN EFFECTIVE AND LAWFUL FRAMEWORK FOR ACHIEVING CLARITY OF FIRST NATIONS TERRITORIAL JURISDICTION IN BRITISH COLUMBIA

by

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DISSENTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN NATURAL RESOURCES AND ENVIRONMENTAL STUDIES

UNIVERSITY OF NORTHERN BRITISH COLUMBIA

December 2017

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ABSTRACT

What is the best way to achieve and sustain clarity of First Nations territorial jurisdiction in British Columbia (BC)? The question is critical to addressing the legal imperative of Indigenous-Crown reconciliation; that is, balancing the rights of Indigenous peoples with the interests of society as a whole through negotiation. Reconciliation requires dialog, and effective dialog is almost impossible amidst conflict concerning which Indigenous polities have legal authority to negotiate concerning specific territories. This dissertation argues that hybrid law – involving the harmonization of state and Indigenous legal systems – should be the basis of common understanding and legitimacy for determining which Indigenous polities have legal authority to negotiate concerning areas subject to “overlapping claims”. Drawing upon the experiences of BC, New Zealand, and Australia, the study concludes that First Nations and the Crown in BC should work collaboratively to empower an independent Indigenous Territories Tribunal to oversee a program of regional inquiries across the province. Regional inquiries should involve: a) research, b) community hearings that empower Indigenous people to articulate their history and legal systems, c) assessments of the character and strength of claims, d) recommendations, and e) the development of Indigenous Jurisdiction Agreements that express complex Indigenous territorialities, hybrid law, and the Indigenous polities that have the legal authority to negotiate with the Crown concerning specific territories. Clarity of Indigenous territorial jurisdiction is a critical aspect of addressing the legal imperative of Indigenous-Crown reconciliation. This dissertation proposes a framework for achieving a geography of reconciliation: that is, an exhaustive map of BC that clearly communicates which First Nation polities have legal authority to negotiate where.
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<td>BC</td>
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CHAPTER 1: OVERLAP DISPUTES: A BARRIER TO EFFECTIVE AND LAWFUL INDIGENOUS-CROWN RECONCILIATION IN BRITISH COLUMBIA

Few issues generate more controversy in British Columbia (BC) than treaty negotiations with First Nations.¹ The legal, economic, and ethical imperatives for settlements are compelling;² yet settling treaties and other land-related agreements without sufficient regard to their evidentiary basis undermines these goals. The BC treaty process neither defines First Nation “traditional territory” nor engages with the antecedents of First Nations’ territorial “claims”. First Nations’ assertions of traditional territory have been accepted into the BC treaty process without scrutiny, with the expectation that First Nations will “resolve issues related to overlapping traditional territories among themselves” (BC Claims Task Force 1991, 20). Overlap disputes – that is, inter- and intra-First Nation contestation concerning territorial jurisdiction – have proven far more difficult than was anticipated at the inception of the BC treaty process over 20 years ago.³

Overlap disputes are a significant barrier to effective and lawful Indigenous-Crown relations in BC: they delay or preclude lawful treaty settlements, can delay or prevent land

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¹ I use the term “First Nations” to refer to groups of Indigenous people in BC however organized for political purposes. As will be discussed in Chapter 6, the term “First Nation” can refer to large or small groups, such as single Indian Act-defined Bands with fewer than 200 members, or larger Indigenous polities such as tribal councils and treaty societies which often represent more than one Indian Act-defined Band and thousands of members. By “Indigenous” I mean people who self-identify as being descended from the original inhabitants of what is now BC. In the Canadian context, I use the term “Aboriginal” as it is defined in the Constitution Act 1982 (s. 35).

² See, e.g., Penikett 2006; BCTC 2008; Deloitte 2016.

³ I use the term “overlap disputes” to describe inter- and intra-First Nation disputes concerning territorial jurisdiction, which includes contestation related to extent of territory, indigenous group composition, and Indigenous representational authority. In the context of BC, the term “overlapping claims” is used cautiously for two reasons. First, “overlapping claims” is often mistakenly understood to imply there is a dispute when this is not necessarily so. Second, in almost all of BC, First Nations’ ancestral territories have never been ceded to the Crown through treaties, and thus First Nations cannot really “claim” land they already “own”. While recognizing that the term “claims” is problematic, there is no better term which conveys its widely-understood meaning in all of the three jurisdictions of particular interest to this study: BC, Australia, and New Zealand.
and resource development, and are a barrier to First Nations having a meaningful role in
decision-making concerning land (Gogal et al. 2005; Browne 2009; McDade 2009; Song
2009; BCTC 2010, 2014; Eyford 2013, 2015).\textsuperscript{4} A conservative estimate is that there are at
least 500 instances of overlapping claims to collectively-held Aboriginal rights\textsuperscript{5} in BC.\textsuperscript{6} Yet,
as of 2014, the BC Treaty Commission (BCTC) was aware of only 18 “Overlap and Shared
Territory Protocols” settled between and among First Nations (BCTC 2014, 45).\textsuperscript{7} If one
accepts the proposition that clarity of First Nations territorial jurisdiction is a requirement
for effective Indigenous-Crown relations, it follows that hundreds of overlapping claims will
need to be addressed in order to achieve clarity of Indigenous jurisdiction on a province-
wide basis – what former BCTC Chief Commissioner Miles Richardson calls “a
comprehensive map of BC” (quoted in BCTC 2014, 5).

Many commentators continue to promote \textit{ad hoc} negotiation of First Nations-to-First
Nations “overlap agreements” using case-by-case facilitation and mediation (e.g. Browne
2009; McDade 2009; East 2009; Rush 2009; BCTC 2010). Rarely acknowledged is that First
Nation parties to overlap disputes are often unable to reach agreements, or that \textit{ad hoc}
political negotiation has largely failed to achieve clarity of Indigenous jurisdiction. Instead, a
dysfunctional narrative concerning overlap disputes is paralyzing Indigenous-Crown

\textsuperscript{4} I use the term “the Crown” to refer to the Governments of BC and Canada together where there is no need to
distinguish between the two.

\textsuperscript{5} In the Canadian context, by “Aboriginal rights” I mean legal rights that are protected by section 35(1) of the
Constitution, as interpreted by Canadian courts.

\textsuperscript{6} The Government of BC manages a Consultation Areas Database of roughly 250 territorial assertions of Aboriginal
rights, which it uses to identify First Nation polities to consult and negotiate concerning specific areas. All of these
territories overlap with multiple others, often many times over.

\textsuperscript{7} “Overlap and Shared Territory Protocol”, also sometimes called “overlap agreements”, are variously defined
agreements between and among First Nations concerning territorial boundaries and access to shared resources.
Such agreements are only sometimes made available to the Crown for decision-making purposes.
relations in BC. Three arguments in particular contribute to this unproductive narrative: 1) unresolved overlap disputes do not give one First Nation a veto over another’s treaty; 2) non-derogation language included in all modern treaties provides a remedy for First Nations adversely impacted by another’s treaty settlement; and 3) First Nations are to resolve overlap disputes among themselves. These arguments have been used to justify not addressing disputes, they privilege some First Nations to the detriment of others, and they omit compelling reasons for a more proactive and effective approach. Almost always missing from the dominant discourse on overlap disputes in BC is the BC Task Force recommendation that “a process for resolution [of overlap disputes] should be in place before conclusion of the treaty” (BC Claims Task Force 1991, 20, emphasis added).

A more constructive narrative is one that acknowledges the need to understand and manage underlying sources of disputes, recognizes that the Crown is squarely implicated in the issue, and acknowledges that the Task Force’s twenty-five-year-old recommendations concerning overlap disputes have not been implemented because of systemic barriers.

Clarity of First Nations territorial jurisdiction is critical to effective and lawful Indigenous-Crown reconciliation because without jurisdictional clarity, and particularly in the context of overlap disputes, First Nations are unable to have a meaningful role in decision-

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8 All of the modern treaties settled in BC contain non-derogation language that purports to provide a remedy for First Nations that are adversely impacted by treaties to which they are not a party. As will be discussed in Chapter 5, however, these provisions are ineffective.

9 This narrative is consistent with arguments made by Crown lawyers and government officers when a number of First Nations in BC sought to have treaty settlements delayed because of overlap disputes (e.g. Arvey 2007; Cook v. The Minister of Aboriginal Relations and Reconciliation 2007; East 2009). It should also be noted that the recommendations of the BC Claims Task Force (1991) were not endorsed by First Nations that have chosen not to engage in the BC treaty process, which amounts to almost half of the Indian Act-defined Bands in BC.

10 I interpret this statement as a recommendation of the BC Claims Task Force (1991), while also acknowledging that there are varied opinions as to whether the parties to the BC treaty process are honour-bound to adhere to it.
making concerning land in partnership with the Crown. In this work I use the term “reconciliation” as it is used in the common law of Aboriginal rights: that is, a legal imperative to balance the legal rights of Indigenous peoples with the interests of society as a whole through negotiations.\footnote{See, e.g., Supreme Court of Canada in \textit{R v. Van der Peet} 1996, paras. 44, 310; \textit{Delgamuukw v. British Columbia} 1997, paras. 161, 186; \textit{Haida Nation v. British Columbia} 2004, para. 32; \textit{Tzilhqot’in Nation v. British Columbia} 2014, para. 118).} Indigenous-Crown reconciliation, however it may be defined through negotiations, requires dialog, and meaningful dialog between First Nations and the Crown is almost impossible amidst conflict concerning which First Nation polities have legitimate authority to negotiate concerning specific territory. A fundamental question thus stands at the heart of Indigenous-Crown relations in BC with which scholarship has yet to directly engage: what is the best way to achieve and sustain clarity of First Nations territorial jurisdiction on a province–wide basis in BC?

This study draws upon literature and interviews with 63 Indigenous leaders, advocates, and activists, Crown officers and negotiators, judges, tribunal staff and members, and scholars in BC, New Zealand, and Australia. Seven key arguments are developed throughout this work and are summarized in Chapter 9. Three of these arguments need to be introduced at the outset. First, BC would be well-served by employing some of the principles and processes that have proven effective in New Zealand and Australia, particularly those concerning the importance of regional inquiries and law for defining the sociospatial dimensions of claims and settlements. Second, hybrid law should provide a basis of common understanding and legitimacy in the sociospatial definition of Aboriginal rights, claims, and settlements. To serve this purpose, Indigenous and state legal systems need to be substantively articulated and harmonized where ambiguities and conflict in and between legal
systems exist. And third, First Nations and the Crown should work together to implement a legislative framework aimed at achieving clarity of First Nations territorial jurisdiction on a province-wide basis – a geography of reconciliation.

I use the phrase “a geography of reconciliation” (singular) to signal my argument that clarity of Indigenous jurisdiction requires more than the assertion of variously-defined “traditional territories” of First Nations, it requires a process whereby First Nations’ territories are defined in relation to each other and the Crown. A geography of reconciliation is one that accommodates Indigenous and state territorialities and legal systems, and through this accommodation produces a single geography of reconciliation – an exhaustive and unambiguous map of Indigenous territorial jurisdiction intended to support effective and lawful Indigenous-Crown relations. This dissertation develops and proposes a framework for doing so.

A Systemic Solution is Needed

The Nisga’a treaty – settled in 1999 – demonstrates key aspects of the challenge. Between 1983 and 1986 a series of meetings between the Nisga’a, Gitxsan, and Gitanyow Nations were held concerning an overlap dispute in the Nass valley, located in northwest BC. The Gitxsan and Gitanyow presented evidence concerning the disputed territory in order to settle the western boundary of their legal claim of Aboriginal title prior to commencement of the well-known Delgamuukw litigation in 1987.\(^{12}\) Evidence was documented in a report entitled “Tribal Boundaries in the Nass Watershed,” which later became a book of the same name (Sterritt et al. 1998). The Nisga’a Nation has yet to provide evidence

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concerning their territorial claim to much of the area now covered by the Nisga’a treaty, including areas also claimed by the Gitanyow and Gitxsan (Sterritt interview 2013; Clifton Percival interview 2014; Starlund interview 2014; see also Sterritt et al. 1998; Sterritt 1999). The trial judge in Delgamuukw (1991) explicitly declined to rule on the overlap issue in this case (17). On appeal, the Supreme Court of Canada emphatically stated that “negotiations should also include other aboriginal nations which have a stake in the territory claimed” (Delgamuukw 1997, para. 186), yet the Nisga’a treaty was settled in 1999 without the involvement of the Gitxsan and Gitanyow. The Provincial Legislature’s Select Standing Committee on Aboriginal Affairs recommended that the Nisga’a, Gitanyow, and Gitxsan enter into mediation (BC 1997). The Nisga’a declined to mediate, and the Crown proved willing to settle the treaty despite the unresolved dispute. No agreement concerning the overlap dispute has been reached (Sterritt interview 2013; Clifton Percival interview 2014; Starlund interview 2014).

Joel Starlund, Executive Director for the Gitanyow Hereditary Chiefs, provides examples of how the Nisga’a treaty has impacted Gitanyow people:

We were negotiating with BC Hydro for a contract [in relation to the Northwest Transmission Line] but BC Hydro ended up signing a direct award contract with the Nisga’a for about 60 kilometers of the transmission line in Gitanyow territory. So we missed out on that economic opportunity. And there have been environmental impacts from that [which] would not have happened if the Gitanyow had the contract. It makes it difficult for us to alter [resource development] projects and put forward [environmental protection] measures when there is another [First Nation] government communicating to the proponents and to BC their views which contradict ours.

13 Biographies of interview participants are provided in Appendix A.
Another one of the major impacts to Gitanyow rights has been on our harvesting of moose. Since 2001, up to 2011, the Nass moose population has crashed by 65% to 70%. The Nisga’a Final Agreement has allowed hunting access for the Nisga’a in Gitanyow territory … which they now view as their hunting territory. Rarely would we see Nisga’a within the territory prior to the Nisga’a agreement being signed. It’s literally taking food off our table. There are people who actually go hungry because there are fewer resources out there. It’s not just something on paper that we write about and say. We have nobody to speak to who has the authority to address these issues, and they keep coming up time and time again (interview 2014).

In 2016 the Gitanyow reinstated its legal claim for Aboriginal title to the Gitanyow Lax’lip (territory), an area almost entirely covered by the Nisga’a treaty. The prospect of the Gitanyow succeeding in its legal claim raises difficult questions concerning the evidentiary basis of the Nisga’a treaty, and for all treaties settled despite unresolved overlap disputes.

Overlap disputes are also an economic problem for the province, as a senior BC Government official explains:

As government decision-makers, we tend to view overlap as an economic problem – as a barrier to making clear decisions. But overlap actually has just as great an effect on Aboriginal people because it often results in business not going ahead. So, questions around who do we talk to, who is the rights holder, who can give us a definitive answer, is something that is plaguing government, and it’s getting worse. It’s significantly worse than it was a decade ago, partly because of our own policies of revenue-sharing. It’s become a real problem. There’s a lost opportunity cost to overlap issues that’s absolutely huge. I don’t think it’s the fact that Indigenous rights and title exist in the province that’s the issue. It’s lack of clarity that’s the issue. Lack of clarity is hurting everybody (anonymous interview 2014).

Overlap disputes thus raise questions concerning whether the Crown is settling agreements with the correct rights-holding Indigenous collectives concerning specific land. The Government of BC has indicated its preference not to negotiate agreements concerning

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14 Malii v. Her Majesty the Queen 2016 (BCSC).
disputed areas for fear of settling with “the wrong group of representatives” (Assistant Deputy Minister Charles Porter, quoted in Davies 2012, 36). A risk for the Crown is that treaty and other settlement benefits are being conferred to First Nations in geographic areas for which the First Nation may not have exclusive or legitimate claim, to the detriment of other First Nations that do. A risk for Indigenous people is that a First Nations polity might sanction the diminishment or effective extinguishment of Aboriginal rights, through treaty settlement, where it does not have the authority, or exclusive authority, to do so. The stakes are high.

Four factors have added to the challenge achieving clarity of First Nations jurisdiction in BC. First, four times as many First Nations are participating in the BC treaty process as was initially anticipated, and these represent only just over half of all First Nations in BC. Negotiating with small, community-based polities (e.g. Indian Act Bands), as opposed to larger polities (e.g. Tribal Councils representing multiple communities), has resulted in many more overlap disputes than was anticipated, as well as disputes over the types of Indigenous polities the Crown should be negotiating with (e.g. Indian Act-defined Bands vs. traditional governance structures or larger polities). Second, the fact that almost half of First Nations in BC have chosen not to join the BC treaty process has also created a difficult dynamic. Some First Nations are invested in settling treaties under the current settlement model, while others fear that the settlement of their neighbour’s treaty will prejudice their rights and interests. By supporting the settlement of treaties without a dispute management process in place, the Crown and the BCTC have created a powerful disincentive for First Nations to address disputes. First Nations that are close to treaty settlement may have little incentive to address disputes because all indications are that their treaty will be settled
regardless of the outcome of efforts to address overlap disputes. First Nations that have
chosen not to engage in treaty negotiations with the Crown also may have little to gain by
seriously engaging in dispute management, and may even believe that efforts to harmonize
territorial claims would be perfunctory because their neighbour’s treaty settlement is
inevitable.

Third, economic opportunities for First Nations associated with resource
development have substantively increased since the inception of the treaty process (Gogal et
al. 2005; Song 2009; Eyford 2015). Because such opportunities are often tied to a specific
territory – e.g. related to pipelines, mines, and forestry – and because the Crown uses, in
part, First Nations’ assertions of traditional territory to determine which First Nations to
consult and negotiate with concerning specific territory, First Nations are incentivized to
make ambit territorial claims and aggressively pursue and defend opportunities that derive
from them. And fourth, the law of Aboriginal rights has developed since the inception of the
BC treaty process. The Crown has a legal duty to consult and accommodate First Nations
where its action may diminish Aboriginal rights (e.g. Haida Nation 2004; Newman 2014).15
The duty to consult requires the Crown to assess the respective strength of First Nations’
territorial claims in order to determine which First Nations to consult and the extent to
which accommodation may be owed (Haida Nation 2004, paras. 37-39, 43-44; Newman
2014). Because the Crown must decide with which First Nations it will settle concerning
specific territory, and because a settlement with one First Nation may diminish the
Aboriginal rights of another, the Crown is directly implicated in overlap disputes by default

or design (Turner 2011; see also, e.g., East 2009).16

Two decades ago, the idea that Indigenous-Crown negotiations could be an entirely political process seemed plausible to the parties to the BC treaty process, yet the common law has developed and in doing so has put political negotiations on a collision course with legally-defined Aboriginal rights. The collision is nowhere more apparent than in overlap disputes, which are at their core a product of ambiguity concerning the criteria by which First Nations and their territories should be defined. To argue that the criteria should be entirely politically-derived is to accept a fundamentally flawed premise: that is, in the context of overlap disputes, that history does not matter, that political “might makes right”, and that the law concerning Aboriginal rights can be overridden by political maneuvering. The imperative of effective and lawful Indigenous-Crown relations requires that the Crown do more than just fulfill its minimum duty to consult and accommodate in the context of overlap disputes. A systemic solution is needed.

**Increasing Awareness of the Issue, But No Consensus on a Way Forward**

The BCTC and the three pan-BC First Nations organizations – the Union of BC Indian Chiefs (UBCIC), the BC Assembly of First Nations (BCAFN), and the First Nations Summit (FNS) – recognize that overlap disputes should be addressed. Yet little agreement exists on how they should be addressed or, for that matter, what it actually means to “successfully resolve” an overlap dispute. Pan-BC First Nations organizations are consistent in their call for the Crown to fund a process for overlap dispute resolution, yet proposals

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16 The Crown’s duty to consult and accommodate First Nations is discussed in Chapters 5 and 6. I use the phrase “consult and accommodate” as shorthand for this legal duty while also acknowledging that the Crown may not have a legal obligation to “accommodate” in all instances (see, e.g., Newman 2014).
from these organizations vary considerably, ranging from bilateral negotiations to binding arbitration where required (UBCIC 2008; BCAFN 2013; FNS 2014).

Proposals from former Chief Commissioners of the BCTC also vary considerably. Sophie Pierre,\textsuperscript{17} for instance, suggests that the BCTC “needs to bring First Nations together in a structured manner” on the issue, yet also contends that treaties should go ahead even when disputes remain unresolved, provided that First Nations demonstrate that “best efforts” (not defined) were made to resolve overlap disputes (BCTC 2014, 15). Miles Richardson\textsuperscript{18} suggests employing “facilitators” to use “rigid accountability criteria” to produce records and make recommendations concerning disputes (Ibid., 7). Unlike Pierre, however, Richardson contends that settling treaties “where there’s a serious dispute” makes things worse (Ibid., 6). As Richardson puts it, “[f]inalizing a treaty with one party is not healthy pressure in my view” (Ibid., 5). Steven Point\textsuperscript{19} proposes that a “traditional territory panel” be created to hear disputes and make recommendations on how disputes might be resolved by agreement. For Point, “[t]he important thing … is that a record would come forward” that can be built on (Ibid., 10). In Point’s opinion the BCTC has the legislative authority to empower such a panel. Others raise doubts as to whether the BCTC has such authority, and also question whether it would be appropriate for the BCTC to assume more than its current facilitative role (Arvey 2007; Devlin and Thielmann 2009; Turner 2011; Turner and Fondahl 2015).

Dispute resolution practitioners generally recognize the limits of facilitation and

\textsuperscript{17} Sophie Pierre was Chief Commissioner of the BCTC from 2009 to April 1, 2015.

\textsuperscript{18} Miles Richardson was Chief Commissioner of the BCTC from 1998 to 2004.

\textsuperscript{19} Steven Point is a Provincial Court of British Columbia judge and former Lieutenant Governor of British Columbia (2007-2009). Point was Chief Commissioner of the BCTC from 2005-2007.
mediation in situations where one or more parties to a dispute have little incentive to reconcile their differences (e.g. Brown 2009; Ready and Bell in BCTC 2014; George in BCTC 2014). Vince Ready, the most well-known professional mediator in BC, suggests that attempts to address overlap disputes are “almost meaningless … if parties, including government, are not willing to do anything but sit on their heels” (BCTC 2014, 23).

According to Ready, a process for addressing overlap disputes requires “serious timeframes and maybe even a legislative framework” (Ibid., 23). Other dispute resolution practitioners caution against “top down” approaches that impose timelines and pre-determined dispute resolution frameworks and criteria, arguing that durable solutions are more likely to derive from “bottom up processes” tailored to the specific circumstances of each dispute (George in BCTC 2014; Henry in BCTC 2014; Stuart in BCTC 2014). A point on which there is near-consensus is that ordinary courts are not an appropriate mechanism for resolution of overlap disputes. Indeed, the BC Supreme Court itself has suggested that “if forced to deal with contested claims, First Nations may well face court imposed settlements which are less likely to be acceptable to them than negotiated solutions” (Gitanyow 1998, para. 41).

On the other hand, approaches that entirely disregard the evidentiary basis of claims also raise difficult questions concerning the utility of political processes for addressing what are, in the view of some, fundamentally legal questions (Devlin and Thielmann 2009; East 2009; Morgan 2009; Rush 2009). Is a political process that pays little or no attention to the historical basis of claims capable of achieving clarity of First Nations jurisdiction? “Will or should the treaty negotiation process itself become more grounded in an assessment and evaluation of First Nations’ rights in order to fully come to terms with the reality of

\footnote{Gitanyow First Nation v. Canada 1998 (BCSC).}
 overlapping claims?” (East 2009, 1). Lawyer and Indigenous advocate Christopher Devlin, who represented a number of First Nations that challenged in court the settlement of treaties in BC because of overlap disputes, suggests that territorial claims, where contested, need to be assessed on the basis of evidence (interview 2013). According to Devlin and Thielmann, … 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. 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 (2009, 18).

Federal Government lawyer Mark East (2009, 1) suggests that “such a shift would entail a significant reorientation of treaty negotiations towards a legally-driven … rights determination process …” East (2009, 1), among others, also questions “whether the goal of reconciliation … can be achieved by interposing the Crown directly into First Nation overlap or shared territory discussions” (e.g. UBCIC 2008; Dickson 2011, 2014). Sterritt and others (1998), on the other hand, squarely implicate the Crown in the issue:

The federal and provincial governments, in their ignorance of the ancient political and legal systems of First Nations, are frequently participants in processes that defy Indigenous law, the very law that underlies the treaty process itself, and, in the case of their treatment of the ‘overlap issue,’ they risk becoming unwitting pawns of individual First Nations that pursue territorial expansion at the expense of their neighbours (4).

The Government of Canada has not formally altered its position on overlap disputes since its Comprehensive Land Claims Policy of 1987, which states 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 1987, 12). Similarly,
the Government of BC has remained almost completely silent on the issue since 1996, when it stated that it “will not support a treaty settlement package where overlaps exist” (BC 1996, quoted in de Costa 2002, 225). One might also surmise that Crown policy is implicit in its endorsement of the recommendations of the BC Claims Task Force concerning overlap disputes, yet the Task Force’s recommendations and BCTC policies concerning overlaps have largely not been followed (discussed in Chapter 5). All but one modern treaty settled in BC has been contested in court because of overlap disputes.21

**Indigeneity, Territoriality, and Rights**

The literature on overlapping claims points to three overarching themes worth underscoring at the outset, to which I return in subsequent chapters. First, questions concerning group composition and political representation are inseparable from questions of Indigenous territoriality. Territory and political identity are mutually constitutive (e.g. Newman and Paasi 1998; Paasi 2000, 2009). Whereas state citizenship is based on state territory, Indigenous territoriality is often based on Indigenous citizenship, a distinction geographer Edward Soja (1971) described as “a social definition of territory rather than a territorial definition of society” (13). One cannot define a First Nation’s “traditional territory” without first defining the Aboriginal collective in which Aboriginal rights are vested (discussed in Chapter 4).

Second, scholars have pointed to disjunctures between Indigenous and state territorialities as a significant cause of overlapping claims. The argument here, with which I

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21 The Gitxsan and Gitanyow contested the Nisga’a treaty in *Lauclon et al. v. HMTQ Canada et al. and Nisga’a Nation* 1998; the Tseshahlt contested the Maa Nulth First Nations treaty in *Tseshahlt First Nation v. Han-ab-abt First Nation* 2007; Treaty 8 First Nations contested the Lheidli T’enneh treaty in *Chief Allan Apsassin et al. v. Attorney General (Canada) et al.* 2007; and four First Nations contested the Tsawwassen treaty in *Cook v. The Minister of Aboriginal Relations and Reconciliation* 2007. These cases are discussed in Chapter 5.
generally agree, is that “[a]chieving reconciliation between Indigenous territories and state assertions of sovereignty depends not only on making better maps, but also on the state recognizing and accommodating the totality of Indigenous relationships with land” (Thom 2014, 17). To frame this argument as a question, then: “Are there better ways to represent Indigenous territorial relations in claims processes?” (Ibid., 17). I argue that there are indeed better ways to represent First Nations territorial jurisdiction, but to this I would also add a cautionary note. The application of Indigenous legal systems is critical to the effective and lawful management of overlap disputes, but this is not to say that the way Indigenous laws were employed necessarily reflects the way First Nations might choose to interpret and apply them now or in the future. As scholars such as Slattery (1987) and Borrows (2002; 2010) remind us, Indigenous laws (e.g. concerning territory) have a basis in traditional custom, but are not for this reason necessarily static or uncontested. Indigenous legal systems “are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices” (Slattery 1987, 745). Caution is thus required to ensure representations of Indigenous territoriality do not succumb to romantic essentialism, as if Indigenous law and territoriality is somehow locked into a pre-colonial way of being. I argue that learning and drawing from the past is a critical element of achieving clarity of First Nations jurisdiction, but so too is acknowledging that all legal systems must change over time.

A third overarching theme is that while the cultural, political, and legal contexts of BC, Australia, and New Zealand are different, experiences of these cases concerning overlap disputes are profoundly analogous.22 Each struggles with the fundamental question at the

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22 As will be discussed in Chapter 2, BC is defined as a case for two reasons: 1) unlike other provinces, historic treaties were not settled in almost all of BC, and thus the Governments of BC, Canada, and some First Nations in
heart of this inquiry: what is the best way to achieve and sustain clarity of Indigenous jurisdiction? One of the main differences between BC and the Australia and New Zealand cases is that in New Zealand and Australia overlap disputes are subject to constructive judicial and quasi-judicial oversight. In New Zealand, the Waitangi Tribunal has provided substantive recommendations on how to address the interests of Maori groups with overlapping claims (e.g. Waitangi Tribunal 2001, 2002, 2003, 2007a, 2007b). In Australia, the management of overlap disputes since the late-2000s has shifted from the National Native Title Tribunal to the Federal Court, which now takes a firm hand in addressing overlap disputes prior to Native Title settlements taking effect. The incentive for some Aboriginal groups to address overlap disputes in Australia can be powerful: either the disputing Indigenous groups find an agreed-upon basis in traditional law and custom on which to address the dispute, or the Federal Court will make a determination as to which group, if any, has Native Title.

Another significant difference between BC and the Australia and New Zealand cases is that scholars in Australia and New Zealand have engaged with the issue to a far greater extent than in BC. Indeed, only the scholarly work of Rush (2009) and Dickson (2011, 2014) are directly concerned with strategies for addressing overlap disputes in BC. Rush (2009) provides a useful discussion on how Alternative Dispute Resolution processes – facilitation, mediation and arbitration – might be applied to address overlap disputes in BC. Dickson’s (2011, 2014) study was intended to evaluate a specific process for addressing overlap disputes proposed (but not implemented) almost a decade ago (Napoleon 2007a),

BC are engaged in a treaty negotiation process that is unique to BC; and 2) in BC, the Crown has adopted policies concerning overlap disputes different from those in the rest of Canada (discussed in Chapter 7).

23 See Chapters 3, 7, and 8.
rather than to investigate other possible process options.

Moreover, literature on overlap disputes in BC is almost entirely silent on the seven most difficult aspects of the issue: 1) ad hoc and last minute attempts to mediate disputes have not and likely will not achieve clarity of Indigenous jurisdiction needed for effective Indigenous-Crown relations; 2) current approaches create a systemic disincentive for some parties to fully engage in lawful and effective overlap dispute management; 3) disjunctures between Indigenous and state law and territorialities make it difficult to use law as a basis of common understanding and legitimacy in the management of overlap disputes; 4) in many instances Indigenous territorialities are so interwoven that conventional boundary agreements are inadequate; 5) the need for Indigenous people at the grass roots level to be fully invested in agreement-making in order for agreements to be durable; 6) the need for objective and well-informed Crown decision-making in the absence of intra-First Nation agreements concerning Indigenous territorial jurisdiction; and 7) the need for the Crown to be a proactive partner in defining and supporting an effective and legally robust approach to the issue. While Australia and New Zealand are the context for the greatest concentration of expertise concerning management of overlap disputes globally, this expertise has yet to be thoroughly canvassed with respect to its potential to inform the management of overlap disputes in BC. This study addresses these gaps.

**Project Purpose and Research Questions**

The purpose of this study is to support effective and lawful Indigenous-Crown relations in BC by developing a framework for achieving clarity of Indigenous jurisdiction on a province-wide basis. The overarching research question is this: what is the best process for achieving and sustaining clarity of Indigenous jurisdiction in BC, and what are its
components, characteristics, and principles? Subsidiary questions include:

1. What is the definition of a “successfully resolved” overlap dispute in BC?

2. Are there barriers to applying Indigenous legal systems to the management of overlap disputes in BC and, if so, what are these barriers and how might they be overcome?

3. Are there barriers to applying the law of Aboriginal rights to the management of overlap disputes in BC and, if so, what are these barriers and how might they be overcome?

4. Do theories concerning Alternative Dispute Resolution and Indigenous Dispute Resolution provide insight on the management of overlap disputes in BC and, if so, how?

5. Is it possible to account for nuanced Indigenous territorialities in processes of Indigenous-Crown negotiation and, if so, how?

6. Do theories concerning territory and the sociospatial dimensions of Aboriginal rights provide insight to the management of overlap disputes in BC and, if so, how?

7. How have overlap disputes been managed in Australia and New Zealand, and do processes and principles employed in Australia and New Zealand have utility for management of overlap disputes in BC?

An Indigenous Territories Tribunal

After more than two decades and around two billion dollars spent, only four treaties

[24 As will be discussed in the next chapter, the way I construct this question is informed by my personal orientation to the project. For now it suffices to note that I do not see overlap disputes as a First Nations-only issue. The Crown is implicated in the issue and should play a proactive role in developing and supporting an effective and lawful process for achieving clarity of First Nations jurisdiction in BC.]
have been settled under the aegis of the BCTC. Of the 60 or so First Nations that remain in the BC treaty process, less than ten are expected to settle a treaty in the foreseeable future (Eyford 2015). Depending on how First Nations are defined, current approaches to treaty negotiation would likely leave more than one hundred First Nations without a treaty, and questions concerning which First Nations have rights to specific land would continue to stymie effective Indigenous-Crown relations. The question to be asked, therefore, is not only how to manage overlap disputes related to the few treaties which have and may be settled under the current treaty model, but how to design a process that achieves clarity of Indigenous jurisdiction in a manner that supports effective and lawful Indigenous-Crown relations. How do we design a process that addresses both legal and political imperatives?

The crux of the argument developed in this dissertation is that an independent commission of inquiry – an Indigenous Territories Tribunal – is the best mechanism for achieving clarity of First Nation jurisdiction on a provide-wide basis. I argue that law can and should be a basis for common understanding and legitimacy, so that outcomes are accepted and upheld even by those who may have preferred a different result. An effective process is one in which the Crown and the BCTC make objective and well-informed decisions based on consensual intra-Indigenous territorial agreements or independent and respected recommendations of an independent Indigenous Territories Tribunal. A lawful process is one that produces outcomes that are consistent with both Indigenous and state legal systems: that is, hybrid law (discussed in Chapters 3, 6, 8 and 9).

25 These include the Tsawwassen treaty (2007), the Maa Nulth First Nations treaty (2009) (covering 5 First Nation communities), the Yale Treaty (2010); and the Tla’amin Treaty (2014). The Nisga’a Treaty (1999) was completed outside the aegis of the BCTC. The Lheidli T’enneh treaty was “completed” in 2006 but not ratified by the First Nation community. According to a recent report commissioned by the federal government, it is “likely that no more than ten tables are likely to conclude a treaty in the foreseeable future” (Eyford 2015, 58).
An Indigenous Territories Tribunal would achieve clarity of Indigenous jurisdiction by systematically conducting regional inquiries throughout the province. A Regional Tribunal Panel should be formed for each region, and employ a process of community engagement, research, community hearings, oversight of culturally-attuned dispute resolution methods, and reporting. Where First Nations are unable to achieve Indigenous Jurisdiction Agreements (discussed in Chapter 9), the Regional Panels should make recommendations concerning First Nations jurisdiction or shared jurisdiction. Agreements brokered by the Regional Panels, and their findings and recommendations, should be registered in a province-wide registry managed by the Indigenous Territories Tribunal.

The BCTC should take into account the findings and recommendations of the Regional Panels concerning whether particular negotiations should advance to the next stage of negotiations within the six stage BC treaty process. The Crown should take into account the Indigenous Jurisdiction Agreements brokered by the Regional Panels, and the findings and recommendations of the Regional Panels, when making decisions concerning the allocation of treaty and other settlement among First Nations. Treaty Agreements-In-Principle should not be settled unless and until regional inquiries have been completed and findings, Agreements, or recommendations have been registered. This framework would provide the incentive and the means to achieve clarity of Indigenous jurisdiction on a province-wide basis.

Contestation and change are hallmarks of all healthy and vibrant societies. A question is whether conflict is managed in a constructive way or in a way that is profoundly dysfunctional and legally suspect, as it is currently. A well-constructed Indigenous Territories Tribunal, when combined with other recommendations derived from this study, would
address the immediate imperative for well-informed decisions concerning the allocation of
treaty and other settlement benefits among First Nations. Clarity of Indigenous jurisdiction
is a fundamental aspect of “reconciliation”, however the term may be defined through
Indigenous-Crown negotiations. The Crown and First Nations should work collaboratively
to establish a legislative framework that empowers an Indigenous Territories Tribunal to
support First Nations and the Crown to achieve and sustain clarity of Indigenous jurisdiction
on a province-wide basis.

Synopsis of Chapters

This dissertation is presented in nine chapters. Chapter 2 discusses the
methodological orientation of the project and the methods employed, and is presented in
two major sections. The intent of the first section is to acknowledge and account for the fact
that this research has been shaped by my epistemological orientation, which has influenced
the research questions asked, how they were asked, and how they are answered. Thus it is
necessary to reflexively examine the underlying assumptions that informed not only how I
completed the project, but why I chose to conduct the research the way I did. The second
section explains the methods employed, such as participant selection, interview techniques,
and data analysis.

Chapter 3 presents a critical review of literature specifically concerned with
addressing overlap disputes. Two paradigms of dispute resolution are explored with
reference to overlap disputes: Alternative Dispute Resolution (ADR) and Indigenous
Dispute Resolution. It is not my intention to dichotomize the two paradigms, but rather to
explore ways that “conventional ADR” has been adapted to Indigenous contexts, challenges
of doing so, and ways Indigenous processes may be distinguished from conventional ADR
processes such as facilitation, mediation, and arbitration. The chapter also explores literature related to employing Indigenous legal systems in the context of overlap disputes in BC.

Chapter 4 concerns territorology: that is, the study of territory and territoriality. A range of understandings of territory are explored, from the dominant “modernist” understanding of territory as an explicitly bounded container of political power, to an understanding based on the idea that territories are relational networks. As Agnew (1999, 504) notes, modes of sociospatial organization will change “as material conditions and associated modes of understanding of them change.” I argue that Indigenous-Crown negotiations can and should be just such a place and moment of change, both in terms of Indigenous reterritorialization as well as the ways that territory and boundaries are understood and enacted. Instead of a mechanism of explicit “othering,” territories can be understood as relational spaces, and boundaries conceived as tools that organize and regulate relations. I argue that conceptualizing territory as a set of inter-connected networks with articulated limits is a key element of understanding Indigenous territorialities within processes of Indigenous-Crown negotiation in BC.

Drawing from literature and interviews, in Chapter 5 I bring the discussion back to overlap disputes in BC, with particular attention to the dysfunctional ways overlap disputes have generally been managed in the context of the BC treaty process. The purpose of the chapter is threefold: 1) to explain the contexts in which overlap disputes arise; 2) to describe how overlap disputes have been managed; and 3) to argue that a better approach is needed. Evolution of Crown and BCTC policies concerning overlap disputes is critically reviewed. Several case examples are examined, with particular reference to the Crown’s legal duty to consult and accommodate First Nations when actions of the Crown may diminish
Aboriginal rights. The chapter demonstrates that current approaches to overlap disputes in BC are no longer tenable, if they ever were, and identifies barriers to their effective management.

Chapter 6 explores the contested nature of legally defined Aboriginal rights, the sociospatial dimensions of these rights, and how different types of Aboriginal rights can overlap and come into conflict. The chapter also explores different types of Indigenous sociospatial identities and disputes that can arise between different types of Indigenous polities. A number of ambiguities and internal contradictions in law are identified, which evinces the idea that the law of Aboriginal rights is far from fully developed. Drawing from interviews and literature, case examples highlight difficult tensions between political processes of negotiation and the application of legal criteria for defining Aboriginal rights and rights-holding collectives – the sociospatial dimensions of claims and settlements.

Chapter 7 is devoted to exploring how overlap disputes have been managed in New Zealand, and identifying principles and processes employed in New Zealand that have utility for achieving clarity of Indigenous jurisdiction in BC. The chapter engages with the problematic nature of overlap disputes in New Zealand, and particularly how disputes have been managed by three intuitions: ordinary courts, the Maori Land Court, and the Waitangi Tribunal. The chapter focuses particularly on the role of the Waitangi Tribunal, which functions as a culturally-attuned historical inquirer and a provider of independent oversight of the treaty settlement process. The Waitangi Tribunal has rendered a significant body of principles and recommendations concerning overlap disputes. I argue that these principles and recommendations have significant utility for achieving clarity of First Nations jurisdiction in BC.
Chapter 8 concerns overlap disputes in Australia. As with the chapter on New Zealand, the purpose here is to explicate the contexts in which overlap disputes arise, how they have been managed, and to identify principles and processes employed in Australia that have utility for achieving clarity of Indigenous jurisdiction in BC. Several key institutions are explored, including Native Title Representative Bodies, the National Native Title Tribunal, and the Federal Court, and particularly their role in managing the legal and political aspects of the issue. The chapter also explores an initiative called the Right People for Country Program, a partnership between Traditional Owner groups and the State Government of Victoria intended to support agreement-making concerning overlap disputes. Approaches to the management of overlap disputes by the National Native Title Tribunal, the Federal Court, and the Right People for Country Program have challenges as well as significant benefits. I argue that some of the principles and approaches employed in Australia have significant utility for achieving clarity of Indigenous jurisdiction in BC.

In Chapter 9 I bring forward processes and principles employed in New Zealand and Australia that have utility for BC, and crystalize the key findings of this inquiry. In this final chapter I address the central question with which this inquiry is concerned: What is the best process for achieving and sustaining clarity of Indigenous jurisdiction in BC? I argue that First Nations and the Crown in BC should work together to implement a legislative framework aimed at achieving clarity of Indigenous jurisdiction on a province-wide basis. I argue that this framework should empower an Indigenous Territories Tribunal to support First Nations and the Crown to develop an exhaustive map of Indigenous territorial jurisdiction on a province-wide basis – a geography of reconciliation.
CHAPTER 2: METHODOLOGY AND METHODS

Research is shaped by the position of the researcher – epistemological, methodological, and personal – which influences the research questions asked, how they are asked and answered, and what is done with the research results (e.g. Tuhiwai Smith 1999; Harding 2004). Research is inherently political not just because the knowledge it produces has political implications but because the entire research process is politically infused. It is thus necessary to explain not only how this project was completed, but why I chose to conduct the research the way I did, and to reflexively examine the underlying assumptions that informed my decisions. Doing so requires exploration of three related topics, which I present as three chapter sections. The first section orients the project to postcolonialism and critical inquiry generally. The intent here is to examine ways in which this work may or may not be considered postcolonial. In the second section I position myself in relation to (and in) the research by discussing how my life and work experiences have influenced the methodological orientation of the project, why I have asked the questions I have asked, and why I choose to engage in this research in the first place. The third section of the chapter summarizes the specific methods employed, such as research participant selection, interview techniques, and data analysis.

Critical Inquiry, Positionality, and Postcolonialism

This project falls within the broad category of critical inquiry in that my objective is to provoke change that furthers a political goal, namely: effective and lawful Indigenous-Crown relations. In this work, I start with the proposition that truth is socially produced, continually contested, and subject to interpretation. Such an epistemological and
methodological orientation is supported by the work of scholars who have paid close attention to the links between power and the production of knowledge (e.g. Foucault 1980), and particularly the ways in which the epistemological and methodological orientation of the researcher influences the production of knowledge (Tuhiwai Smith 1999; Harding 2004). The intersubjective nature of research means that researchers are not just observers of social phenomena and the truth-claims of others. Rather, as researchers, we are actively involved in the production of meaning.

The past few decades – “the postmodern era” – has witnessed a burgeoning of literature questioning the very idea of objectivity, asserting that purportedly objective researchers are not themselves neutral but rather often reflect the social norms and standards of dominant social groups and institutions (e.g. universities). Critical theorists in feminism, for example, argue that such taken-for-granted norms are often masculine (e.g. England 1994; Madge et al. 1997). Neo-Marxist scholars argue that capitalism is not as universally advantageous as many assume, but rather privileges bourgeoisie interests (e.g. Rubinstein 1995). Critical theories of postcolonialism, because of their attention to taken-for-granted assumptions concerning colonialism and Indigenous peoples, have some relevance to the current enquiry.

**Postcolonialism and Decolonization**

Postcolonial research is an eclectic field, ranging from approaches intended to describe and explain colonial expansion to a realm of critical inquiry with the explicit goal of “empower[ing] 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, 26). Broadly conceived, postcolonial research attempts to deconstruct the discourses,
institutions, and practices that produce social oppression and asymmetrical relations of power in colonial contexts (Tuhiwai Smith 1999; Young 2001; Robinson 2003; Howitt and Stevens 2005; Weaver 2005; Gilmartin and Berg 2007). Postcolonial research aligns with other forms of critical inquiry in that it aims to expose and confront “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* justifications for the maintenance of inequalities and the continued oppression of [Indigenous] people” (Tuhiwai Smith 1999, 185-186).

Distinctions within postcolonial scholarship hinge on the degree to which research recognizes the intellectual spaces occupied by the voices of Indigenous people, whether such voices are privileged over others, and whether research is explicitly intended to support the political agenda of the colonized (Gilmartin and Berg 2007). Certainly one could argue that Indigenous voices should be privileged in such inquiry for epistemological reasons. Those experiencing colonialism first-hand have unique and specific insights into impacts of the colonial encounter, as well as, sometimes, distinct ways of understanding the world (Tuhiwai Smith 1999; Howitt and Stevens 2005; Kovach 2009). As Maori scholar Tuhiwai Smith (1999, 187-188) explains, “there is more to Kaupapa Maori [research]26 than our history under colonialism or our desire for self-determination. We have a different epistemological tradition which frames the way we see the world, the way we organize ourselves in it, the questions we ask and the solutions which we seek.” Some scholars working within a postcolonial framework thus seek to challenge and “decolonize” dominant understandings such as those related to land, knowledge, and power (Howitt and Stevens, 2005; Gilmartin

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26 Literally translated, “Kaupapa Maori” means “a Maori way” (Benton et al. 2013).
and Berg 2007; Tuck and Yang 2012). For example, Tuhiwai Smith (1999) suggests that research which is “on” or “about” colonized peoples should be conceived, designed, and carried out in a way that respects the priorities and “cultural ground rules” of Indigenous peoples, which in her view is best done by Indigenous researchers themselves.

I do not claim to employ a postcolonial or decolonizing approach in this inquiry. I prefer not to use the terms “postcolonial” and “decolonizing” metaphorically (Tuck and Yang 2012). Nonetheless, I have attempted to adopt what I believe is the most fundamental principle of a postcolonial orientation. That is, respectful research having anything to do with Indigenous people should have as a goal not “creating space” for Indigenous voices, but rather recognizing that the intellectual (and geographical) spaces of Indigeneity are already profoundly occupied. As I understand it, a fundamental goal of postcolonialism and decolonization is to recognize the prior occupation of Indigeneity, and to hear, understand, and account for these voices. Accounting for these voices is not an easy task. For instance, a fundamental tenant of postcolonial theory is the contention that researchers need to engage with a “broadened understanding of Indigenous perspectives and epistemologies” (Shaw et al. 2006, 268). Yet scholars working in this realm only sometimes acknowledge that “[b]ifurcating ‘Indigenous’ from ‘Western’ is misleading and problematic” (Ibid., 272). At least to some extent a postcolonial approach to research requires generalizations about “Indigenous perspectives and epistemologies” which may obscure underlying diversity and complexity. As Said (1993, 336) notes,

No one today is purely one thing. Labels like Indian, or Woman, or Muslim or American are not more than starting-points, which if followed into actual experience for only a moment are quickly left behind. Colonialism consolidated the mixtures and identities on a global scale. But its worst and most paradoxical gift was to allow
people to believe that they were only, mainly, exclusively, white, or Black, or
Western, or Oriental. No one can deny the persisting continuities of long traditions,
sustained habitations, national languages and cultural geographies, but there seems no
reason except fear and prejudice to keep insisting on their separation and
distinctiveness, as if that was all that human life was about.

Said (1993) thus reminds us that the divide between Indigenous and non-Indigenous
identities – between the colonized and colonizer – is not as sharp as is often assumed.
Nonetheless, there are times when generalizations about culture, such as those concerning
“Indigenous perspectives and epistemes,” serve a worthy purpose. In the realm of
policy and law, for example, there is an imperative to recognize and account for the
perspectives, knowledges, and aspirations of Indigenous peoples – what Canadian courts
have termed “the Aboriginal perspective.” Yet, identities are complicated and plural, which
makes the task of hearing and accounting for Indigenous voices in the realm of policy and
law difficult. Indigenous people often do not speak with one voice. To recognize Indigenous
voices thus requires some generalization, yet not to make generalizations concerning
“Indigenous perspectives” would be to deny their rightful place in policy and law, which in
turn would implicitly support dominant, ostensibly “culturally neutral” social norms when
they are in fact anything but (Kahane 2004).

In a similar vein, geographers such as Marsden and Galois (1995), Blomley (1996),
and Morris and Fondahl (2002) remind us that simplistic distinctions between the powerful
(colonizer) and the powerless (colonized) can also be problematic. Echoing Lefebvre (1991),
for example, Morris and Fondahl (2002, 109) suggest that paying “exclusive attention to the
dominant group’s role in the production of space will misconstrue the complexity of the

process,” which may result in the false portrayal of spaces as “homogenous and devoid of internal difference, ambivalence, or contradiction – the ‘coherence of 'the powerful' overstated” (quoting Massey 2000, 280). These authors thus “challenge caricatures … of Native peoples as ineffectual victims of colonial forces” (Ibid., 122). In this context, “power” does not necessarily mean coercive or corporal power but the power to develop and maintain the discourses – the values, beliefs, and practices – which circulate repetitively until normalized (Foucault 1980). The ability to shape discourse has a weighty influence on shaping political processes and outcomes.

As was noted earlier, a number of problematic discourses interpenetrate the issue of overlap disputes in BC. Exposing and replacing these narratives – their embedded and assumed beliefs, values, and knowledges – requires understanding the power that imbues them. The salient point made by authors such as Foucault (1980), Lefebvre (1991), and Morris and Fondahl (2002) is that while the power to dominate discourse and material outcomes may be wielded primarily by state actors, this is not entirely so. The agency of First Nations needs to be recognized to more fully comprehend the production of space in the sphere of Indigenous-Crown negotiations.

Certainly aspects of postcolonial theory are relevant to this inquiry. The project is consistent with a postcolonial orientation in that it explores and challenges dominant discourses related to how Indigenous sociospatial identities should be operationalized in the realm of Indigenous-Crown relations in BC. The approach I take also diverges from a postcolonial orientation in a significant way: the overarching purpose of this project is to benefit society as a whole, which of course includes First Nations. If postcolonial research is that which is intended to privilege the voices and interests of the colonized over the
colonizer, or which relies upon an unambiguous distinction between the two, then this project is decidedly not postcolonial research. My intent is to contribute to a solution in the interest of society as a whole, of which First Nations are a tremendously important part.

**Positioning Myself**

This project has its origins in my long-standing interest in how Indigenous communities – and rural communities generally – might be better accommodated within processes of natural resource management and allocation. The way I frame the primary research question, and the project’s findings, are influenced by my life and work experience. The following is intended to explain how my orientation to the topic of overlap disputes has influenced my approach to the study and its findings.

My personal and work life has intersected with First Nations in a number of ways. I have spent much of my life on the rural coast of BC, where Indigenous people often outnumber non-Indigenous. Some of my fondest childhood memories are of catching and riding the free-roaming horses that often gravitated to the Indian Reserve close to where my family lived. There was something of a “you-can-ride-‘em-if-you-can-catch-‘em” understanding within the community (no saddles, and bridles optional if you were feeling especially brave). At the time I did not think of the Indian Reserve as a separate community. To me there did not seem to be a difference between “native horses” and “non-native horses” or between native and non-native kids. We were just kids trying to catch and ride horses, including my own (easy to catch) horse, and there was a lot of sharing.

As a young teenager in the mid-1970s, I worked on a First Nation-owned salmon seiner for a summer. At the time it did not seem unusual to me that I was the only “white guy” on an otherwise all-Indigenous crew. What mattered was that I knew my way around
boats, I worked hard, and I knew how to cook. My claim to be a good cook, like my answer when asked how old I was, was somewhat exaggerated! I was taken under their wing and taught the ropes. Perhaps it was naiveté if not the “hippy-ish” feel of the time and place, but my sense is that “our community” is more divided now than it was then – our common-ground no longer assumed. From these early beginnings, though, sharing, learning, and partnering with First Nations have been almost constant in my life and work.

From the early-1990s until recently I worked primarily as a cartographer and a natural resource analyst, specializing in GIS, land use planning, and applied research. For about 15 of the past 25 years I worked for and with a number of First Nations in BC and in the Northwest Territories, including Indian Bands, a tribal council, a land use planning committee, and a group of hereditary Matriarchs and Chiefs. For a three-year period I lived and worked in a remote First Nation village managing a traditional land use and occupancy research project, researching and mapping traditional territory, among other things. My work with First Nations has focused mainly on supporting land use planning and treaty negotiation, and helping build mapping and research capacity in First Nation communities.

I also worked for the Government of BC for eight (long) years, as a consultant and analyst, prior to leaving government to pursue graduate studies. I have been thinking about completing this project for about 20 years, since my work with First Nations began in earnest in the mid-1990s. In 2011 I completed the first phase of the project, a Master thesis focused on the causes and implications of overlapping claims in BC (Turner 2011; see also Turner and Fondahl 2015). In 2012 I was interviewed by Canadian First Nations Radio (CFNR) concerning my Master thesis. I quote from the interview to explain some of the propositions I brought to this inquiry:
We are an incredibly diverse, multinational province. There isn’t one particular formula that will result in success everywhere. Success will be defined differently in different areas. But I think there are three principles that are fundamental to moving the treaty process forward … the idea of a truth commission, the idea of an impartial, research-based process … [and] the idea of bringing legal principle to bear.

When you look at the [treaty] process as it stands now, there isn’t much opportunity for Indigenous people to tell their side of the story, to tell their history from their own perspective. And I think that’s a fundamental shortcoming. If you talk to any trauma counsellor – and let’s face it, there’s been a lot of trauma – they will tell you that healing requires facing up to what’s happened, which is something I don’t think has happened to the extent that it needs to. The treaty process in BC is very future-focused, which is very different than a truth and reconciliation process, such as the one for residential schools, or truth and reconciliation processes employed in South Africa, or South America, or in New Zealand. An important part of the process is that people tell their stories and have them recorded and acknowledged.

I also believe that the process needs to be research-based. It needs to be based on the geopolitical history of different groups, on the Indigenous legal systems of different groups. So it’s very important that the process be staffed by people with the right expertise … who are equipped to hear evidence in different ways, in different languages where required.

There’s also the legal question. Does the approach of basically ignoring contested territorial claims actually undermine the legal legitimacy of treaty-making? I don’t think we have been paying enough attention to these kinds of issues. It’s my hope that, by bringing more focus to these kinds of questions; by, for example, employing a commission of inquiry-style institution to research these things, not only would we learn more about Indigenous systems of territoriality, we would, at the same time, learn more about the common law of Canada. What we’re working towards is a state of legal pluralism, one that acknowledges and accommodates Indigenous legal systems within the common law of Canada.

For example, a commission of inquiry-style institution [for addressing overlap disputes] could use a phased approach: information gathering, a semi-formal process where people offer testimony and tell their stories, and examination of the documentary record. The next phase would be mediation: the mediation of disputes between First Nations, or between the Crown and First Nations, or a combination of
both. There also may be really intractable disputes that require a recommendation be made, if not adjudication. But this is very different from the conventional legal system which produces winners and losers. I think this kind of commission of inquiry approach has a much greater potential to come up with solutions that are acceptable to everyone (CFNR 2012).

My life, work, and academic experience thus prevent me from claiming the neutrality of an objective bystander in this inquiry. As all researchers do to some extent, I came to this project with a number of propositions already in mind, that I believed warranted closer examination. I also have a personal goal in pursing in this research. This project is very much compelled by my desire to support what I believe is an important and just cause: to achieve and sustain an effective and lawful Indigenous-Crown relationship. Lawful Indigenous-Crown relations in BC encompasses the right and ability of First Nations to exercise self-determination, which includes the ability of First Nations to effectively participate in decision-making concerning lands and resources. The imperatives are twofold: There is the immediate imperative of efficacy captured by the term “effective”. “Lawful” refers to a process and outcomes that are true to the spirit and intent of the law of Aboriginal rights, which encompasses both state and Indigenous legal systems (discussed Chapters 3, 5 and 6). Both of these imperatives align with the interests of society as a whole, which of course includes the interests of First Nations. Clarity of First Nation jurisdiction matters a great deal because without it First Nations cannot effectively participate in decision-making concerning lands and resources, which undermines effective and lawful Indigenous-Crown relations.

This is the ontological, epistemological, and thus methodological position from which I pose the core question of this project: what is the best way to achieve and sustain clarity of Indigenous territorial jurisdiction in BC? Other researchers might prefer to pose the question differently, for example by framing overlap disputes as a First Nations-only
issue: e.g. “how should First Nations address overlap disputes?” The question can also be framed in terms of Crown-only options: e.g. “how should the Crown decide which First Nations to deal with concerning contested territory?” I understand the issue of overlap disputes as fundamentally about relationships – relationships among First Nations and between First Nations and the Crown. I have chosen to focus on these relationships because I believe this approach best supports the interests of society as a whole.

The approach I take with this research is influenced by lessons I have learned from First Nations over the years, from sharing horses, to learning to work a commercial salmon seiner, to partnering with First Nation to research and map traditional land use and territories. The findings of this research are in many ways similar: I argue that effective management of overlap disputes requires sharing information, learning about and harmonizing legal systems and policies, and creating an Indigenous-Crown partnership in the interest of all citizens of BC. My time working for the Crown also influences the research in that it strengthens my hope that the recommendations developed through this work will be implemented. Based on my work experience and interviews with government officials, I believe Crown actors understand the need for clarity of First Nations territorial jurisdiction. Current approaches to the issue are profoundly dysfunctional primarily because we have yet to create a better option.

Crown actors have been too quick to implement a largely unilateral, Crown-only process for assessing the character and strength of First Nation claims, rather than proactively supporting a process that relies upon First Nations expertise on such issues (discussed in Chapter 5). Yet this, in my view, was/is not done with malicious intent. The approach adopted by Crown actors was and continues to be a consequence of two factors:
1) a need to be able to demonstrate that the Crown is fulfilling its minimum due diligence requirement with regard to its duty to consult and accommodate; and 2) lack of a better way to address the core question with which this inquiry is concerned. My hope is that this research will contribute to more effective and lawful outcomes by creating a framework that clarifies and thus strengthens Indigenous-Crown relations.

**Methods: A Qualitative, Multi-case, Instrumental Case Study**

A qualitative case study involves systematic research of a bounded system with focus on an issue or set of issues illustrated by a case or cases (Creswell 2007; see also Eisenhardt 1989; Baxter and Jack 2008; Flyvbjerg 2011). Case studies can be single-site or multi-site. In the latter, the object of study is examined in different geographical locations. Case studies are further distinguished by whether research focuses on an entire case or cases (a holistic case study), or on themes or analytical aspects within a case or across multiple cases (an instrumental case study) (Eisenhardt 1989; Creswell 2007).

This project employs a qualitative, multi-case, instrumental case study approach to explore the management of overlap disputes in three geographic regions: BC, Australia and New Zealand. Research questions are explored in two ways: 1) through review and analysis of documentary sources; and 2) through interviews with purposefully selected individuals with expertise on overlap disputes. While most closely aligned with the discipline of human geography, this project does not explicitly adhere to a single disciplinary framework. Instead, I take a post-disciplinary approach to this research (e.g. Gregson 2003; Painter 2003; Shaw et al. 2006), drawing from academic disciplines which provide scholarly insight into the subject of inquiry regardless of disciplinary origin or orientation.

This study employs the following components: 1) development of preliminary
propositions; 2) purposeful sampling; 3) data collection; 4) data analysis and identification of
in situ (case) themes; 5) cross-case and contextual analysis of themes and propositions; and 6)
the development and presentation of findings, assertions and recommendations (see, e.g.,
Eisenhardt 1989; Creswell 2007; Baxter and Jack 2008; Flyvbjerg 2011). Research
propositions and related questions have already been discussed (see Chapter 1 and
discussion quoted from my 2012 interview with Canadian First Nations Radio). I have
chosen to focus on BC as a case, as opposed to Canada more generally, for two reasons: 1)
unlike other provinces, historic treaties were not settled in almost all of BC, and thus the
Governments of BC, Canada and some First Nations in BC are engaged in a treaty
negotiation process that is unique to BC; and 2) in BC, the Crown has adopted policies
concerning overlap disputes different from those in the rest of Canada (discussed in Chapter
7). I choose to examine New Zealand and Australia as cases because they are both engaged
in settlement processes with Indigenous peoples that are also challenged by overlap disputes.

The next step in a qualitative (multi) case study is the collection of data related to
each case. This project engages with data in three broadly conceived domains of inquiry: 1)
the legal and political context of each case; 2) specific political, judicial, and quasi-judicial
processes aimed at managing overlap disputes in each case; and 3) critique that identifies the
challenges and benefits associated with how overlap disputes are managed in each case, such
as those concerning efficacy and lawfulness.

**Literature-based data collection**

The project draws from a wide range of literature sources, both academic and gray.
Scholarly literature consulted includes books, chapters, and articles generally associated with
six academic disciplines: 1) human geography; 2) alternative dispute resolution; 3) political
science; 4) legal studies; 4) anthropology; 5) sociology; and 6) First Nations studies. There is of course much overlap among these disciplines and literature. The project also draws extensively from case law (court decisions), statute law, policy documents, and reports, particularly those produced by the BC Treaty Commission, the Waitangi Tribunal of New Zealand, and the National Native Title Tribunal of Australia.

The issue of overlap disputes is an underdeveloped area of academic inquiry in BC, and in Canada generally. One of the challenges is that reports concerning specific overlap disputes are rarely available, likely for two reasons: 1) negotiations/mediation concerning overlap disputes are often confidential to the disputing parties; and 2) many of the negotiations fail, and thus make for less-than-flattering reports for dispute management professionals. In contrast to BC, a significant body of literature concerning overlap disputes in Australia and New Zealand is available. Literature was identified through database searches and recommendations of interview participants. I reviewed over 700 documents (articles, book chapters, reports, court decisions, etc.) for this study, with well over 300 hundred cited in this dissertation. Literature was analyzed in the same manner as interview text, as discussed below.

Interviews

Semi-structured interviews with purposefully selected research participants (interviewees) were conducted in each of the three jurisdictions of interest. I interviewed 63 individuals, split almost evenly among BC, New Zealand and Australia. Selection of research participants was based on theoretical sampling (Babbie 2007; Creswell 2007): that is, based on participants’ expected expertise concerning the topic of inquiry, which I estimated based on the work experience of potential participants, publications (if any), and on
recommendations of other participants. At the outset, my intention was to interview individuals from four broad heuristic categories: 1) Indigenous leaders, including leaders of Indigenous groups that have contested or are contesting treaty settlements because of overlap disputes, as well as leaders of groups trying to settle treaties in contested areas; 2) advocates of Indigenous groups, such as negotiators and lawyers; 3) Crown actors, such as high-ranking public officials, negotiators, and lawyers who have acted on behalf of the Crown in the context of overlap disputes; and 4) judges sitting in ordinary courts, Commission and Tribunal staff and members, and scholars.

In this work I took a high, policy level approach, whereas another researcher might have followed a more grass roots path by analyzing the perspectives of people who understand overlap disputes in a different way. About half of the 63 individuals interviewed self-identify as Indigenous (see Appendix A for brief biographies of research participants). That other perspectives have a prominent place in this research (e.g. negotiators, judges, scholars, lawyers and Crown actors, many of whom are also Indigenous) is a product of their expertise, and the overarching intent of this project – to benefit society as a whole, as articulated by a broad range of perspectives. To give the reader a better understanding of who I interviewed, the following provides an approximate characterization of research participants by current vocation, while also cautioning that current vocation is not the same as past or future vocation, and that many participants had and have multiple concurrent vocations. These descriptions overlap considerably:

- Legal practitioners, including lawyers and judges, some of whom at different times have acted for Indigenous groups involved in overlap disputes, or acted on behalf of
the Crown in matters related to overlap disputes, or rendered judicial decisions or quasi-judicial recommendations concerning overlap disputes;

- Public officials, such as senior Crown negotiators, department heads, and assistant deputy ministers who have directed Crown policy concerning overlap disputes;

- Scholars, Commission staff and Commissioners, and Tribunal staff and Members, some of whom have also produced scholarly work on overlap disputes, or have acted on behalf of Indigenous groups, and/or the Crown; and

- Indigenous leaders and First Nations advocates, such as senior negotiators directly involved in overlap dispute negotiation, mediation, and litigation.

The people interviewed for this project are thus not easily categorized. Common to almost all participants is their direct experience with overlap disputes. In Appendix A I have attempted to provide sufficient information concerning the experience of participants for the reader to understand how each participant’s experience may have informed their opinions.

I used a snowball sampling approach (Babbie 2007) to identify potential research participants, starting with email inquiries to people I knew from my work experience, from literature, and people suggested by members of my PhD committee. I received replies to almost all the email queries I sent out, nearly all of which contained words of encouragement, recommendations on literature, and suggestions on people I might interview. Indeed, email responses from potential participants reflect a widely-held opinion I encountered while working on this project generally: the issues with which this project engages are of tremendous practical importance in all three of the regions studied. In many cases not only did participants recommend other potential participants, they also sent emails
of introduction on my behalf, which was critical to gaining access to some political elites.

**Research Ethics and Interview-based Data Collection**

Principles set out in the *Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans* (2010, 2014; hereafter “TCPS”) imbued all aspects of my interview research, from initial participant recruitment to having some participants review a near-complete draft of this document to ensure their ongoing consent to be identified and quoted. Many of the people interviewed – e.g. First Nations leaders, senior government officials, negotiators, tribunal officers and members – occupy very high profile positions and are vulnerable to public scrutiny. I was incredibly fortunate that many of the people interviewed spoke candidly on a controversial topic, and sometimes in ways that could have damaged their careers if taken out of context or mis-represented. The following paragraphs describe the research process I followed and how I integrated ethical principles of research at each step.

Interviewing began in late 2012 and was completed by mid-2014. All but three of the interviews were conducted in person, in various settings such as university meeting rooms, restaurants, and participants’ offices and homes. Three interviews were conducted by video conference (Skype). I traveled to New Zealand and Australia for five weeks in early 2013, and again for five weeks in early 2014 to conduct interviews. Several research trips were made throughout BC in 2013 and 2014, such as to the Nass Valley, Terrace, Hazleton, Powell River, Vancouver, and Victoria. Each of the 63 participants interviewed added to my knowledge of the issue, often in unexpected and profound ways. While not all are cited in this dissertation, the contributions of all 63 research participants are reflected in this work, and I am very grateful to each, as well as to people who were not formally interviewed but who generously introduced me to key literature and people.
I approached the interviews as an opportunity to identify and explore issues and themes, and to critically interrogate the propositions described earlier. I employed a semi-structured interview method (Kirby and McKenna 1989; Dunn 2005; Babbie 2007): that is, I used an interview guide comprised of open-ended questions to gently steer interviews towards the project’s research questions. Interviews encompassed four stages. First, emails with potential participants were exchanged. To ensure fully informed consent, the initial email sent to potential participants contained information about the project’s rationale, purpose, questions, methods, and protocol for the management of information shared during an interview. The initial email indicated my preference for the interview to be audio recorded but also offered an opportunity for anonymized participation and/or for the interview not to be recorded. The initial email also asked the potential participant to review a consent-to-participate form.

The face-to-face portion of the interviews began with a discussion of information contained in the initial email. At my prompting, some participants indicated that they preferred to wait until the end of the interview before deciding whether they wanted to participate anonymously. Of the 63 people interviewed, seven chose not to have their identity disclosed, five chose not to have the interview audio recorded, and seven had no objection to being recorded or identified on the condition that they have an opportunity to review a draft of the dissertation text in which they were identified. I interview 56 participants individually, with five choosing to be interviewed in groups of two and three. Four participants were interviewed twice. 57 interviews were audio recorded. Interview length ranged from 30 minutes to five hours, resulting in 75 hours of audio recordings. Most interviews were about an hour in length. All recorded interviews were fully transcribed,
resulting in just fewer than 1300 pages of interview transcripts.

The second stage of interviews focused on broad questions concerning overlap disputes, such as those pertaining to what the term “overlapping claims” means, whether and how overlap disputes are problematic, and what it means to “successfully resolve” an overlap dispute. Early in each interview I encouraged participants to talk about their views concerning the source, salience, and implications of overlapping claims, and the ways overlap disputes effect Indigenous-Crown relations. The content of the third stage of interviews depended on the specific expertise of each participant. Where appropriate, I prompted participants to explain how overlap disputes had been managed in their experience, and then encouraged them to speak about issues associated with such approaches, such as those related to efficacy, ethicality, and legality. The fourth and final stage of the interviews involved participant verification of transcripts, discussed below.

Interviews produce large amounts of data impossible to analyze if not converted to text and systematically organized. Audio-recording and transcription of interviews provide a number of benefits. First, recording interviews allows the interviewer to focus on active listening and thoughtful prompting/questioning, rather than on note-taking. Second, it provides for verbatim transcription and accurate quotation (Kirby and McKenna 1989; Dunn 2005; Baylis 2007). And third, when transcripts are provided to participants for verification, transcription provides an opportunity for participants to reflect on the information they provided, make revisions or additions they deem appropriate or, in the event that they may have second thoughts, withdraw from the research entirely (TCPS 2014).

Most of the recorded interviews were transcribed by professional transcriptionists, all
of whom signed a non-disclosure agreement. I personally transcribed about twenty percent of the recorded interviews. An “intelligent verbatim” transcription technique was employed: that is, each word appearing in the transcript was transcribed with fidelity to the recording, but with verbal expressions omitted where they did not add meaning (e.g. “ums” and “ahs”) (Dunn 2005; Bayliss 2007). After initial transcription, I carefully compared each audio recording with the transcript of each recorded interview and modified the transcript where necessary to ensure fidelity of punctuation and content. I then sent the transcripts by email to respective participants with an invitation to edit, add, or remove from their transcript any of the statements made. Only five research participants choose to return an edited transcript to me. Most participants indicated by reply email their decision not to edit the transcript, and that they looked forward to receiving a copy of the finalized dissertation. A near-complete draft of this dissertation was sent to interview participants who asked to review the draft prior to confirming their ongoing consent to be identified and quoted.

**Data analysis and identification of in situ (case) themes**

Large volumes of text are difficult to interpret without a systematic method of organization, synthesis, and abstraction. Qualitative methods literature discusses a range of techniques that can guide such an interpretive process, all of which require the researcher to comprehend data, ascribe preliminary meanings, theorize relationships, and contextualize data into findings. Following methods outlined by Kirby and McKenna (1989), Ryan and Bernard (2000, 2003), Cope (2005), Dunn (2005), and Perakyla (2008), I employed an inductive process of constant comparative analysis of text comprised of three stages:

1. The first stage involved an iterative process of “margin coding” in which sections of text relevant to the inquiry were electronically copied to a sortable table and assigned
preliminary descriptive keywords (Kirby and McKenna 1989; Cope 2005). These sections of text were generally three to six sentences.

2. In the second stage I developed a set of thematic categories, involving an iterative process of identifying and defining descriptive (manifest) and analytic (latent) categories within which text sections seemed to fit (Ryan and Bernard 2003; Cope 2005). Sections of texts where then sorted, and relationships re-examined to determine whether and how preliminary categories needed to be merged, split, and/or if new thematic categories needed to be created (Kirby and McKenna 1989; Cope 2005; Dunn 2005). Qualitative methods literature often describes this stage as codebook development (Kirby and McKenna 1998; Ryan and Bernard 2000, 2003; Cope 2005; Perakyla 2008).

3. Once preliminary categories were reasonably stable – that is, when additional analytical iterations did not change the categories or their meanings – I assigned each section of text a code associated with the thematic category (Kirby and McKenna 1989; Cope 2005).

The three cases – BC, Australia and New Zealand – were first examined separately, in order for themes unique to each case to emerge independent of themes from other cases. I initially kept the propositions discussed earlier “bracketed” from the development of analytical themes (Creswell 2007; Babbie 2007). In other words, the initial propositions did not influence the development of themes derived from interviews in order for themes from interviews to emerge inductively (Kirby and McKenna 1998; Ryan and Bernard 2000, 2003; Cope 2005; Perakyla 2008).
Cross-case analysis, synthesis, and development of assertions and recommendations

Cross-case analysis involves comparing and contrasting themes across multiple cases. The overarching purpose of cross-case analysis is to encourage consideration beyond initial impressions based on findings in each case, which in turn may reveal opportunities to integrate or transpose themes from one case to another (Eisenhardt 1989; Creswell 2007; Baxter and Jack 2008). Comparison and integration of analogous in situ case themes has produced more sophisticated understandings than those derived from singles cases. Indeed, as discussed in Chapter 9, cross-case analysis demonstrates an opportunity to transpose a number of profoundly important principles and processes for the management of overlap disputes from Australia and New Zealand to BC.

Another component of multi-case studies is comparison of literature with themes derived from primary research. As already noted, little scholarly attention has been paid to overlap disputes in BC, and even less directed at processes for managing them. Little attention has been paid to a set of critical questions: How should overlap disputes to be managed in instances where Indigenous territorial relations are so interwoven that conventional boundary agreements are near impossible? How should overlap disputes be managed in instances where an underlying cause of disputes is a lack of commonly accepted criteria for defining Indigenous territorial claims? How should overlap disputes be managed where First Nations are unable to reach agreement? What should be the role of the Crown with respect to the issue? How, if at all, should Indigenous and state legal systems be employed in the management of overlap disputes? How can lessons learned from the experiences of Australia and New Zealand inform the management of overlap disputes in BC? Because of these gaps, there is little with which to compare this project’s conclusions
and recommendations. Indeed, the conclusions and recommendations presented in Chapter 9 in most respects are unique in the academic literature.
CHAPTER 3: MANAGING OVERLAP DISPUTES: A REVIEW OF LITERATURE

What does it mean to effectively and lawfully manage overlap disputes?

Conventional approaches to conflict management hold that justice is satisfied through unbiased adjudication based on widely accepted principles and procedures. Ordinary courts, for example, administer law by determining facts and applying legal precedent and reasoning. This model of ostensibly impartial adjudication is sometimes challenged on the grounds that it is predicated on culturally-specific understandings, and thus privileges some social groups to the detriment of others (Kahane 2004; Bell 2004; Behrendt and Kelly 2008). Challenges to purportedly neutral adjudication have prompted the development of alternative approaches to dispute resolution in both inter- and intra-cultural contexts. Efforts to apply such Alternative Dispute Resolution (ADR) processes in the context of overlap disputes raise a number of difficult questions: What are these processes intended to achieve? Who are the decision makers? What should be the role of people with specific knowledge concerning a dispute, such as Indigenous elders and other knowledge holders? What criteria should form the basis of decision-making? What structure of decision-making will produce outcomes that are accepted as legitimate? What if the parties to a dispute are unable to agree on the dispute resolution process itself? Is there a role for adjudication, and if so on what basis?

Drawing from literature on alternative dispute management in Indigenous contexts generally, and with particular attention to literature on overlap disputes in BC and Australia, this chapter provides a foundation for understanding these and related questions. This chapter is presented in three major sections. This first section canvasses literature on overlap disputes in BC generally. Two paradigms of dispute resolution are then explored: Alternative Dispute Resolution (ADR) and Indigenous Dispute Resolution. I use the somewhat
The chapter then turns to Indigenous dispute resolution processes; that is, processes that are defined and controlled by Indigenous people, and that draw primarily from, if not exclusively from, Indigenous values and legal systems. It should be noted at the outset that it is not my intention to attempt to dichotomize the two paradigms. To attempt to do so would require excessive generalizations, such as those imagining an unambiguous divide between exogenous and endogenous ideas and practices (Robbins 2004; Kahane 2004; but see also Walker 2004; Victor 2007). As Kahane (2004, 38) suggests, a key consideration thus relates to the goals of dispute management, and “what sorts of generalizations about cultural values will conduce or thwart these goals?” Heeding Kahane’s (2004) caution I will make my intent explicit: the goal of the third section is to synthesize literature related to employing Indigenous legal systems in the context of overlap disputes in BC. As will be shown, however, I do not view such processes as purely endogenous to state law. The forth section of this chapter provides a synthesis of prominent themes in the literature concerning both paradigms. In subsequent chapters I use these themes to interrogate the proposition that an endogenous Indigenous Territories Tribunal, as compared to many of the processes discussed in this chapter, is the best strategy for achieving clarity of Indigenous jurisdiction.

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28 By “exogenous ideas and practices” I mean cultural traits developed without influence of others cultures, whereas “endogenous ideas and practices” are produced in relation to and with “other” cultures (see, e.g., Robbins 2004).
on a province-wide basis.

Towards An Effective Strategy for Managing Overlap Disputes in BC

Only a handful of scholars have directed attention to overlapping claims in BC (Sterritt et al. 1998; Sterritt 1999; Thom 2009; 2014; Dickson 2011, 2014; Turner 2011; Turner and Fondahl 2015) and Canada more generally (Knight 1982; Wonders 1988; Usher 2003; Nadasdy 2003, 2012; Ray 2005). While this literature is generally more concerned with the causes and implications of overlapping claims than with processes for addressing overlap disputes, it does offer a number of important considerations. Scholars such as Ray (2005), Banks (2006), and myself (Turner 2011), for example, have explored how judicial constructions of Aboriginal rights can lead to overlapping claims in the political sphere. This is so because different kinds of Aboriginal rights invoke different spatialities, which may be shared among First Nations or, in other circumstances, be geographically exclusive to one First Nation. Moreover, the manner in which state law has defined the Aboriginal collectives in which rights are vested may be different from the way First Nations have chosen to politically organize for treaty purposes. Such disjunctures are symptomatic of a difficult tension between BC’s overtly political process of treaty negotiation and how Canadian courts have defined Aboriginal rights and rights-holding Indigenous collectives (discussed in Chapters 5 and 6).

Anthropologists such as Nadasdy (2003, 2012) and Thom (2009, 2014) remind us that “‘[c]ommon-sense’ notions of territory put forward for treaty negotiation are ‘not simply formalizing jurisdictional boundaries among pre-existing First Nations polities … they are mechanisms for creating the legal and administrative systems that bring those polities into being” (Thom 2014, 18 quoting Nadasdy 2012, 503, emphasis in original). From this
perspective, “the language of overlap emerges from the creation of these political institutions and the ensuing ethno-territorial identities and corresponding nationalist sentiments” (Thom 2014, 18). Thus, according to Thom (2014, 18), overlap disputes are “pressing and intractable problems because the solutions demanded by the state—the delineation of contiguous, bounded, exclusive territories—require Indigenous peoples to fundamentally reimagine both territory and territorial relations.”

Nadasdy (2003, 2012), Thom (2009, 2014) and others employing similar frameworks globally (e.g. Roth 2009; Sletto 2009; Hennessey 2013) suggest that “overlapping claims” may be due as much to disjunctures between “Indigenous territorialities” and “state territorialities” as they are due to intra-Indigenous disputation. It is also worth questioning whether dichotomizing state and Indigenous territorialities is always appropriate, and whether overlap disputes are indeed problematic because of such disjunctures, as Thom (2014) and others seem to suggest. After all, First Nations in BC are making overt statements of explicitly bounded territory and vigorously defending these boundaries through litigation and political means. To suggest that First Nation’s territorial claims are only responding to “solutions demanded by the state” (Thom 2014, 18) may be to underestimate First Nation’s agency in the process. Nonetheless, disjunctures between Indigenous and state territorialities are implicated in the issue of overlap disputes, which begs the question of whether boundaries, as conventionally understood, are an appropriate way to represent Indigenous rights and territorialities in Indigenous-Crown negotiations. In subsequent chapters I develop a framework that accommodates nuanced Indigenous territorialities while also supporting effective and lawful Indigenous-Crown relations.

With few exceptions scholarly inquiry in BC has not been directed at processes for
managing overlap disputes. Sterritt and others (1998), for instance, have contributed to our understanding of the issue, yet their work was intended to support only one perspective in a specific dispute. The positional arguments of lawyers who act on behalf of clients involved in overlap disputes should also be regarded as such. Generally, this literature falls into one of two “camps”: 1) lawyers who advocate for First Nations close to settling a treaty, who argue that current approaches to the management of overlap disputes are effective and lawful, and thus that Treaties should be settled despite unresolved overlap disputes (e.g. Arvey 2007; East 2009); and 2) lawyers who advocate for First Nations with claims which overlap with proposed treaties, who argue that treaty settlements should be delayed until overlap disputes are addressed (e.g. Devlin and Thielmann 2009). Even the BCTC, the purportedly neutral facilitator of the BC treaty process, has an explicit mandate to support treaty settlements, which in some cases may conflict with the interests of First Nations not in the treaty process. Much of the literature on overlap disputes in BC has been authored by those with a political agenda or a specific mandate to advocate for particular First Nations.

Relevant literature is also found within the broader domain of dispute resolution in Indigenous contexts generally (e.g. Bell 2004; Kahane 2004; LeBaron 2004; Lowe and Davidson 2004; Macfarlane 2004; Walker 2004; Victor 2007; Osi 2008; Adebayo et al. 2014), as well as those focusing on the application of Indigenous legal systems in dispute management (e.g. Borrows 2002, 2010; Chartrand 2004; Napoleon 2004, 2007b, 2009; Napoleon and Overstall 2007; Christie 2009). Literature on overlap disputes in BC is fairly consistent on a number of issues, such as preference for negotiated (as opposed to litigated) outcomes, the importance of incorporating First Nations knowledge and values into such processes, and recognition that flexibility is required to accommodate the diversity of
Indigenous cultures and disputes in BC (BCTC 2010; Dickson 2011, 2014; Sigurdson in BCTC 2014; George in BCTC 2014; Henry in BCTC 2014; Stuart in BCTC 2014; Turner and Fondahl 2015). The literature also diverges on a number of key points, such as on the utility of historical evidence, whether third-parties such as facilitators, mediators, or arbitrators should intervene, and the extent to which the law of Aboriginal rights should be considered in decision-making.

Comparatively, scholars and dispute management practitioners in Australia and New Zealand have paid far more attention to overlap disputes than in BC. As in BC, overlap disputes in Australia and New Zealand often center on two related issues: 1) disputation concerning the spatial extent of claimed territory; and 2) conflict concerning which Indigenous polities should be negotiating with the Crown on behalf of Indigenous rights-holding collectives. The legislative framework of Australia, with its emphasis on exclusivity of Indigenous claims, is the context for particularly divisive conflicts, with disputes concerning Aboriginal group composition often provoking disputes about territorial claims, and vice versa (e.g. Merlan 1997; Sutton 2010; Kelly and Behrendt 2007; Behrendt and Kelly 2008; Bauman 2005, 2006, Bauman and Pope 2009; Burnside 2012; Bauman et al. 2015).

While the treaty settlement process in New Zealand is also challenged by disputes concerning territory (e.g. Dawson 2004; Waitangi Tribunal 2001; 2007a, 2007b; Vertongen 2012), it grapples primarily with contestations concerning Indigenous group composition and representation (e.g. Wainwright 2002; Poata-Smith 2004; Dawson and Suszko 2012; Joseph 2012). Common to the Australia and New Zealand cases is that their claims/treaty processes both employ quasi-judicial, commission of inquiry–style institutions – The National Native Title Tribunal (NNTT) in Australia and the Waitangi Tribunal in New

Zealand – to support Indigenous-Crown negotiations, including aspects related to overlap disputes. As will be discussed in subsequent chapters, aspects of these processes have profound utility for the management of overlap disputes in BC.

**Alternative Dispute Resolution: A Panacea to Overlap Disputes?**

**Mediation**

The most recognizable form of conventional ADR is mediation, which is described as an “intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power … who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute” (Moore 2003, 20). Mediation is a consensual process intended to assist parties to reach agreement. The goal is “to create a process that is meaningful to the parties and improves relationships, participation, responsibility, and satisfaction” (Bell 2004, 257). Mediation is distinguished from negotiation by the presence of a neutral third party who assists the parties to a dispute to define the process and issues to be decided, improve dialogue, and sometimes make recommendations concerning possible solutions (Jones 2002; Pirie 2004; Moore 2003; Rush 2009; Osi 2008).

Many dispute resolution professionals contend that mediation is well suited to the management of overlap disputes in BC (e.g. BCTC 2010; Ready and Bell in BCTC 2014; Sigurdson in BCTC 2014; Henry in BCTC 2014). In Australia, mediation of overlap disputes is not only promoted by dispute resolution practitioners but is required under the Australian *Native Title Act 1993* (s. 94d; see also, e.g., Jones 2002; Bauman 2006, 2008; Bauman et al. 2015). Such authors generally argue that mediation, when done in “culturally appropriate” ways, allows Indigenous disputants to control or at least influence the process of dispute management (Jones 2002; Macfarlane 2004; LeBaron 2004; Bauman 2006; Osi 2008; George
in BCTC 2014; Henry in BCTC 2014). Fair and durable agreements are reached, they argue, by having disputants themselves select a mediator and define the purpose of mediation, the desired outcome of the process, and issues to be decided. A range of approaches are employed within the broad framework of mediation, with distinctions often centred on whether processes are confidential to the parties, the extent to which parties present evidence for consideration (and the forms of evidence), and whether mediators make recommendations concerning resolution (Moore 2003; Rush 2009; Osi 2008; Ready and Bell in BCTC 2014).

Major reasons often offered for preferring mediation over litigation are that it increases efficiency, reduces costs, and empowers disputing parties with some control over process and outcomes (Moore 2003; Bell 2004; Behrendt and Kelly 2008; Osi 2008). Moreover, some authors argue that mediation can be a process that integrates, in a neutral and elicitive way, the values of those involved, and thereby produces agreements more acceptable to disputing parties (Jones 2002; Bell 2004; Webber 2004; Bauman 2006; Bauman and Pope 2009; Rush 2009; BCTC 2010; Ready and Bell in BCTC 2014; Henry in BCTC 2014; Sigurdson in BCTC 2014; Henry in BCTC 2014). Given the popularity of mediation for addressing overlap disputes, it is somewhat surprising that so little inquiry has focused on the barriers to addressing overlap disputes, or on the efficacy of mediation for addressing these barriers in BC.

Such issues have been canvassed to a far greater extent in Australia and New Zealand than in BC. For instance, concerning the mediation of overlap disputes in New Zealand,
Hond (2002) points to three factors that can render mediation ineffective: 1) power imbalances; 2) the parties in dispute being at different stages of negotiation with the Crown; and 3) the parties using fundamentally different criteria to define the territorial dimensions of rights and claims. Issues of power imbalance are well documented in the literature on dispute resolution in Indigenous contexts generally (Bell 2004; Kahane 2004; Lebaron 2004; Behrendt and Kelly 2008). Hond (2002) suggests that mediation in the context of overlap disputes is especially vulnerable to such power imbalances, particularly where one party to a dispute is further along in a claims negotiation process than another. In such situations mediation can “end up reflecting the ‘dominant narrative’ of rapid conclusion of treaty claims … regardless of the merits of respective claims” (Ibid., 587). The danger with such a dynamic is that one party to an overlap dispute can, “with the weight of their intimate relationship with the Crown … and the pressure to keep the process moving,” effectively become “emissaries of the Government's treaty settlements process” (586). In Hond’s (2002) view, when combined with ambiguity concerning the goals of mediation, such “external pressures” can “leave both parties, but especially the weaker party, feeling coerced and under pressure to comply” (589). Indeed, some authors caution that mediation can place too much faith in the ability of mediators to counteract such power imbalances (Walker 2004; Kahane 2004; Victor 2007; Behrendt and Kelly 2008). As LeBaron (2004) puts it, “mediators and facilitators constantly make micro judgments about what is relevant, productive, and appropriate in a process” (22). Such judgments can sometimes be closely aligned with the values and issues privileged by those funding and convening mediation.

2012; Vertongen 2012. Specific approaches to the management of overlap disputes in Australia and New Zealand are explored in Chapters 7 and 8.
processes (Hond 2002; Lebaron 2004).

Disparity of power may thus not only undermine the very principles for which mediation is lauded, it may actually make some situations worse. As Hond (2002) notes, where the parties “do not trust the process, or where they feel uncertain as to what the consequences of their actions will be, they are encouraged to adopt ‘safe’ and … uncompromising positions, often leading to a more entrenched separation than before” (586). While referring to a specific overlap dispute in New Zealand, Hond’s (2002) argument may well be a cautionary tale for BC:

“The proper place for these matters to be addressed [is] early in the process. This did not happen. Now it seems, in a reactive fashion, we turn to mediation as a less confrontational way of massaging out the knots of intransigence and opposition gushing forth from a hastily constructed settlement process” (589-590).

The concern here is that mediation in the context of overlap disputes can become a perfunctory, artificial hand-holding exercise, hastily appended to claims settlement processes at the eleventh hour in an attempt to placate dissenters. An expectation that mediation will produce “win-win” outcomes may be unrealistic in such situations, particularly where there is disparity of political power between disputants.

**Fact-finding**

Fact-finding is an approach to conflict management predicated on the idea that at least some causes of disputes – e.g. suspicion, assumptions, and misunderstandings – can be allayed by researching and communicating facts. Fact-finding assumes a conventional definition of “facts” as information that can be independently verified using generally accepted research methods (Schultz 2004; Rush 2009). Proponents of fact-finding within ADR processes stress that fact-finding alone is often insufficient to resolve disputes, but that
factual issues need to be addressed rather than ignored (Shultz 2004; Rush 2009). As Schultz (2004) notes, “[e]ven if some kind of consensus can be reached, there is little hope that negotiated agreements will be effective if key facts are left uninvestigated. Agreeing to the status of the facts allows for a constructively refocused dispute of the real issues, as well as the ability to forge knowledgeable, farsighted, effective and ultimately more stable agreements” (3-4).

A number of commentators have argued for greater emphasis on the factual basis of Indigenous territorial claims in BC (Sterritt et al. 1998; Devlin and Thielmann 2009; Rush 2009; Turner 2011; Turner and Fondahl 2015). For instance, fact-finding can provide a basis for common understanding that can serve to isolate specific issues, as Rush (2009, 10) explains:

Let me give an example of overlapping claims where utilizing a fact-finding process would assist First Nations in addressing their dispute. Four Indigenous Nations each claim aboriginal title to all or a portion of an area in the central part of British Columbia. One says that they occupied the disputed territory exclusively prior to 1846 and continue to do so. The other three each say that their members used the resources of the area and intermarried with ancestors of the Nation claiming to be the sole occupant. The Nations are interrelated by language and lineage. What are the historical facts?

If the claims are to be resolved on some basis other than political positioning, opinion or propaganda the basic facts have to be known to the disputants. This does not mean to say the dispute is going to be resolved by each Nation being armed with the facts. But it would help to have a third party ascertain the facts and to have them accessible to each Nation to improve communications about the conflict. Fact-finding may lead to some measure of agreement about the facts to permit the parties to focus on what is really in dispute. In this example was there more than one exclusive occupying Nation in the traditional territory at the time of sovereignty. Are the Nations really part of the same cultural group?

The preceding quote raises three important issues to which I return throughout this
inquiry. First, unlike Australia and New Zealand, with their foci on evidentiary basis of claims (discussed in Chapters 7-8), the BC treaty process has paid little attention to the geopolitical history of First Nations. First Nations statements of “traditional territory” are received into the BC treaty process with little definition or scrutiny. Rush (2009) is one of the few authors to explicitly suggest that that facts concerning geopolitical history, however complicated, can and should inform the resolution of overlap disputes (see also Sterritt et al. 1998; Devlin and Thielmann 2009; Turner 2011; Turner and Fondahl 2015).

Second, Rush’s (2009) reference to First Nations’ invoking legal constructions of “exclusivity” and the year “1846” imply that the law of Aboriginal rights might define at least some of the “basic facts” to be considered. As noted by authors such as LeBaron (2004) and Macfarlane (2004), the danger of invoking such predetermined criteria is that it diverts attention from the essentially value-laden processes of determining which facts should be relevant and determinative. I am not here suggesting that Rush (2009) is arguing for wholesale or uncritical acceptance of the common law as a primary criteria of fact-finding, but merely pointing out that such an approach would be problematic in some contexts. The law of Aboriginal rights, as it currently stands, may very well be inconsistent with Indigenous legal systems, values, and understandings (e.g. Bankes 2006; Borrows 1999a, 2002, 2010; Christie 2006, 2013). Criteria other than exclusive occupation in 1846, such as recent Indigenous land use and occupancy, may be more congruent with present-day Indigenous community values and legal systems in some instances. Even when facts are

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30 As will be discussed in Chapter 6, the reference to “exclusivity” and “1846” refers to the common law test for establishing Aboriginal title, which requires a First Nation to demonstrate that it exclusively occupied the area in question at the time when the British Crown asserted sovereignty over BC. Also worth noting is that Aboriginal title may exist in areas that were jointly occupied by two or more First Nations – known in law as “joint title” or “shared exclusion occupation” (e.g. Delgamuukw v British Columbia 1997, paras. 143, 158).
undisputed, their relevance to a particular dispute may be contested. Different First Nations will privilege different criteria to determine the extent of “their” territory. Equally important to facts are questions concerning their salience and incorporation into decision-making.

A third important point relates to Rush’s (2009) question concerning whether disputing First Nations might actually be part of the same First Nation. First Nations political organization – how the social boundaries of First Nation collectives are defined – is intimately related to overlap disputes in BC, as they are in Australia and New Zealand. Such issues become particularly apparent where the “basic facts” concerning overlap disputes are assumed to be coincident with legally defined Aboriginal rights and rights holders. To privilege common law “facts” and criteria would be to assume that the political organization of First Nations for treaty purposes should be consistent with how courts have determined Aboriginal rights are allocated among First Nations. However, the manner in which the state law defines Aboriginal collectives in which Aboriginal rights vest may be different from the way First Nations themselves have chosen to organize for treaty purposes (discussed in Chapter 6). Overlap disputes often arise from different interpretations of a fundamental (but difficult) question: what is a First Nation? Tensions between mediation and fact-finding are seldom acknowledged in the literature. Much like the BC treaty process itself, conventional ADR is rarely described as a “truth seeking” process. Predetermination of criteria for decision-making may indeed be antithetical to the purportedly elicitive, value-accommodating orientation of ADR, particularly where the salience of particular criteria is contested.

**Arbitration**

Another form of conventional ADR is arbitration. Unlike a mediator, the role of an
arbitrator is to make a decision concerning a dispute, which can be binding on the parties (often subject to appeal), or recommendary. While specific models of arbitration vary, their purpose is consistent: to make definitive determinations concerning the issue in dispute (Bell 2004; Osi 2008; Rush 2009). Arbitrators make decisions based upon evidence, argument and precedent. Arbitration is thus more structured than mediation, but is generally more flexible than ordinary courts with regard to the kinds of evidence that may be considered. While arbitrators will generally consider arguments concerning the relevance, reliability, and weight of particular evidence, the presumption in arbitration is that factual information is the foundation of determinations (Osi 2008; Rush 2009). Like judges, arbitrators rationalize their decisions based upon findings of fact and the reasoned application of principles and precedent to these facts (Rush 2009; Osi 2008; Bell 2004). While arbitration has been suggested by a number of commentators (e.g. Sterritt 1998; BCAFN 2014; Ready and Bell in BCTC 2014), here again Rush (2009) is one of the few who has written in detail on how arbitration might work in the context of overlap disputes in BC:

The courts’ jurisprudence on what constitutes the tests for aboriginal title and rights could be applied to determine which Nation exclusively occupied or shared resources in the mutually claimed territory. The facts adduced at arbitration would be aimed at meeting these tests and in the end proving the case of one Nation or the other. Arbitration in respect of an overlap to be determinative would have to be conducted according to an agreed upon Memorandum of Understanding in which the identification of the question to be decided, the procedures to be followed and whether the decision is to be binding would have to be stipulated by the parties … I do not mean to suggest that an arbitrator would, like a court, be confined to making a determination which is black and white – a choice between the two Nations’ aboriginal title and rights. Arbitration does not need to be a zero sum resolution (6-7).

Rush is here referring to private arbitration in which the authority of the arbitrator/s
is bestowed by consent of the parties to a dispute. The jurisdiction of a private arbitrator/s is limited to that which is conferred by the parties by agreement. Rush’s (2009) argument, and particularly his invocation of common law tests for Aboriginal rights as primary criteria for adjudication, though, raises an important question: would a private arbitrator have legal jurisdiction to make a determination concerning Aboriginal rights that is binding on the disputing First Nations? The argument for such a proposition would be that Aboriginal peoples have an inherent right to determine allocation of Aboriginal land rights among themselves, according to their own laws, and that this right includes the authority to delegate, by agreement, this jurisdiction to an arbitrator.31

The Supreme Court of Canada has held that a Commission authorized under provincial statute has jurisdiction “to take cognizance of existing constitutional [Aboriginal] rights and rights under federal rules, [but] not to alter or supplant them” (Paul v. BC 2003, para. 19, emphasis added).32 A determination of a Commission under provincial statute that caused the Aboriginal rights of one First Nation to be supplanted to another would be ultra vires; that is, without authority in law. Less certain is whether First Nations themselves can legally empower an arbitral body to make a determination concerning an overlap dispute, which in effect might transfer the Aboriginal rights of one First Nation to another. Indeed, this line of reasoning also brings into question the legality of bi-lateral, First Nation-to-First Nation overlap agreements that so many commentators have uncritically promoted as the solution to overlap disputes. Can the territory of one First Nation be effectively transferred to another simply through intra-Indigenous political agreement? Do First Nation-to-First

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31 On the inherent right generally, see, e.g., Slattery (1987) and McNeil (2007).
32 Paul v British Columbia (Forest Appeals Commission) 2003 (SCC).
Nation political accords alter, supplant, or otherwise diminish Aboriginal rights? Given that Aboriginal rights are inalienable except to the Crown (R. v. Guerin 1984, 498), one might assume not, except perhaps through an inherent right of self-government. As will be discussed in Chapter 6, Canadian jurisprudence has yet fully articulate a principled basis for allocating Aboriginal rights between and within First Nations.

While there appears to be near-consensus in the literature concerning the potential benefits of ADR in Indigenous contexts – e.g. reduced dependence on professionals, enhanced participation, and more holistic understandings of disputes (Jones 2002; Kahane 2004; LeBaron 2004; Macfarlane 2004; Bauman 2006; Osi 2008; Bauman and Pope 2009) – there is also a compelling argument that ADR processes can simply mirror dominant values and understandings, privilege the politically powerful, and obscure ulterior motives (Pirie 2004; Walker; 2004; Victor 2007; Behrendt and Kelly 2008). A point on which most authors agree is that ADR in Indigenous contexts should not be approached as though it were simply a matter of making minor adjustments to conventional ADR techniques. As Webber (2004) points outs, “Indigenous disputes are not merely another field within which mediation or arbitration can be deployed. Indigenous dispute settlement, to be successful, must come to terms, in both its design and execution, with the broader context of colonial interaction, a context that has had such a profound impact on the relationships and institutions in issue” (150). ADR processes only live up to their promise when they reflect the values and goals of the parties in dispute.

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33 For example, the BCTC has made it clear that it will support the settlement of treaties in contested areas provided that First Nations settling treaties can demonstrate that they have made “best efforts” (not defined) to address the dispute (BCTC 2014). One can imagine that participation in mediation might be interpreted as an indication that it has demonstrated such “best efforts”, regardless of any genuine willingness to negotiate or compromise.
Indigenous Dispute Resolution

For these reasons some authors are understandably skeptical of supposedly “culturally sensitive” ADR processes that claim to accommodate Indigenous values and priorities (LeBaron 2004; Walker 2004; Victor 2007; Behrendt and Kelly 2008). These scholars argue that disputes in Indigenous contexts are best addressed through processes that privilege Indigenous legal systems and methods over those of society as whole, or at least place Indigenous laws, knowledge, and priorities on equal footing with other considerations (Bell 2004; Kahane 2004; Lowe and Davidson 2004; Macfarlane 2004; Napoleon 2004, 2007b; Borrows 2010). Ktunaxa First Nation leader and former BCTC Chief Commissioner Sophie Pierre describes such an approach, in reference to overlap disputes and Ktunaxa law (K’itnumuctiti):

We need a process that supports the traditional ways families dealt with sharing … there is a way of working that out internally within [our] language group, [our] particular culture. [T]here is shared territory with our neighbours as well. That is an external nation-to-nation issue. Given that, I see us addressing this is in two different ways. Within a cultural grouping we need a process that supports the traditional ways families dealt with sharing. Then when you get to the periphery where overlaps are with another nation … there are also cultural ways of dealing with that. We have not been honouring our own laws and I think that’s part of the problem.

Our role34 is to support those communities in being able to bring back their own cultural dispute resolution. We are talking about supporting people who still hold onto that cultural knowledge, being able to record that, being able to support that within the communities so that it continues. We have the historical cultural solutions already for dispute resolution. We know our nation’s traditional territories … because we have place names. The areas where you have a shared territory or an overlapping claim also have place names. Our neighbouring nations also have place names. Putting those place names one on top of the other makes our nations stronger. This

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34 Sophie Pierre was Chief Commissioner of the BCTC at time that she made these statements, so presumably she was referring here to the role of the BCTC.
is where I am worried about the Tsilhqot’in decision, if it brings us down that road where we do not recognize place names or we do not recognize a place that has been shared and has two or three, maybe five names to that one place — that we do not recognize the strength of that and we say instead that because it has five names, well then it does not belong to anybody” (quoted in BCTC 2014, 14-15).

The preceding quote exposes a number of important considerations. The first is perhaps obvious: Indigenous peoples of BC had and often still have legal systems governing the allocation of land rights, privileges, and responsibilities within and between First Nations. It perhaps also goes without saying that Indigenous legal systems have been undermined and to some extent supplanted by state law and other interventions (e.g. Harris 2002; Raibmon 2008). Literature on dispute resolution in Indigenous contexts identifies a number of challenges associated with the erosion of Indigenous legal systems. Turner (2004), for instance, emphasizes the importance of Indigenous language for fully understanding Indigenous legal systems, and notes that many Indigenous people “do not understand their traditional philosophies in their own languages” (65). Victor (2007, 17) contends that applying Indigenous legal systems to present-day conflicts is challenged by what she calls “internal colonialism”, the result of which is that some Indigenous people may, as Bell (2004) suggests, understand Indigenous laws and processes as inferior to those of the state. Moreover, Dickson (2011) argues that some Indigenous communities in BC have retained their legal traditions to a greater extent than others, which, as Bell (2004) points out, “raises difficult questions about how to balance the need to revive and protect Indigenous traditions

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35 Pierre is here referring to first legal case in which the Supreme Court of Canada recognized Aboriginal title. At trial the Tsilhqot’in First Nation sought a declaration of Aboriginal title in an area that it exclusively occupied (i.e. to the exclusion of other First Nations) (Tsilhqot’in Nation v. British Columbia 2007, 2014).

of law and dispute resolution, [while] at the same time be accountable to those in the community who have become separated from traditional ways” (246-247).

A second and related issue raised by Pierre (above) was mentioned earlier: some contend that decision-making concerning overlap disputes should be primarily based on the law of Aboriginal rights. Pierre’s concern with the Tsilhqot’in legal case appears to flow from a perceived disjuncture between Indigenous and state legal systems as they relate to the sociospatial dimensions of Aboriginal rights, which is discussed further in Chapters 5 and 6. The point to underscore at this juncture is that in instances where Indigenous legal systems are inconsistent with state law or other imaginaries – e.g. perceived disjunctures between Indigenous territorialities and dominant conceptions of land-as-property (Egan 2013; Blomley 2014) – some Indigenous people may prefer to abide by the latter, which itself may create or exacerbate conflicts within and between First Nations communities. Erosion of Indigenous legal systems and disjunctures between Indigenous and state legal systems are two challenges to the proposition that overlap disputes can, or ought to be, addressed through the application of Indigenous laws. These and others issues, such as those concerning evidence, neutrality, interface with state political systems, and perceived legitimacy, are discussed in the final section of this chapter.

Two proposals explicitly call for the application of Indigenous law in the management of overlap disputes in BC, the first concerning a province-wide overarching framework, the second focused on a specific dispute. Both are reviewed below, starting with the province-wide framework proposed by the Union of BC Indian Chiefs (UBCIC 2008).

**Proposal for an Indigenous Title Council**

According to the UBCIC (2008), “[t]he essential starting point for understanding the
issue of overlaps is to acknowledge the fundamental distinction between … Indigenous Title and Aboriginal Title” (3). The UBCIC (2008) describes Indigenous Title as “the inherent and sovereign Title that a First Nation holds according to Indigenous laws … the legal relationship to the land which is defined by those Indigenous laws and legal systems which have governed First Nations since time immemorial (3).” Aboriginal title, on the other hand, is a legally recognized interest in land defined in Canadian common law. This distinction has resonance in rulings of the Supreme Court of Canada (SCC) concerning what the court has called “the Aboriginal perspective.” In its R. v. Sparrow (1990) decision, for example, the SCC found that it is “crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake (39).” According to the UBCIC (2008), “Indigenous Title” reflects “the Aboriginal perspective” because it is based on Indigenous law as opposed to Canadian common law, as the UBCIC explains:

Resolving the shared territory/overlap issue can be understood as the process of applying and implementing Indigenous laws to guide how First Nations’ Indigenous Titles intersect and interact. In this respect, the act of resolving the shared territory/overlap issue is an exercise of sovereignty and autonomy, which will then guide the understanding and evolution of how Aboriginal Title is defined and understood under the common law. By approaching the question in this way, the outcome of the process of identifying how Indigenous Title interacts in a particular area may result in a range of outcomes much more sophisticated, and appropriate, than the narrow and limited approach of simply drawing a line on a map (3-4).

Echoing legal scholars such as Borrows (2002, 2010), McNeil (1989; 2006), and Slattery (2000; 2006), the distinction drawn here by the UBCIC (2008) is that the common law of Aboriginal rights derives from both European-derived and Indigenous legal systems. The law of Aboriginal rights is a form of inter-societal law (Slattery 2000), which is what makes it *sui generis*; that is, legally unique and in a class of its own. Indigenous legal systems,
on the other hand, are neither dependent on nor receive authority from common law or statute.

At the heart of the UBCIC (2008) proposal is the contention that “all First Nations have, since time immemorial, applied and implemented their own laws, including laws that governed relations with other First Nations” (6). According to the UBCIC (2008), processes for resolving overlap disputes are an opportunity to express and implement Indigenous laws, and that these laws should comprise the primary criteria, if not the only criteria, to inform decision-making concerning overlap disputes. To this end, the UBCIC proposes that a “neutral, non-affiliated, Aboriginal institution” be established – what it calls an “Indigenous Title Council of British Columbia” (hereafter “the Council”) – “to provide dispute resolution services and support to First Nations seeking to resolve overlaps” (Ibid., 7). The proposal suggests that the Council would have three goals: 1) “To research, design, and develop template processes for the resolution of shared territory/overlap disputes in British Columbia; 2) At the request of First Nations, to facilitate the development and implementation of a process of shared territory/overlap resolution between those Nations; and 3) at the request of First Nations, play neutral roles within shared territory/overlap resolution processes, including mediating, and where appropriate, arbitrating aspects of the dispute” (Ibid., 7).

In recognition of the “diversity of First Nations” in BC, the UBCIC argues that “there is ‘no one size fits all’ process” for addressing overlap disputes (Ibid., 7). Rather, the UBCIC proposes that the Council would “assist the Nations to develop the resolution process most suitable to their interests” (Ibid., 7) by providing a range of services, such as “providing suggestions and information,” “facilitating the Nations’ efforts to design and
agree on a process,” and “assist[ing] the Parties to ensure the Process moves forward in a timely manner towards a successful outcome” (Ibid., 8). The role of the Council would depend on the design of each tailor-made individual process, which would be determined by the parties to each particular overlap dispute. “Depending on the Nations’ request, the Council might facilitate, mediate, or arbitrate” disputes (Ibid., 8). “At the request of the Nations, the Council may play a binding decision-making role, in some instances making a decision on the resolution of the shared territory/overlap issue” (Ibid., 8). While the UBCIC proposal contends that the Council “would have certain core internal capacities,” it suggests that the Council would “fulfill some of its roles by drawing on external individuals and experts to play roles, under the Council’s auspices, within particular resolution processes” (Ibid., 8). According to the UBCIC, a province-wide “Indigenous Title Council” is “a necessary component of resolving shared territories/overlap issues,” and “requires a commitment by the Crown to provide resources to support the process” (Ibid., 10).

The UBCIC (2008) proposal for an Indigenous Title Tribunal diverges from the ADR processes discussed earlier in at least two respects. First, the Council would be an “Aboriginal institution,” although this term is not defined. One might surmise that an “Aboriginal institution” would be staffed and managed by Indigenous people, but this is not necessarily so. The suggestion that the Council would draw from “external individuals and experts” (Ibid., 8) also blurs the distinction between an “Aboriginal institution” and non-Aboriginal institution, particularly inasmuch as the proposal provides no indication of the qualifications of “external individuals and experts” or how they might be selected. Second, the UBCIC (2008) proposal emphasizes Indigenous laws as the primary criteria on which decisions concerning overlap disputes would be based. This approach resonates with the
work of scholars such as Borrows (2002, 2010), Chartrand (2005), Napoleon (2007b), Napoleon and Overstall (2007) and Christie (2009), who argue that Indigenous laws can and should play a role in the resolution of disputes in Indigenous contexts, including overlap disputes (Napoleon 2007b).

However, the UBCIC’s proposal leaves unexplored a number of key questions and considerations concerning applying Indigenous legal systems in dispute resolution, some of which already introduced earlier in this chapter. For instance, the dispute resolution framework proposed by the UBCIC is entirely voluntary and makes no provision for situations where one First Nation party to a dispute may be reluctant to engage in mediation or arbitration. The proposal also suggests that the Council will “assist the Parties to ensure the Process moves forward in a timely manner towards a successful outcome,” yet provides no indication of how the Council might do this in instances where one party to a dispute is reticent to engage. Lack of incentive is a major barrier to the effective management of overlap disputes, and is discussed in Chapters 5 and 6. Moreover, the UBCIC proposal is silent on what would comprise a “successfully resolved overlap dispute”, and provides no indication whether and how process outcomes would align with treaty negotiation or other Indigenous-Crown negotiation processes.

Proposal for an Indigenous Legal Lodge

Another process centered on Indigenous legal systems was proposed in response to an overlap dispute arising in the context of the Lheidli T’enneh treaty. The proposed “Indigenous Legal Lodge” (hereafter “the Lodge”) is intended to “create the political space to explore each Indigenous society’s Indigenous legal principles, precedents, rules, practices, and legal reasoning processes” (Napoleon 2007a, 1; see also Dickson 2011, 2014). The
The proposed Lodge is predicated on the idea that “it is possible to develop a flexible, overall legal framework that Indigenous peoples might use to express and describe their legal orders and laws so that they can be applied to present-day problems” (Ibid., 1). According to the proposal’s author, legal scholar Val Napoleon, the Lodge is fundamentally “about creating the intellectual space in which people are able to think critically and rigorously about Indigenous legal orders and law in a much more substantive and creative way than presently exists” (Ibid., 3).

The structure of the Lodge is proposed as follows: 1) a panel of three ‘neutral’ Indigenous people from First Nations with no direct interest in the overlap dispute; 2) an expert in the law of Aboriginal rights to provide advice and support; 3) three facilitators with knowledge and experience with Indigenous legal orders and law to work with the First Nation communities; and 4) individuals selected by the First Nations to tell the panel about their experience and knowledge of the overlap area, their understanding of the historic and current relationships between and among the First Nations, and how their legal traditions might be drawn upon to address the overlap dispute. The Lodge would run over a period of just over a year, but the panel itself would convene only for a short time (a minimum of five days). The process would begin with an initial meeting of the parties to confirm or modify process design. A ceremonial feast would be hosted by the Lheidli T’enneh and attended by delegations of ten to fifteen people from each of the First Nations as well as the panelists to witness the First Nation’s commitment to the process (Ibid). Prior to the panel convening, the facilitators would assist the First Nations to “articulate their Indigenous laws, frame legal perspectives, define legal obligations and principles, and consider their application to the overlap issue” (Ibid., 7). The role of the facilitators would be to “support and enable full
participation and engagement of the parties . . . ,” with focus on relationships rather than on which First Nation might have the strongest historic claim (Ibid., 7). These facilitated “community deliberations” would be intended to provoke discussion concerning the Indigenous legal orders and laws of each First Nation, including related issues of “process, interpretation, change and challenge, accountability, and application” (Ibid., 3).

Each First Nation would select a number of individuals to speak to the panel concerning matters related to the overlap area, such as Indigenous laws and legal processes, history, current and historic land use, resource sharing, intermarriage, trade, access routes, boundaries, and how they would like to see the overlap dispute addressed. The role of the panel would be threefold: 1) to listen to, acknowledge and consider the testimony offered; 2) to work with the representatives of the First Nations to draft an agreement on managing joint interests in the overlap area; and 3) in the event that the First Nations were unable to reach an agreement, to prepare non-binding recommendations on possible remedies within thirty days of having adjourned. According to the proposal, the “recommendations will not focus on rights based upon historic use and occupancy, but on interests, relationships and reconciliation” (5).

Concerning possible outcomes, the proposal suggests a number of possibilities, including “an agreement for the mutual recognition of various joint interests … joint management arrangements … and shared jurisdiction of the overlap area” (Ibid., 8). Aside from a brief indication that “[i]t would be important to include consultation, decision-making processes, and arbitration for future planning in the overlap area,” (8) and that the agreement “set out a mandated process for its affirmation by every generation and witnessing at a public gathering (ten years),” (9) the proposal contains little detail on the
content of such agreements. Indeed, as with almost all of the literature on the topic, the proposal for the Lodge is silent on whether any agreement deriving from the Lodge would be shared with the Crown, or whether and how it would support Indigenous-Crown relations.

Neither the Indigenous Title Council (UBCIC 2008) nor the Indigenous Legal Lodge (Napoleon 2007a) have been implemented. While these models are sometimes briefly mentioned in literature pertaining to overlap disputes in BC (e.g. East 2009; Rush 2009), there has been only one academic inquiry into the utility of such approaches: a Masters project entitled “Addressing Disputes Between First Nations: An Exploration of the Indigenous Legal Lodge” (Dickson 2011, 2014). The study’s stated intent was “to contribute to the ongoing work of [the government of Canada] to explore alternative dispute resolution models for addressing overlapping claims (overlaps)” by answering this question: “Is the Indigenous Legal Lodge [ILL] a suitable framework for resolving overlap disputes between BC First Nations?” (2). The study encompassed a literature review and interviews with five “Indigenous stakeholders” – described as “hereditary chiefs, former Indian Act chiefs, and academic experts from various BC First Nations” (52) – to “gain insight about Indigenous norms and principles of DR” (dispute resolution). As explained by Dickson (2010), “norms and principles identified by stakeholders” were used to “develop criteria for assessing the ILL” (2). The “Indigenous stakeholders” interviewed were also invited “to identify strengths and weaknesses” (51) of the proposed Lodge, which were assessed “against each criterion developed” (2). “From this examination, recommendations [were] made for implementing the ILL in a variety of BC First Nations’ contexts” (2).

Five criteria were used to assess the potential of the Lodge to be “amenable to a
variety of BC First Nations’ contexts”: 1) “flexibility”; 2) “local development”; 3) “inclusivity”; 4) “trust mechanisms”; and 5) “criterion for third parties” (Dickson 2011, 6-8). Dickson (2011) argues that these criteria comprise “an assessment framework for DR [dispute resolution] in Indigenous contexts” generally (20). These themes (“criteria,” to use Dickson’s term) are prevalent in the literature on dispute resolution in Indigenous contexts generally, and are revisited later in this chapter. Concerning the Lodge itself, the study suggests a number of ways by which it might be enhanced to make it “more amenable to a variety of BC First Nations” (8). Of these recommendations, most are suggestions to consider in more detail issues such as community ratification, how the BCTC might contribute to the process, and whether it would be appropriate to include in the Lodge an expert in Canadian law.

More specifically, Dickson (2011) recommends: 1) that the Lodge “develop a strategic plan for undertaking consultations at various levels in order to ensure all relevant perspectives are included”; and 2) “[e]stablish defensible criteria for who will speak to their experience of the overlap” (8). While I agree that these two issues were not fully described in the proposal for the Lodge, based on my interview with Napoleon (2013) and some of her other writing (e.g. 2004, 2007b, 2009), this is likely because the Lodge stands for the proposition that the disputing First Nations themselves would define these aspects as part of the Lodge process. Because the Lodge proposal indicates that the First Nations communities would select the individuals to speak to the panel, it follows that the First Nations themselves would also define the criteria for their selection, and not the facilitators or panelists. Moreover, the idea that the criteria for participant selection would need to be “defensible” raises a difficult question, namely: defensible to whom, and on what basis?
As noted by Borrows (2002, 354), a key question is whether particular models of dispute resolution “may inappropriately favor certain groups at the expense of others, for example, men over women, elderly over the young, large over smaller families, the politically well-connected over the disenfranchised and those on the margins, the powerful over the powerless (or any combination thereof).” Dickson’s (2011) call for “defensible criteria” to “ensure all relevant perspectives are included” may well be in response to a desire to diffuse such disparity of power and privilege. Yet this recommendation seems to contradict a fundamental precept of the Lodge and of ADR generally: that the disputing parties themselves determine which perspectives and criteria are relevant and which individuals participate. While Dickson (2014) ultimately suggests that the Lodge “is an ideal process” for the resolution of overlap disputes “because it is rooted in community preferences and norms of dispute resolution and law” (53), she leaves a number of significant challenges unexplored, such as situations in which there is contestation within a First Nation community concerning which perspectives and criteria are relevant to a dispute, how Indigenous laws should be interpreted, and which individuals should participate in the process. Moreover, as with the UBCIC proposal, Dickson’s analysis seems to assume that a successfully resolved overlap dispute is one in which the First Nations parties reach an agreement – any agreement. The content of such agreements, or how the content of these agreements might align with the goal of reconciling Indigenous and Crown interests is not discussed. Similarly, Dickson’s (2011) assessment “criteria” ignores the role of state law in such processes. In fact she recommends that the inclusion of an expert in Canadian law in the structure of the Lodge be reconsidered. As authors such as Borrows (2010) and Napoleon (2007b) recognize, applying Indigenous law to present-day problems requires
consideration of both Indigenous and state legal systems, and particularly how these systems interact.

The proposals for the Indigenous Legal Lodge and the Indigenous Title Council both have at their core the principle that Indigenous laws should be the primary criteria for informing the management of overlap disputes. Both proposals emphasize principles of flexibility, local First Nation development, and inclusivity. There are three notable differences, however, the first obvious, the second and third subtle and implicit. First, the proposal for a province-wide Indigenous Titles Council outlines a broad framework within which individual processes would be tailored to specific disputes, the details of which would be negotiated between the First Nations parties to each dispute. The Indigenous Legal Lodge, on the other hand, was intended as a process that would support the resolution of a single, specific overlap dispute. Second, a subtle but significant distinction exists between the two proposals concerning the role of state law. The UBCIC (2008) proposal suggests that overlap dispute processes “under the Council’s auspices, would articulate Indigenous law, and thereby comprise “the Aboriginal perspective”, which would “then guide the understanding and evolution of how Aboriginal Title is defined and understood under the common law” (3). The proposal does not discuss whether or how state law might inform the development or articulation of Indigenous law, or whether factors other than Indigenous law might be considered in dispute resolution. By including “an expert in Canadian law”, Napoleon’s (2007a) proposal for an Indigenous Legal Lodge implicitly acknowledges a place for state law in deliberations.37

37 Napoleon (2007a) identifies a number of well-known indigenous people to serve in the role of expert in Canadian law: “Tony Mandamin (Anishnawbe), Mary-Ellen Turpel-Lafond (Cree), David Nahwegahbow (Ojibwa), Darlene
Third, the UBCIC proposal (2008) suggests that dispute resolution processes under the aegis of the Council would provide an “opportunity to express and implement Indigenous laws” (6, emphasis added). The proposal does not discuss the practical challenge of such an enterprise. The Lodge proposal, on the other hand, sets out a process for “exploring and discussing” First Nations law’s “sources, processes, interpretation, change and challenge, accountability, and application” (Napoleon 2007a, 3, emphasis added). The reference to “change,” “challenge,” and “accountability” acknowledges that Indigenous legal orders and laws are neither static nor uncontested. Indigenous legal systems are subject to continual contestation from within and externally, as are all legal systems (Napoleon 2004, 2007b; Borrows 2010). It is through such contestation that all law develops over time. Both proposals stand for the idea that Indigenous law can and should be a central consideration in the context of overlap disputes. The Lodge proposal acknowledges and sets out a process for working through some of the challenges of doing so.

A Duty to Learn

Two related points require emphasis at this juncture, to which I return in subsequent chapters. First, the law of Aboriginal rights is a form of inter-societal law derived from both state and Indigenous legal systems (Slattery 1987, 2000; McNeil 2007). Canadian courts are required to take into account “the Aboriginal perspective” when determining the character of Aboriginal rights (e.g. Sparrow 1990, 39) including the allocation of rights among and within First Nations communities. The law of Aboriginal rights (discussed in Chapters 5 and 6) also stands for the idea that “the Aboriginal perspective” concerning land “can be

Johnson (Anishnawbe) or other such person” (5). Note the implication here: these are indeed experts in Canadian law, but they are also experts in ways that Indigenous and state legal systems interact.
gleaned, in part, but not exclusively, from their traditional laws …” (Van Der Peet 1996, para. 41). Canadian law thus requires the Crown to inform itself of the Aboriginal perspective when it contemplates actions that might diminish Aboriginal rights (e.g. Haida Nation 2004, paras. 36, 39). Canadian law is thus capable of evolving to encompass Indigenous understandings of their relationship with land, both past and present. Taken together these principles comprise what former Chief Justice of the BC Court of Appeal Lance Finch (2012) calls “a duty to learn.” The Canadian state and its judiciary have a legal duty to learn about and account for Indigenous laws in decisions and policy.

Second, Indigenous law, like all law, must evolve to remain legitimate. Indigenous legal systems are neither static nor exist in isolation (Napoleon 2007b; Borrows 2010). Just as Canadian law is capable of integrating Indigenous understandings and laws, so too is Indigenous law capable of integrating state law. As Borrows (2010) puts it, “[l]aws do not automatically become non-Indigenous just because Indigenous peoples adapt and adopt practices found in other legal traditions” (184). As Borrows (2010) notes, legitimacy of Indigenous legal systems should not be “measured by how closely they mirror the perceived past, but by how consistent they are with current community values and future needs” (185; also Napoleon 2004, 2007b). If one accepts the proposition that a prerequisite to a functional legal system is that it enjoys wide acceptance in the community to which it applies, it follows that Indigenous legal traditions will continually develop to be compatible with present-day values (Napoleon 2007b; Borrows 2010). For instance, using the Gitxsan law (ayook) as an example, Napoleon (2004) suggests that in some situations it will be necessary for there to be “explicit acknowledgment of, [or] agreement to, changes to law to fit contemporary circumstances…” (188). As Napoleon (2007b) explains, “[w]e have to be
critical and rigorous about this. We have to apply the same critical thought to our Indigenous legal orders and laws as we do to Western law” (14). Sorting through an Indigenous community’s underlying issues of social power, privilege, sexism, and tensions between traditional and present-day values and aspirations are part of what Napoleon (2004) describes as the “difficult” and “terrifying” work of “internal reconciliation” (186).

In subsequent chapters I take this argument a step further. I argue that the effective and lawful management of overlap disputes requires that both “internal reconciliation” and “external reconciliation” be confronted unabashedly, head on. Anything less than a critical and rigorous approach to law in the context of overlap disputes – the substantive articulation and harmonization of Indigenous and state legal systems – risks papering over underlying legal issues that will only arise later. Overlap disputes are not a First Nations-only issue wherein only Indigenous people and their laws are put under the microscope. State law and policy must be subject to the same critical rigor. I argue that society as a whole, including First Nations, together, have a duty to learn about and give effect to Indigenous legal systems within Canadian law and policy, not least in the context of overlap disputes.

Synthesis of Prevalent Themes in Literature

Approaches to the management of overlap disputes discussed in this and subsequent chapters all grapple, in different ways, with the same fundamental issues and questions. For purpose of synthesis, I organize these issues and questions into four thematic categories, each discussed below: 1) Which type of process is best? 2) Who controls the process and makes decisions?; 3) What criteria should form the basis of decisions, and how is evidence to be interpreted and applied?; and 4) how should overlap disputes be managed when First Nations are unable to agree upon the dispute management process itself? These are among
the most immediate and difficult questions with which the following chapters engage. The intent of the remainder of this chapter is to synthesize the literature concerning overlap disputes within these thematic categories.

Globally, by far the greatest concentration of literature specifically concerned with Indigenous overlap disputes pertains to the Australian context. Where appropriate, this literature is discussed together with those concerning BC in the paragraphs that follow. My intent in this section is to examine the convergence and divergence of principles within the four related thematic categories just listed, not to compare the specific approaches employed in BC, Australia, and New Zealand. Specific processes employed in the management of overlap disputes in New Zealand and Australia are discussed in Chapters 7 and 8.

**Which type of overlap dispute management process is best, and who decides?**

Salient literature reflects near-consensus among scholars that the best type of process for managing overlap disputes is the process selected and developed by the disputing Indigenous groups themselves (Bauman 2006; Behrendt and Kelly 2008; Rush 2009; Dickson 2011, 2014; Bauman et al. 2014). Webber (2004), for example, argues that “[t]o be legitimate – to secure willing Indigenous participation – the very structures of dispute settlement have to be negotiated, either expressly or through mechanisms of consultation… The more sustained the attempt to incorporate Indigenous concerns and modes of interaction – the greater the likelihood that mechanisms will provide outcomes acceptable to the parties” (150). Concerning overlap disputes in BC, Dickson (2011) describes this consideration (or “criterion”, to use her term) as “local development”, and suggests that

overlap dispute processes “must be developed at a local level and emerge from the human and cultural resources available within communities” (67).

Thus for BC, as for Australia, there is near-consensus in the literature that there is no “one size fits all” type of process suited to all types of overlap disputes (Bauman 2006; Brown 2009; McDade 2009; Rush 2009; Dickson 2011; Bauman et al. 2014). In BC this sentiment is echoed by dispute resolution practitioners generally (e.g. George in BCTC; Sigurdson in BCTC 2014; Henry in BCTC 2014), the BCTC (2010, 2014), former BCTC chief commissioners (Pierre in BCTC 2014; Point in BCTC 2014; Richardson in BCTC 2014), and pan-provincial First Nations organizations (UBCIC 2008; BCAFN 2014). However, that there may not be a “one size fits all” process does not preclude an overarching framework for deployment of dispute-specific approaches tailored to each situation. In addition to the UBCIC (2008) proposal discussed earlier, several commentators have proposed province-wide approaches to the management of overlap dispute resolution in BC (Ready and Bell in BCTC 2014; Richardson in BCTC 2014; Point in BCTC 2014; BCAFN 2014; Turner and Fondahl 2015). These proposals range in length from only a couple of sentences to a couple of pages. Two comparable “framework” processes have also been proposed, and one State-wide framework implemented, in Australia. The “Right People for Country Program” – a non-litigious framework for addressing Indigenous overlap disputes in the Australian State of Victoria – is discussed in Chapter 8. I contrast the two Australian proposals to demonstrate a number of key challenges and distinctions, below.

One proposal arose from the findings and recommendations of the Australian
Indigenous Facilitation and Mediation Project (Bauman 2006).\textsuperscript{39} The proposal is for a nationally coordinated Aboriginal and Torres Strait Islander Mediation, Facilitation and Negotiation Service to, among other things, build Indigenous decision-making and mediation capacity, and provide a “clearing house” for such services (Bauman 2008). The proposal is predicated on four propositions: 1) facilitation and mediation can be adapted to suit the needs of specific intra-Indigenous disputes; 2) appropriate application of facilitation and mediation in Indigenous contexts requires specific expertise; 3) there is a shortage of people with this expertise, and a shortage of appropriate and consistent training and standards for mediators working in Indigenous contexts; and 4) a nationally managed Mediation, Facilitation and Negotiation Service (hereafter “the Service”) is required to address these shortages (Bauman 2006, 2008). According to the proposal, the Service would “co-ordinate the roll out of a regional network of Aboriginal and Torres Strait Islander mediators, facilitators and negotiators,” coordinate training, and evaluate pilot and implemented strategies (Bauman 2008, 2).

The other proposal calls for the creation of a national “Indigenous Dispute Resolution Tribunal” to address intra-Indigenous disputes arising in the context of the National \textit{Native Title Act 1993} (Vivian 2009). The proposal arose out of recognition of four propositions: 1) addressing overlap disputes “is the right and responsibility of Indigenous peoples as an expression of autonomy, exercising responsibility for the functioning of their own communities”; 2) attempts to resolve overlap disputes through facilitation and

\textsuperscript{39} The Indigenous Facilitation and Mediation Project, completed by AIATSIS, was intended to support “best practices approaches to Indigenous decision-making and dispute management, particularly in relation to the \textit{Native Title Act 1993} (NTA) which emphasizes agreement-making through non-adversarial approaches, such as mediation, facilitation and negotiation” (Bauman 2006, iv; see also Bauman 2005, 2008). The project identifies a number of principles with utility for BC. These principles are summarized in Appendix B.
mediation are often unsuccessful, and arbitration is necessary if/when mediation fails to produce agreements; 3) employing conventional dispute resolution approaches “has the danger of legitimising the very institutions that have entrenched colonisation and marginalisation of Indigenous people”; and 4) “a framework that overtly legitimises Indigenous authority is not in itself sufficient” (Vivian 2009, 3). Concerning the last point, the proposal suggests that overlap disputes in Australia arising in the context of Native Title differ markedly from intra-Indigenous disputes in other contexts. In this view, overlap disputes arise because “native title determinations require the identification of artificial constructs … unlikely to be used by Indigenous people themselves (Ibid., 1). Thus, and not unlike how disjunctures between Indigenous and state territorialities prompt overlap disputes in BC, the Native Title Act 1993 in Australia can be “a source of conflict almost mandated by the legislation” (Ibid., 2).

As will be discussed in more detail in Chapter 8, the Native Title Act 1993 (NTA) requires that determinations of Native Title in Australia have a basis in Aboriginal law and custom. The NTA and related jurisprudence have established a set of stringent criteria – what Vivian (2009) refers to as “artificial constructs” – that Aboriginal groups must demonstrate adherence to in order have Native Title recognized. Vivian’s (2009) proposal for a pan-Australian Indigenous Dispute Resolution Tribunal is in response to the challenges of trying to locate and expand the space where the NTA and Aboriginal legal systems converge, and the imperative to sort through the intra-Indigenous disputes that crystallize in and around this space. The proposal thus admits that overlap disputes in Australia often crystalize in the context of, if not because of, the Native Title framework of Australia – at the nexus of Indigenous and state law – and thus “it is critical” that the process for
addressing such disputes “has legitimacy within both Indigenous and non-Indigenous communities as a respected institution of Indigenous and non-Indigenous systems of law” (Ibid., 3). In this respect, the proposal for a national Indigenous Dispute Resolution Tribunal is analogous to the proposal for an Indigenous Legal Lodge, albeit the Lodge’s inclusion of state law is more implicit.

Another significant divergence between approaches discussed in this chapter concerns whether specific processes (or overarching frameworks) might involve adjudication or arbitration in the event mediation fails to achieve desired outcomes. With only a few exceptions, literature on overlap disputes in BC avoids the question of adjudication almost entirely. While a few commentators in BC have called for a process of adjudication as a last resort (Sterritt et al. 1998; Devlin and Thiemann 2009; BCAFN 2014), as discussed earlier, Rush (2009) is the only author to discuss in any detail how arbitration might be applied. Rush’s (2009) analysis suggests that the law of Aboriginal rights would be a primary criteria of adjudication, yet does not discuss the interaction of state and Indigenous legal systems, or how these legal systems might be harmonized when in conflict. The proposal for an national Indigenous Dispute Resolution Tribunal in Australia, on the other hand, explicitly acknowledges that disputes within and between Indigenous communities arising in the context of the NTA are both inter- and intra-cultural in nature, and thus require a framework consistent with the values and laws of society as a whole, including those of Indigenous people (Vivian 2009). As Vivian (2009, 3) puts it, overlap disputes “are intra-cultural in that the resolution of disputes will require application of cultural norms in a culturally appropriate environment. They are inter-cultural in the sense that the question raised by the dispute is externally imposed: What is the ‘society’? Are the rights group or
communal rights? Where are the boundaries, etc.? Addressing such questions requires more than cross-cultural sensitivity; “a pluralist environment must be created” (Ibid., 5).

The distinction between adjudicative and recommendary processes is sharp. Distinctions between “Indigenous processes” and other ADR processes, on the other hand, are often difficult to discern. For example, the proposal for a national Australian Indigenous Mediation, Facilitation and Negotiation Service is consistent with a sentiment commonly expressed in literature concerning overlap disputes in BC, as well as literature concerning dispute resolution in Indigenous contexts generally: facilitation and mediation can be appropriate mechanisms provided that they embody the goals, values, and preferred decision-making criteria of the disputing parties (Bell 2004; LeBaron 2004; Lowe and Davidson 2004; BCTC 2010; Dickson 2011). The focus of these proponents of mediation is on process design. As Pirie (2004) argues, “the prescription seems to be to add more Aboriginal input, representation, traditions, and values with a corresponding reduction in the complexity, formality, and rigidity of existing systems” (333). Authors such as Bell (2004) and Osi (2008) use the term ‘Indigenization’ to refer to such hybrid process which attempt to adapt conventional ADR models to the preferences of disputing Indigenous parties. Borrows (2002, 2010), Walker (2004), Napoleon (2004, 2007b), Behrendt and Kelly (2008), and Vivian (2009), on the other hand, argue that revival or creation of Indigenous systems and institutions is a more appropriate approach to intra-Indigenous disputes.

The underlying skepticism here is born of a fear that adaptation of conventional ADR mechanisms might only encompass those aspects of Indigenous values and legal systems that do not conflict with the values and laws of society as a whole. The differences between these two paradigms can also be blurry and indistinct, with each cross-pollinating
the other until distinctions can sometimes become meaningless. Given such hybridity, criteria for determining which kind of process is best suited to address overlap disputes may have more to do with the people involved – e.g. process decision-makers, participants and third parties – than the models suggested by the broad terms “Indigenous process,” “facilitation,” “mediation,” or even “adjudication.”

**Who are the appropriate decision-makers, participants, and third parties; and who decides?**

Who should be involved in the process? Who are the decision-makers? Who decides who the decision makers will be?40 Who should particulate and how? What if there is no consensus concerning who should be involved with the process? As with the previous thematic category, the literature on these questions is consistent on several points, divergent on some points, and almost silent on others. There is near-consensus in the literature that questions concerning who should be involved in dispute management processes are best answered by the disputing Indigenous parties themselves (Bell 2004; LeBaron 2004; Bauman 2006; Victor 2007, Behrendt and Kelly 2008; Rush 2009; Dickson 2011; Bauman et al. 2014). There is also substantive agreement in the literature that this argument applies as much to the selection of third party interlocutors – facilitators, mediators and arbitrators - as it does the selection of people to participate and make decisions concerning process and outcomes. As with issues concerning process selection and design, however, the literature is almost silent on the difficulties associated with such choices, such as when disputing parties do not agree on who has the authority to speak or decide.

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40 This question is (of course) subject to the paradoxical “chicken and egg syndrome”. The initial question is not who the decision makers will be, but rather concerns who will decide who the decision-makers will be (*ad infinitum*) (Bauman interview 2014).
Echoing scholars such as Kahane (2004), Walker (2004), Victor (2007), and Behrendt and Kelly (2008), Dickson (2011) suggests that it may be “more important for third party interlocutors to be skilled and familiar with the conflict issues and history … than it [is] for them to be impartial and neutral” (66). The argument here is that third-party interlocutors should “be familiar with historical relationships between parties, the particular cultural context of the dispute, and knowledge[able] concerning [local Indigenous] protocol and traditions” (Ibid., 78). Others contend that impartiality of third-parties is essential for fair outcomes in the context of overlap disputes (Sterritt et al. 1998; Bauman 2006; Vivian 2009; Devlin and Thiemann 2009; Rush 2009). I do not mean to suggest a simple dichotomy between “insider partials” or “outsider neutrals,” or between those who argue the benefits and limitations of third-party neutrality. Although not discussed in the literature, it is arguable that the importance of such distinctions depends on the nature of the dispute. Local facilitators with intimate knowledge of the histories, cultures, and legal systems of each First Nation may be preferable where an overlap dispute is not really a dispute at all, but rather an opportunity to affirm and articulate territorial relations between and among First Nations. At the other extreme, third-party neutrality may be essential where there are clearly disputes concerning which people have rights where, which may require third-parties to make decisions, whether recommendary or binding.

While a number of commentators have acknowledged the benefits of a framework capable of addressing a full range of overlap disputes, including those which may require third-party decision makers (e.g. Point in BCTC 2014; Richardson in BCTC 2014; BCAFN 2014), only the proposals for the pan-Australian Indigenous Dispute Resolution Tribunal (Vivian 2009) and the pan-BC Indigenous Title Tribunal (UBCIC 2008) propose a
framework for doing so. These proposals – and the Indigenous Legal Lodge – suggest that third-party decision makers would be “arm’s length” from disputing parties. Another important distinction concerns whether third-party decisions would be binding or recommendatory. The proposal for the Lodge indicates that decisions of the panel would be recommendatory (Napoleon 2007a). The proposal for the pan-BC Indigenous Title Tribunal (UBCIC 2008) suggests that decisions of the Tribunal would be binding only with the agreement of disputing parties. Decisions of the proposed national Australian Indigenous Dispute Resolution Tribunal would be binding only if mediation fails, which makes it the only proposal to suggest a mechanism for addressing situations where disputing parties are unable to agree on fundamental aspects of the dispute resolution process itself.41

**How are criteria, information, and evidence to be defined and used, and who decides?**

Are there criteria that might be applied universally to decision-making in the context of overlap disputes in BC? Who should determine which criteria should be applied, and who should determine how criteria are interpreted and weighted? Does selection of particular decision-making criteria privilege some First Nations to the detriment of others? What if there is no consensus concerning which decision-making criteria are appropriate? As with the previous two themes, literature on these questions is consistent on some points, divergent on some points, and almost entirely silent on others. For example, there is near-

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41 While this distinction is revealing, it should also be understood in light of the respective statutory contexts of Australia and BC. The BC proposals are consistent with a popular political discourse in BC which basically says that overlap disputes are a First Nations-only issue and it is up to First Nations to resolve them. The proposed pan-Australian indigenous Dispute Resolution Tribunal, on the other hand, is consistent with the legal framework of Native Title in Australia, which requires that overlap disputes be addressed prior to any determination of Native Title being made. As will be discussed in more detail in Chapter 8, a judicial finding of Native Title in Australia requires that overlap disputes be addressed one way or another: by agreement, by the federal court, or through an alternative process such as the proposed indigenous Dispute Resolution Tribunal.
consensus in the literature that dispute resolution processes in Indigenous contexts should reflect the values and priorities of the First Nation parties to the dispute (Bell 2004; LeBaron 2004; Lowe and Davidson 2004; Macfarlane 2004; Walker 2004; Bauman 2006; Victor 2007; Behrendt and Kelly 2008; Dickson 2011). Echoing these authors, Victor (2008) suggests that purportedly “cultureless” approaches to ADR and Indigenous processes are “often fundamentally different from one another …, grounded within a very different worldviews, and often ask very different types of questions” (5). Yet, at the same time, the literature rarely addresses the diversity of opinion and values within and among Indigenous communities or the related challenges of what Napoleon (2004) calls “internal reconciliation.”

**How are overlap disputes to be managed in the absence of intra-Indigenous territorial agreements?**

A range of values, beliefs, and resultant priorities exist within any community. As Napoleon (2004) notes, “these norms, or understandings of right and wrong, are contested at every level of human social interaction” (8). Thus identifying “Indigenous values” is, as Bell (2004) points out, “a complicated task that requires more than looking to values that were dominant prior to colonization. Culturally specific values now include a blend of Western and Indigenous ideas of the law and conflict” (246). Consequently, tensions may emerge between a desire to respect and give voice to “traditional” values and processes, and an imperative to be accountable to those whose values may not accord with, for example, fundamentalist interpretations of Indigenous law and custom (Napoleon 2004; Borrows 2010). Such tensions can become particularly conspicuous in the context of overlap disputes. Indeed, much of the literature on overlap disputes in BC highlights two tensions in
particular: tension between different forms of Indigenous governance, and tension between state and Indigenous legal systems.

Concerning overlap disputes in BC, Dickson (2011) highlights the importance of designing overlap management processes capable of accommodating “competing governance structures” (67). The issue is evident where First Nation parties to an overlap dispute are politically organized in fundamentally different ways, such as Indian Act Bands, treaty organizations, hereditary societies, or other forms of political agency (discussed in Chapter 6). These sociospatial identities often overlap in complex ways, with “each invoke[ing] different allegiances, legitimating discourses, and representations of space” (Turner 2011, 65). The arguments of differently constituted First Nations are thus often presented in fundamentally different ways, based on different criteria, and grounded in what MacFarlane (2004) calls different “moral orders” (96).

Take, for example, an overlap dispute between a First Nation politically organized as an Indian Act Band and another First Nation organized according to a First Nation’s Indigenous legal system. The arguments of these two First Nations concerning who has authority to make decisions, the extent of territory, and protocol for sharing resources may be based on fundamentally different criteria. To transpose MacFarlane’s (2004) argument to the context of overlap disputes, “[s]uch differences are sometimes described as ‘irreducible’ or ‘incommensurate,’ where they flow from fundamentally different paradigms of values such that they cannot be ‘mapped onto,’ expressed as, or reduced to the moral order of the other” (96). The political and social realities of different First Nations may give rise to different values, assumptions, and beliefs concerning the criteria on which decision-making should be based.
Literature on overlap disputes in BC rarely engages deeply with how Indigenous legal systems might be applied to address overlap disputes, or how Indigenous and state legal systems might interact within such processes. Indeed, much of the literature concerning BC reflects the idea that processes for dispute resolution need to be based on one or the other, but not both. Dickson (2011), for instance, suggests that the inclusion of a third party “expert in Canadian law” in the Indigenous Legal Lodge should be “revisited” (76). The reasoning here seems to echo that of the UBCIC (2008) proposal for a pan-BC Indigenous Title Tribunal; that is, the resolution of overlap disputes in BC is a matter of applying Indigenous legal systems, and that the law of Aboriginal rights should be informed by Indigenous law but not the other way around. Rush (2009), on the other hand, repeatedly invokes state law as primary criteria for decision-making concerning overlap disputes.

Contrary to Dickson’s (2011) analysis, I argue that Napoleon’s (2007a) proposed Lodge considers the middle ground between these two approaches, in that it acknowledges that Indigenous legal systems – like all legal systems – do not exist in isolation from “external” influences. Such an approach resonates with the work of Bell (2004), Kahane (2004), and Borrows (2010) who advocate for Indigenous dispute resolution processes that are “informed by, but not prescribed by, the people’s historic legal order …” (Napoleon and Overstall 2007, 7). Indeed, Napoleon (2007a) is the only scholar to have proposed a process for developing a hybrid legal framework for addressing overlap disputes in BC. As with all of the literature concerning overlap disputes in BC, neither the Lodge proposal nor Dickson (2011) provide any indication of how overlap disputes might be managed in situations where disputing First Nations fundamentally disagree on what the dispute resolution process is intended to accomplish, who has the authority to make decisions, and the criteria on which
decisions would be based. While the literature on overlap disputes is rife with arguments for First Nation control of decision-making on issues such as process goals, decision criteria, and third-parties, conspicuously absent is discussion of situations where disputing First Nations are unable to agree on basic elements of the dispute resolution process itself.

**Conclusion: Significant Gaps in Literature**

This chapter has introduced numerous issues and themes further developed in subsequent chapters. There is near-consensus in the literature on most of the questions posed in the introduction to this chapter, such as that overlap dispute management processes should embody Indigenous values and laws, that third-party interlocutors, if any, should be chosen by the disputing parties themselves, and that each dispute resolution process should be uniquely tailored to each dispute. Similarly, there is an implicit suggestion in the literature on BC that overlap disputes are “successfully resolved” when there is an agreement between disputing First Nations – any agreement – regardless of its utility for enhancing Indigenous Crown relations, or whether it is consistent with legally defined Aboriginal rights. In the following chapters I argue that these kinds of assumptions – e.g. that First Nations will resolve overlap disputes among themselves without a framework that incentivizes and supports such efforts – is a somewhat naïve and a woefully inadequate response to the issue.

Three significant gaps in the literature are vividly apparent. First, all but one modern treaty to have reached the final stages of treaty negotiation in BC has been contested because of overlap disputes, which suggests that in many cases First Nations will be unable to reach agreements concerning overlap disputes. In some cases, First Nations may not agree on which type of process is appropriate for attempting to reach agreement. The literature on the
BC case is entirely silent on what should be done in instances where First Nations are unable to agree on how they might agree. Second, the literature on the BC case rarely discusses how present-day Crown and BCTC policies, by supporting the settlement of treaties in contested areas, are fostering a significant disincentive for some First Nations to engage with the issue. Treaties are being settled in BC regardless of whether overlap disputes are resolved, yet the literature rarely speaks to this dysfunctional dynamic. And third, First Nations and the Crown both have a profound interest in promoting effective and lawful Indigenous-Crown relations through the clarification of Indigenous jurisdiction. Yet literature on overlap disputes in BC rarely if ever recognizes that the Crown has something to add to the process (aside from funding), and that the Crown, in the interest of lawfulness and efficacy, has a profound interest in how overlap disputes are addressed.

Overlap disputes crystalize in the context of Indigenous-Crown relations, and are as much about relationships between First Nations and the Crown as they are about relationships between and among First Nations. A successfully managed overlap dispute is not simply one that placates dissenting voices. A successfully managed overlap dispute is one that supports the overarching goal of effective and lawful Indigenous-Crown relations. These are among the arguments with which this inquiry is concerned, that have not yet been well-documented in literature.
Agnew (1999, 504) argues that modes of sociospatial organization will change “as material conditions and associated modes of understanding of them change.” In this chapter I argue that present-day Indigenous-Crown negotiation in BC can and should be such a place and moment of change, both in terms of the reterritorialization of Indigenous spaces and ways that territory and boundaries are understood and enacted. Employing conventional understandings of territory can be an inherently problematic and even violent way of recognizing Indigenous spaces through Indigenous-Crown negotiation in BC. Disjunctures between traditional Indigenous territorialities and conventional notions of property and jurisdiction often pose a fundamental challenge to achieving clarity of intra-Indigenous jurisdiction in the context of Indigenous-Crown relations. Rather than a mechanism of such explicit “othering,” territories can be imagined as relational spaces, and boundaries conceived as tools that organize and regulate social relations. My intent with this chapter is to posit a conceptual foundation on which to build this argument: Indigenous-Crown reconciliation, and overlap disputes specifically, are an opportunity to imagine and give material effect to territory in a way that accommodates intertwined Indigenous territorialities and support effective and lawful Indigenous-Crown reconciliation. Reconciliation, however it may be defined through negotiation, requires dialogue, and effective dialogue is almost impossible in the midst of conflict concerning which Indigenous polities have the authority to negotiate with the Crown concerning specific land.

This chapter is presented in two major sections. The first section chronologically traces evolution of thought within Anglo-American literature on territory, with focus on the territorial norms that continue to exert a powerful hold on geopolitical imaginaries,
aspirations, and ideologies the world over, including those apparent within processes of Indigenous-Crown negotiations in BC. A number of innovative theories of territory are explored, with emphasis on the ways these conventional “modernist” understandings of territory tend to dominate political imagination and praxis. Particularly relevant to this inquiry are ways that territory and boundaries classify and simplify material reality, which in turn reifies and obscures sources of political power, ideology, and meaning. The chapter then turns to a relational conception of territory, one that places inter-institutional and interpersonal relations at the conceptual core of territory. Key distinctions between these seemingly incompatible conceptions of territory are then examined, which demonstrates that such distinctions are far more tenuous than is often assumed. I argue that effective and lawful Indigenous-Crown relations require a geography of reconciliation that is based on both types of territories. Modes of sociospatial organization will change as understanding of them change. Indigenous-Crown negotiations in BC can be such a moment of change. Territory can be imagined and boundaries enacted in ways that make intertwined Indigenous territorialities visible, while also supporting effective and lawful indigenous-Crown reconciliation. This chapter explicates a conceptual framework for doing so.

**Territory as an Explicitly Bounded Container of Political Power**

**From biological determinism to overt human strategy**

Considerable debate has occurred over the extent to which territorial behavior should be understood as an innate characteristic of all species, including humans (e.g. Delaney 2005, Elden 2013; Brighenti 2010a; Storey 2012; Sassen 2013). The most-often-cited work in this vein is *The Territorial Imperative* (Ardrey 1966), which argues that humans have an innate biological imperative to occupy, control and defend the spaces they inhabit. Ardrey (1966)
understood human territoriality as a fundamental biological drive: a constant, innate human characteristic played out in different contexts. This biologically deterministic approach frames territorial behavior as a natural and largely unchanging phenomenon rather than a product of social conditioning. While the “nature vs. nurture” polemic is sometimes still discussed in territorology literature, such debates are now generally seen as unproductive for understanding human territoriality (Sack 1986; Delaney 2005; Brighenti 2010a; Storey 2012; Elden 2013). Like all naturalizing discourses, understanding territory through the lens of biological determinism tends to obscure the role of social power, ideology, and agency. Reification of territory tends to normalize the phenomena that give territory meaning, which tends to depoliticizes the ideologies embedded in different ways of understanding and enacting territory.

In contrast to an innate territorial imperative, Edward Soja (1971), Jean Gottmann (1973), and almost all subsequent territoriologists argue that human territorial behavior arises out of temporally and geographically contingent sociopolitical conditioning (Soja 1971; Gottmann 1973; Lefebvre 1991; Delaney 2005; Paasi 2009; Agnew 2009; Storey 2012; Murphy 2013; Elden 2013). Soja (1971), in *The Political Organization of Space*, for instance, cautioned against conflating animal and human territoriality, arguing instead that human territoriality is a conscious and culturally contingent sociospatial strategy. Notable is Soja’s (1971) claim that while all societies have modes of sociospatial organization, few historically operated in overtly territorial ways, suggesting instead that the “modernist” conception of territory – that is, as an explicitly bounded container of political power (Taylor 1994) – is more geographically and historically limited than is often thought (Soja 1971; see also Elden 2010, 2013). Indeed, following the work of Soja (1971) and others discussed below,
territoriality is now understood as a product of social conditioning, and is thus expressed in different ways in different places at different times. The concept of territory as an explicitly bounded container of political power is a fairly recent invention (Soja 1971; Sassen 2006; Agnew 2009; Elden 2010, 2013).

Another significant early contribution to the study of territory was Gottmann’s *The Significance of Territory* (1973). Elements of Gottmann’s (1973) framework, particularly those enhanced by Lefebvre (1991) and Raffestin (e.g. 1984, 2012), are increasingly prevalent in examinations of state, supra-state, and sub-state territorial projects (e.g. Sassen 2006, 2013; Brighenti 2006, 2010a; Brenner and Elden 2009; Painter 2010; dell’Angnese 2013). Gottmann’s (1973) notion of network flows, “crossroads” (nodes), and iconographies provides a contemporary interpretation of territory, and a particularly useful heuristic for understanding the territories at work in processes of Indigenous-Crown negotiations in BC.

It was some years before the territorial ideas of Gottmann (1973) began to penetrate the Anglo-American research agenda. Indeed, the best known English language book on human territoriality – David Sack’s aptly titled *Human Territoriality* (1986) – makes no mention of Gottmann (1973).

**Territory’s tendencies**

The disciplines of political geography, international relations, and law have long treated territory as a juridico-political strategy that delineates spaces of sovereignty, polities, and law (Agnew and Corbridge 1994; Blomley 1994; Taylor 1994; Elden, 2013). Sack’s (1986) explication is generally consistent with what I call a “conventional, modernist” conception of territory: “the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships by delimiting and asserting control over a
geographic area” (19). Thus for Sack (1986) territory is “a primary geographical expression of social power” (5). This definition obviously emphasizes explicitly demarcated boundaries, yet also evinces the idea that territory can be enacted at a variety of scales by a variety of actors. According to Sack (1986), any space can become a territory, from the micro-spaces of the workspace (e.g. an office) to supra-national spaces (e.g. the European Union). Emphasis is on the enactment of boundaries, so that any individual or group can “turn on or turn off” a territory provided that they have the ability to enforce the boundary (1).

Central to Sack’s (1986) contribution is what he called the “tendencies of territoriality” (31), three of which are, in his view, definitional of territory. These “tendencies” have become well known and are now often (explicitly or implicitly) employed as a framework for understanding why and how territory works as an overt spatial strategy (e.g. Taylor 1994; Delaney 2005; Agnew 1994; Elden 2010, 2013; Storey 2012; Murphy 2013). According to Sack (1986), these tendencies “permit us to see that some territorial effects are universal, occurring in almost any historical context and organization, while others are specific to particular historical periods and organizations” (6). Territoriality, in this view, is an overt expression or assertion of control over space, where the first three tendencies - classification, communication, and enforcement (31) – are considered logically prior to other tendencies. In this view, Sack’s (1986) territoriality entails classification, communication and enforcement but can be caused by and result in several or all of the other tendencies (Delaney 2005; Storey 2012). Elements of Sack’s (1986) framework with utility for this inquiry are examined below, with key words associated with each tendency italicized.

Classification, communication, and enforcement
Definitional to Sack’s (1986) understanding of territoriality is that it *classifies* by space rather than by type, which has the effect of simplifying that which it contains (Delaney 2005; Murphy 2012). For instance, when someone asserts that an office or parcel of land is theirs, there is generally no need to specify which material objects within that space belong to whom. Territory thus avoids the need to enumerate and classify the particular by asserting varying degrees of control over some or all of the objects and people within a territorialized space. This “territory effect” (Brenner and Elden 2009) is especially prevalent in the political sphere, where classification by space often denotes different forms of sociospatial order, such as legal jurisdiction, sovereignty, and governance (e.g. Agnew and Corbridge 1994, Blomley et al. 2001; Paasi 2009; Agnew 2009; Murphy 2013).

The second of Sack’s (1986) definitional tendencies is that territoriality is generally easy to communicate “because it requires only one kind of marker or sign - the boundary” (32). Sack’s (1986) emphasis is thus not just on enforcement of boundaries as a means of possession and control, but on the simplicity and ease of communication of spatial boundaries (see also Murphy 2013; Storey 2012). This commonsensical idea that territory is a spatially bounded social space has been taken up by subsequent theorists such as Delaney (2005), who defines territory as “a bounded social space that inscribes a certain social meaning onto defined segments of the material world” (14; see also, e.g., Taylor 1994; Brenner 2004; Elden, 2010, 2013; Murphy 2013). *Enforcement of control* is the third of Sack’s (1986, 32) definitional tendencies of territoriality. Here again emphasis is on the simplicity of spatially demarcated boundaries that denote the spatial extent of authority. According to Sack (1986), this enforcement aspect, along with the first two tendencies, distinguishes between “primitive”, “pre-modern”, and “modern” forms of territoriality (27, 37). Forms of
sociospatial organization that do not exhibit the tendencies of classification, communication, and enforcement of bounded space are thus, in Sack’s (1986) view, considered “pre-modern”, and not territoriality per se. Indeed, Sack’s (1986) conception of territory – as a bounded container of enforceable political power – adheres to the notion that societies progress or evolve through stages of “primitive”, “pre-modern” and “modern” forms of sociospatial relations (27, 37). The distinction drawn by Sack (1986) underscores his emphasis on enforceable boundaries that circumscribe spaces of modernity: “primitive societies rely almost entirely on a social definition of territoriality whereas civilizations and especially modern societies do the opposite” (37). The distinction drawn here by Sack (1986) is between what Soja (1971) describes as “a social definition of territory rather than a territorial definition of society,” (13) although for Soja such distinctions have little to do with a society’s “progress” towards modernity.

Sack (1986) thus invokes a narrative purporting to explain the emergence and diffusion of a conventional, modernist form of territoriality, one often uncritically associated with societal “development” and “progress”. Authors such as Delaney (2005, 2009) and Storey (2012), however, suggest that this kind of evolutionary account is deficient in at least two respects. First, it tends to obscure ways that different modes of social organization produce and are produced by different sociospatial arrangements, which in effect lumps together other modes of sociospatial organization under a single rubric of “premodern”. This “premodern” versus “modern” dichotomy ignores significant differences between supposedly premodern sociospatial systems. Second, this “evolutionary stages of territoriality” narrative, through its invocation of the category “premodern”, implicitly implies an imperative for the reconfiguration of “premodern” sociospatial orders to conform
to a particular conception of “progress” (Delaney 2009; Storey 2012). Territory defined as
spatially bounded political power is only one (albeit dominant) mode of sociospatial
relations. I argue that complications arising from overlapping Indigenous claims to territory
are an opportunity to articulate and give material effect to an alternative model of territory.

The reifying, displacing, depersonalizing, and place-clearing effects of territory

The relatively narrow definition of territoriality espoused by Sack (1986) does not
detract from the value of his contribution for understanding the causes and effects of
territoriality and, more succinctly, territory. Indeed, Sack (1986) offers a penetrating analysis
of territory to which numerous scholars have added (e.g. Taylor 1994; Agnew 1994; Delaney
2005, 2009; Sassen 2006; Elden 2010, 2013; Storey 2012; Murphy 2013). The following
illustrates the salience of Sack’s (1986) contribution to this inquiry, supplemented with
insights of subsequent authors, particularly with respect to the reifying, displacing, depersonalizing,
place-clearing tendencies of territory.

For Sack (1986), territory is “a primary geographic expression of social power” (5)
through which social power is reified (33). Through its reifying effects, territory makes social
power visible through material signifiers such as borders, fences, maps and so on, which
“gives some forms of power a material referent in the world” (Delaney 2005, 77). As Sack
(1986) notes, “power and the like are often potentialities. Territoriality makes potentials
explicit and real by making them ‘visible’” (33). Territory thus has a tendency to displace
attention from the relationship between the controlled and the controlling, that often
obscures aspects of social power (Sack 1986; Delaney 2005). Like the tendency of reification,
this displacing function distracts attention from underlying sources of social power so that
“territory appears as the agent doing the controlling” (Sack 1986, 33). The notion of “the law
of the land” is illustrative, whereby legally and socially regulated behaviors seem so obvious that it appears that territory itself is the agent doing the controlling, rather than the people and institutions that wield law (Brighenti 2006; Delaney 2011).

Territory also has a *place-clearing function* – an “essential means by which a place is made, or a space cleared and maintained, for things to exist” (Sack 1986, 33). In this sense territory, as construed by Sack (1986), simultaneously empties (deterritorializes) and enacts (reterritorializes) a particular sociospatial order, such as a particular regime of property, law, and political authority (Blomley 2003; Butler 2009). Territory creates and sustains the idea of socially *emptiable space*, whereby space is construed as “no man’s land” that, as Lefebvre (1991) puts it, “serves those forces which make a *tabula rasa* of whatever stands in their way, of whatever threatens them — in short, of differences” (285). Territory thus construed has a homogenizing effect that tends to obscure or destroy other historically and geographically contingent modes of sociospatial organization, such as those of Indigenous peoples (e.g. Brealey 1995).

Territory has a tendency to *depersonalize* social relations “[b]y classifying at least in part by area rather than by kind or type” (Sack 1986, 33). Through the application of rules to spaces (and to social roles within spaces) people are instructed to adhere to rules enacted in the name of territorial formations, which again *obscures* the relational dimension of territory (Sack 1986; Lefebvre 1991). The *displacing and depersonalizing* tendencies of territory thus combine to reify social power so that it appears to reside in the territory itself rather than in the actors who are actually complicit in de/re territorialization (Lefebvre 1991). Territory has the effect of diverting attention from actors to the product of their activity, such as borders, fences, or cartographic representations. In this way, as Delaney (2005) notes, “territory does
much of our thinking for us and closes off or obscures questions of power and meaning, ideology and legitimacy, authority and obligation” (18).

Sack’s (1986) “tendencies” provide a useful framework for understanding some of the causes and effects of a particular kind of territory – one defined as the classification, communication, and enforcement of areally bounded social space intended to “affect, influence, and control” (2). Indeed, Sack’s (1986) framework brings to light a number of ideas that deserve closer attention, not least that social power, meaning, and ideology are always implicated in the classification, communication, and enforcement of territory in both material and abstract ways (Lefebvre 1991). I return to these concepts later in this chapter.

 Territory as a political technology

Human territoriality in the tradition of Sack (1986) is still very much a part of the Anglo American research agenda in political geography. Elden (2013), in his historical survey of the word and concept, does not venture far from Sack’s (1986) understanding of territory as an explicitly bounded and enforceable social space. In The Birth of Territory (2013) and related articles (e.g. 2007, 2009, 2010) Elden offers a conceptual, Foucault-ian archaeology of territory. Through the excavation of legal, political, and literary texts – from Ancient Greece to eighteenth-century Europe – Elden (2010, 2013) traces the genealogy of territory to the advent of technologies for measuring, mapping, and demarcating space. He references a specific set of concepts concerning the organization of sociopolitical space, that he argues arose in early modern Europe in the context of increasingly centralized authorities and the assertion of juris-political power. Thus conceived, territory is “a political category: owned, distributed, mapped, calculated, bordered, and controlled” (Elden 2010, 810; also 2007, 2009, 2013).
Elden (2013) emphasizes the etymology of territory, and in particular the word *territorium*, that he describes as an “extremely rare term in classical Latin that becomes common in the Middle Ages, [defined as] land belonging to a town or another entity such as a religious order” (2010, 806). Echoing Sack (1986), the emphasis here is on the political-economic aspect of territory: *a strategy* that permits the assertion of jurisdiction and ownership over explicitly and areally demarcated land (Elden 2013, see also 2007, 2009). Elden (2013), like Sack (1986), also maintains that territory has an aspect of enforcement, which he traces to the Latin term *terrere* (to frighten), that shares the same root as *territorium* (also Brighenti 2006; Painter 2006). Thus, for Elden (2013), territory has a strategic, “military” dimension of enforcement.

This conception of territory, however, is more historically specific than that of Sack (1986). According to Elden (2013), the economic (classifying and bordering) and strategic (enforcement) aspects alone are not enough to understand territory in its historic specificity. Two other elements are necessary: 1) a legal dimension associated with sovereignty, jurisdiction, and authority; and 2) a technical dimension emerging from expertise used to demarcate particular areas under an authority (Elden 2013). Thus for Eldon territory is understood as a political technology comprising techniques for measuring and controlling land – economic, strategic, legal, and technical: a specific, historically and geographically contingent form of sociospatial organization associated with the emergence of the modern state.

Elden (2013) is certainly not alone in associating the concept of territory with the emergence of the modern state (e.g. Taylor 1994; Murphy 2013). The excursions of Soja (1971), Sack (1986) and particularly Elden (2007, 2009, 2010, 2013) explicate a narrow, albeit
popular, reading of territory. But this does not detract from the conceptual value of these works. In particular, the reifying, displacing, depersonalizing, and place-clearing tendencies of territory are concepts that have significance for this inquiry. That territorialization – that is, the enactment of territory – is generally understood as a strategy that classifies, communicates, and enforces political power cannot be overstated. While territory as a bounded “power container” (Taylor 1994) is most often equated with the modern state, this conception also displays remarkable tenacity in the realm of irredentist claims, and is certainly implicated in the issue of overlap disputes (e.g. Thom 2009, 2014; Nadasdy 2012). However, territory is a polysemic concept that has different meanings in different social, temporal, and geographic contexts. Different societies at different times employ a range of varied sociospatial arrangements, not all of which focused on explicit areal boundedness (e.g. Soja 1991; Lefebvre 1991; Gottmann 1973; Antonsich 2009; Raffestin 2012).

A Social Definition of Territory

Disjunctures between traditional Indigenous territorialities and conventional notions of property and territorial jurisdiction often pose a fundamental challenge to achieving clarity of intra-Indigenous jurisdiction (Thom 2009, 2014; Nadasdy 2012). Indigenous land use and allocation may have been, and may still be, governed by nuanced legal systems not well represented by simple, mutually exclusive territorial boundaries. Indigenous sociospatial identities have also often shifted over time, not only with the movement of people but with the merging and division of groups and the forging of new identities, often as a result of colonial violence such as the Indian Reserve system and other state interventions (Turner
and Fondahl 2015). Shifting tribal organization and nuanced Indigenous legal systems can make exclusively bounded spaces problematic. For instance, “Eddie” Taihakurei Durie, the longest-serving Chair of the Waitangi Tribunal, explains this disjuncture with reference to New Zealand’s treaty settlement process:

Maori do not define their tribes by boundaries so much as *whakapapa* -- that is our word for it – genealogy. We define [tribes] by genealogy and our relationships with each other. And sometimes it’s not polite to say where the boundary is, because then the tribe on the other side is going to want to pick a fight with you. So you are rather indistinct unless you are looking for a scrap. That was the traditional way of doing it. If you wanted a scrap you would lay an *okati* [line] that cut along an area and say “don’t cross this line, and if you do cross it, it’s war”.

Maori sense of property ownership wasn’t defined in the British way of having enclosures. Rather, not of all the resources in a given area belong to a particular farmer, but rather different things within that area are used by different people at different times of the year for different purposes. Different people had different interests in those areas.

My grandmother was brought up in the days when people had candles and lamps, and she used to put it to me this way. When I asked her “how far do our boundaries go”, she would say that “they go as far as our candles glow.” She thought it was impolite to actually ask exactly where it was because that would be cause for war. So, you have this tribe sitting on one side and another tribe sitting on the other side and in-between you have this area where the glow of candles intermingles. So of course you are going to get overlaps.

Then the settlement process came in and they say that you have to tell us where your boundaries are: “define your area of interest.” And I said, “well, how can we? It is an impossible task. You are asking us to do that which is culturally inappropriate for us to do. That is fighting talk when you invite us to fight with our neighbors. You’re asking us to get into a fight.” But that is what we are obliged to do by the settlement process.

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42 See, e.g., Banner 1999; Stokes 1997, 2002 on New Zealand; Windsor and McVey 2005; Thom 2011 on BC; Behrendt and Kelly 2008; Kelly and Behrendt 2007 on Australia.
Durie crystalizes a theme common to almost all of the interviews I conducted. European-derived conceptions of exclusively delineated property and territorial jurisdiction are often incompatible with traditional Indigenous legal systems. Traditional systems of land tenure tend to allocate property rights among families and individuals on a functional rather than a geographical basis. The term “layered interests” is often used to describe these systems: a person or family would not own all resources within a particular area, but instead have the right to harvest particular resources in a particular way at a particular time.

Brown (2009) contends that in BC,

[t]raditionally, the territories were defined by a complex interaction of history, laws, place names, language, different activities, family and clan relations, different seasons and time periods, etc. ... What we really ought to do is spend our time evolving our understanding to catch up with First Nations and to work together to develop better tools and systems for recording and recognizing territorial claims in a three or four dimensional representation (1-2).

I agree that there are indeed other ways to understand and represent Indigenous territorial jurisdiction than explicitly bounded containers of political power, but to this I would also add that the way Indigenous land laws were employed does not necessarily reflect the way First Nations might choose to employ them in the present-day or future. Caution is required to ensure representations of Indigenous territory do not succumb to romantic essentialism, as if Indigenous territory is somehow locked into a pre-colonial way of being. As Joe Williams, Former Chair of the Waitangi Tribunal notes,

[i]t’s certainly the case that prior to the introduction of the agrarian economy, there was simply no way you could have straight-line, coterminous boundaries anywhere. Of course our ancestors fought. They fought like hell. But they all understood that everyone had rights everywhere … on either side of the line. But now, because it has

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43 See, e.g., Banner 1999 on New Zealand; Sutton 2003 on Australia; Turner 2000; Turner et al. 2005 on BC.
been transmuted from traditional economies to a new economy, straight-line boundaries really matter. The very complex modes of overlapping rights … don’t work in the modern economy. And it creates these intractable problems (interview 2014).

In Chapters 6 and 9 I argue that learning and drawing from the past is a critical element of achieving clarity of Indigenous jurisdiction in the context of Indigenous-Crown relations, but so too is acknowledging that all legal systems must change over time. Indigenous-Crown negotiation in BC is an opportunity for the articulation of law and territory in a manner that accommodates Indigenous territorialities while also supporting Indigenous-Crown relations. The following posits a conceptual framework for doing so.

** Territory as a relational production **

In contrast to the Sack-ian (1986) tradition, other territologists have taken up and built upon the work of the French geographer Claude Raffestin (e.g. 1984, 2007, 2012). Raffestin theorizes territory in an explicitly relational way: as an interplay between relational flows and processes that mediate flows. Drawing from these and other authors, as well as English translations of some of Raffestin’s work (1984, 2007, 2012), the intent of this section is to explicate a relational conception of territory, and to explore its utility for understanding and reimagining the territorial dimensions of Indigenous-Crown negotiations in BC.

As was noted earlier, for instance, Gottmann (1973) was the first to introduce a relational conception of territory to English language scholarship. Gottmann (1973) understands territory as a system of circulatory movement, “crossroads”, and symbols that structure surrounding space (see also Muscara 2005; Murphy 2012). These crossroads are for

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Gottmann (1973) relational places of opportunity, exchange, and instability, where the management of instability necessitates politics, law, and enforcement (Muscara 2005). Crossroads are thus a heuristic for describing the meeting places of symbolic and material flows, be they flows of people, material goods, technologies, knowledge, or symbols. Iconographical flows are central to Gottmann’s notion of regionalism, from which territory derives, and he explains:

To be distinct from its surroundings, a region needs much more than a mountain or a valley, a given language or certain skills; it needs essentially a strong belief based on some religious creed, some social viewpoint, or some pattern of political memories, and often a combination of all three. Thus regionalism has what might be called an iconography at its foundation (1950, 70, quoted in Muscara 2005, 33).

Gottmann (1973) thus embraces a social definition of territory rather than a territorial definition of society, that orders the concept of boundaries, at least conceptually, secondary to the production of sociospatial identity. Boundaries are thus understood relationally as “crossroads” that regulate flow through varying degrees of enforcement and impedance. Boundaries are produced at crossroads where the symbols of different regions – e.g. historical interpretations, beliefs, and social norms, etc. – are distinguished and enforced. This is not to say that iconographies themselves do not circulate and indeed interpenetrate regions as well, but rather that regional coherence and stability is dependent on the tenacity of specific regional iconographies. As Muscara (2005, 43) explains, “[b]y influencing circulation flows through the regulation of accessibility, the enforcement of an iconography can reach the extreme of dictating total closure of … space.”

Raffestin (e.g. 2004, 2012) and others have expanded the idea that territories are more a function of relations than areally demarcated spaces of exclusive political power
(Soderstrom and Philo 2004; Brighenti 2006, 2010a, 2010b, Fall 2012; Klauser 2008, 2012; Antonsich 2009, 2011; dell’Agnese 2013). In this view, territory is not so much a strategy of material appropriation and control, as in the Sack-ian (1986) approach, but a relational program of cultural identification (Klauser 2012; Murphy 2012). This relational ontology is the foundation on which Raffestin builds his territorology, as well as his political ambition. His goal is to redefine geography in opposition to objectivist and essentializing approaches (Raffestin 2012). Raffestin (2012) starts with the premise that territoriality is not so much an overt strategy or behavior as it is a set of mediated relationships that bind people with people and people with the material environment (Brighenti 2010a; Klauser 2012). Mediation, or “modes of mediation”, refers to the techniques, knowledges, and representations (mediators) employed by different actors in the conduct of relations, that in turn produce, and are produced by, territoriality (Raffestin 1984, 140; see also 2012).

Similar to Gottmann’s (1973) relational notion of territory as circulatory flows, crossroads, and iconography, Raffestin’s territorology holds that territory is an ongoing relational production – a process of deterritorialisation, territorialization, and reterritorialization – mediated by social practices, intentions, and power/knowledge (Raffestin 1984, 2012). As indicated by the terms “production” and “knowledge/power,” Raffestin owes much to the work of Lefebvre (e.g. 1991) and Foucault (e.g. 1980). Lefebvre’s notion of “the social production of social space” provides a useful framework for understanding a Raffestin-ian conception of territory, and the territories at work in Indigenous-Crown negotiations in BC.

The social production of social space
Henri Lefebvre was a French sociologist best known, in English language geography, for *The Production of Space* (1991), in which he asserts that “(social) space is a product” that “serves as a tool of thought and action [...] control, and hence of domination and power...” (26, 56). Lefebvre (1991) uses the term “social space” in a manner somewhat analogous to the concept of place, as it is commonly employed in English language geography (e.g. Massey 1994, 2004, 2005; Amin 2002; Cresswell 2004). Social space in this context signifies a complex social production pervaded by power and socially produced meaning, that in turn produces spatial understanding and practices (Lefebvre 1991; see also Merrifield 2000; Butler 2009; Brenner and Elden 2009). The term “absolute space” is used by Lefebvre (1991) to indicate a pregiven material reality to which spatial meaning is ascribed through the production of social spaces. Echoing Gottmann (1973), the crux of Lefebvre’s (1991) contention is that practices, imaginaries, and spatial representations circulate and are enforced until normalized; a process that often obscures the political ideologies embedded within particular sociospatial arrangements. Lefebvre (2009) explains:

Is not the secret of the state, hidden because it is so obvious, to be found in space? The state and territory interact in such a way that they can be said to be mutually constitutive. This explains the deceptive activities and image of state officials. They seem to administer, to manage, and to organize a natural space. In practice, however, they substitute another space for it, one that is first economic and social, and then political. They believe they are obeying something in their heads - a representation (of the country, etc.). In fact, they are establishing an order – their own” (228).

Lefebvre is here referring to an “illusion of transparency” (1991, 28) in which reality and appearance are systematically conflated, that in turn creates and sustains particular

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45 First published in French in 1974.
sociospatial arrangements while precluding others. By employing territory’ *reifying, depersonalizing,* and *place clearing* tendencies, the state and its agents are thus deeply implicated in the production of such illusionary, self-affirming representations of social space. As Brenner and Elden (2009) note, “[b]y projecting this ‘illusory clarity of space’ throughout society as a whole, the state attempts at once to manipulate political-economic relations more effectively and to mask its own pervasive role in such interventions” (371). Lefebvre (1991) characterizes this phenomenon as “the fetishization of space in the service of the state” (21), a process driven by the state’s “apparatus of power and knowledge” (51). The illusory reification of spatial imaginaries (fetishization) combines with veiled state-centric practices to produce and sustain particular sociospatial orders, such as those at work in Indigenous-Crown negotiations in BC.

Lefebvre (1991) posits a conceptual triad for understanding the social production of social space: 1) abstract *representations of space* produced by “experts” within power-infused institutional apparatus; 2) *representational spaces* of lived experience, social imagery, and resistance; and 3) material *spatial practices* such as everyday routines, networks and pathways through which social life is produced and reproduced (48–49). It is through the simultaneous operation of these three dimensions – perceived, conceived, and lived – that social space is inexorably tied to the production of social relations. Social space is not only part of the apparatus of social regulation but a site of ideological struggle and resistance. As with Raffestin, Lefebvre’s (1991) focus is on the processes implicated in the production of social spaces, and particularly on the imaginaries and spatial practices that produce and reproduce hegemonic order.
Lefebvre’s (1991) schema brings into focus some of the territorial aspects of Indigenous-Crown negotiations in BC. If one were to transpose Lefebvre’s notion of space to territory in the context of this inquiry, representations of territory would be conceptualized as territoriality; that is, perceived territoriality expressed through technologies produced within a system of ideology, power, and knowledge, such as First Nations’ assertions of traditional territory institutionalized by the BC Treaty Commission. Such dominant conceptions of space (territory) are thus intimately tied to an order imposed by social power, at least partially at the behest of the state. Certainly the “continuing allure” (Murphy 2012) of the Sack-ian conception of territory permeates the imaginaries implicated in the BC treaty process. Indeed, it is precisely this conception of space that has often provoked overlap disputes among First Nations in BC. In contrast, representational territory is “lived” territoriality – the territoriality of experience – that sometimes clash with other territorial imaginaries. Territorial practices are the mechanisms by which imagined territorialities are given material expression, such as through treaty settlement.

Overlapping territorial claims of First Nations in BC can thus be understood as resistance to the ideologies embedded in the Sack-ian notion of territory: an implicit “(perhaps unintentional) challenge to the often taken-for-granted spatial practice of representing territories as discretely bounded and exclusive” (Turner and Fondahl 2015, 8). Nonetheless, discordance between these dimensions of social space – e.g. between perceived, conceived, and practiced social space – can provoke contestation, particularly where new forms of sociospatial relations are sought, as in Indigenous-Crown negotiations. As Lefebvre (1991) argues, “new social relations demand a new space, and vice-versa” (59). The creation of new arrangements of social relations, such as those sought within the BC
treaty process, requires the production of a social space concordant with the relational regime sought.

**Territory as a relationally mediated production**

With this knowledge of Lefebvre’s (1991) work now in hand, we can return to Raffestin, who combines Lefebvre’s (1991) account of social space with Foucault’s (1980) notion of power/knowledge to develop an explicitly relational theory of territory. A number of Lefebvre’s (1991) conceptual elements are apparent in Raffestin’s conception of territory, not least that territory (a social space) is an ongoing production and not just a product; a relational process and not just a behavior or strategy (contra Sack 1986). For Raffestin (2012) the category of mediator includes but is more expansive than Lefebvre’s spatial practices: mediators are the “tools of apprehension of and relation with the environment” (128) that reflect the power of relational “labour”. Echoing Foucault (e.g. 1980), power is here construed as relational “labour”, itself a production of accumulation, privileging, and deployment of knowledge and energy. Thus conceived, labour is knowledge and energy combined, or “informed energy” (Klauser 2012), that mediates the production of social space (Raffestin 2012; see also Brighenti 2010a; Klauser 2012). Territorialization, then, in Raffestin’s program, is a dual process of material and immaterial production through the labour of energy and knowledge. Thus conceived, the mediating effects of accumulated intellectual and material energy are fundamental to the production of territory, as well as for any process that seeks to change the structure of sociospatial relations.

Unlike authors such as Sack (1986), Raffestin dismisses the notion of an evolutionary path from “primitive” to “modern” territory, as he explains:
… all systems of relations are complex, the most ancient no less than the most recent. A traditional society is not easier to describe than a contemporary one. It is, above all, important to identify the moments of transgression that highlight the norms linked to interdiction. In all territoriality there functions a dialectic of prohibition and transgression, interdiction and violation … (2012, 129).

Thus, for Raffestin, moments of prohibition and transgression comprise territoriality, not a supposed “progression” from “primitive” to modern. Also apparent in the quotation above is the concept of “boundaries”, although in Raffestin’s territorology the concept is better described as limits of transgression and interdiction. Similar to Gottmann’s (1973) notion of iconographical interplay at crossroads of flows, Raffestin’s (2012) concept of boundaries derives from the idea that territory is mediated within a semiosphere; “that is, the signifying system from which the actor draws the informational resources for action” (129). Thus for Raffestin territory is a “relational semiotic space” (dell’Agnese 2013); a production where actors select from a repertoire of informational resources (signs) based on their intentions and objectives (Brighenti 2010a; Klauser 2012). The production of territory, in this view, would be impossible without limits and the possibility of transgression. This is not to say that Raffestin overlooks the concept of boundaries. Boundaries are for Raffestin (2012) a subset of a broader concept of limit. According to Raffestin, “culture is a catalogue of limits, and history a catalogue of their transgression” (Raffestin 2012, 128).

Territory, then, is not entirely geographical. It can also be semiotic (Brighenti 2010b), a relational system of exchanges in which actors invoke different mediators that condition physical and social environments (Brighenti 2010a; Klauser 2012). To some extent actors chose the mediators they invoke, although autonomy of actor choice is conditioned by hegemony, which is to say that they become normalized within discursive space that
conditions perception and understanding (Raffestin 2012; see also, e.g., Foucault 1980). For instance, certainly money has become an increasingly dominant mode of territorial mediation (Raffestin 2012). Actors use money to buy land, which has the effect of territorializing material space. Raffestin understands this kind of territorialization as the application of the accumulated intellectual and material energy of money and private property. Money and private property are, both materially and intellectually, powerful mediators because they reflect significant accumulations of “labour”, and thus have become socially dominant (Raffestin 2012).

To apply the heuristic of mediators to the current inquiry is to recognize the power of such mediators within Indigenous-Crown negotiations and law, and the ways such mediators are invoked by different actors at different times. For instance, First Nations often invoke particular sets of mediators. These include what I will call traditional, culturally-specific mediators, for example Indigenous languages, kinship ties, and legal systems. Often also invoked are what Robbins (2004) calls “Indigenous modernities” that reflect varying degrees of hybridity between Indigenous and non-Indigenous epistemologies. Such Indigenous modernities are reflected in mediators such as cartographic representations of territory, claims for recognition of Aboriginal rights under state law, and communal identities crystalized around Indian Act Bands. The Crown often invokes different mediators, such as money, negotiation policy, and appeals to the public interest. Recall that for Raffestin territory is an ongoing production in which actors’ intentions are combined with the labour of mediators (Raffestin 2012). To transpose a Raffestin-ian framework to this inquiry, the territorial aspects of Indigenous-Crown negotiations can be understood as an ongoing production in which the mediators of different actors collide and compete.
In the case of an overlap dispute, the mediators invoked by one First Nation compete with those of another or multiple other First Nations. At different points in time such productions give rise to boundaries; that is, material or symbolic inscriptions that makes relations visible. Per Raffestin’s framework, it is the amount of accumulated intellectual and material energy (labour) vested in particular mediators (or constellations of mediators) that determines the visibility and meaning of boundaries, and thus the nature of relations attenuated by boundaries. The labour of mediators determines not only the “location” of boundaries, be they spatial or aspatial, but also how boundaries themselves are understood.

How, then, does this conceptual framework relate to the territories at work in processes of Indigenous-Crown negotiations? Scholars working in this vein suggest that relations among people need to be put at the conceptual center of territory (Brighenti 2006, 2010b; Painter 2010; Raffestin 2012; dell’Agnese 2013). Theirs’ is a “bottom-up” understanding of territory in which norms concerning prohibition and transgression are mediated at an inter-institutional or even interpersonal scale. “Top-down” (e.g. Sack-ian) approaches tend to accept territory as a prefatory given, which tends to depersonalize and displace attention from the ideological norms that bring territory into being. Both types are apparent in processes of Indigenous-Crown negotiation but their degree of visibility varies dramatically. Degree of visibility depends on the accumulated intellectual and material energy (labour) embedded in the mediators recruited to a cause. To transpose this framework to the current inquiry, overlap disputes are essentially a collision of different mediators, where mediators compete and those with greater accumulated labour prevail. Territorial inscriptions resulting from treaty settlements are a product of a clash of different mediators.
Settlement of treaties despite overlapping claims – e.g. despite disjunctures between different ways of understanding territory – can reflect the dominance of the modernist, conventional notion of territory within processes of Indigenous-Crown negotiation.

**Territory as relational networks with articulated limits**

Processes of de/re territorialization generally involve the enactment of some sort of boundary. Accordingly, boundaries and territory can be understood as two aspects of the same phenomena or process. A key distinction between different ways of understanding territory lies in the meaning of the term “boundary”. How, if at all, does the spatial structure of a relational network relate to the pervasive notion that territory is areally bounded space? How does a relational network give rise to boundaries?

Echoing Raffestin, authors such Brighenti (2006, 2010a), Painter (2010) and dell’Agnese (2013) suggest that answers to these question lie in the idea that “[b]oundaries are not the opposite of flows but rather the moment when flows become visible, inscribed in the field of visible, socially relevant phenomena” (Brighenti 2010a, 61). Boundaries and network flows are thus complementary rather than oppositional elements of territory. Boundaries, in the conventional sense, are concerned with the regulation of thresholds, such as varying degrees of access, inclusion, or exclusion. The mediation of relational networks concerns access and speed of flow, such that movement through boundaries is conceptually equivalent to flows through networks (Painter 2010; Brighenti 2010a, 2010b; dell’Agnese 2013). To borrow language employed in the study of place, a relational understanding of boundaries is equivalent to “nodes in relational settings” (Amin 2002, 391) or “articulated moments in networks of social relations and understandings” (Massey 1994, 5) that make social relations visible (Brighenti 2010a). Territory is network in disguise, the boundedness of
which determined by the mechanisms that regulate relational flows (Painter 2006, 2010; Brighenti 2006, 2010b; dell’Agnese 2013). These mechanisms (or mediators, to use Raffestin’s term) are the means by which network flows are allowed, slowed, or impeded.

Territory and explicitly bounded juris-political jurisdiction have long been understood as twin concepts arising from staunchly spatial ideas concerning the administration of law. The territorial reach of courts is often assumed to be coextensive with that of the state (Gottmann 1973; Ford 1999; Leckey 2004). Scholars such as Blomley (e.g. 1994, 2003) and Brighenti (2006, 2010b) argue that the relationship between law and space can be reimagined. Law needs to be somewhere, but the territorial reach of law can also be a person or class of people, at the level of inter-personal and inter-institutional relations (Brighenti 2010b). A relational approach shifts territory away from its depersonalizing tendencies towards a territory derived from interpersonal and interinstitutional relations. It shifts understanding from the simplifying and reifying tendencies of geocentric territorial inscriptions to the personal and the particularistic.

Network and territory are not incommensurable sociospatial concepts. They are in fact complimentary yet rarely articulated as such. Certainly Sack (1986) is correct in his contention that areally bounded territories of political power are easy to communicate, yet this conception obscures a deeper reality: territory is not the timeless geographical power container it is often made out to be, but rather is an ongoing production of networked relations in which connections between people and materiality are mediated and inscribed. A relational understanding of territory has profound utility for understanding and reimagining the territories at work in Indigenous-Crown negotiations in BC and beyond. Employing such understanding, however, requires more than just “adding on” networks to prevailing notions
of territory. The effective management of overlap disputes requires that dominant
conceptions of territory be fundamentally reimagined. It requires the articulation of relations
between people and between people and materiality in a manner that makes relations at the
inter-institutional and personal level visible.

**Conclusion: A Territorology of Reconciliation**

Methods of territorial analysis continue to be the subject of considerable debate. Since the mid-1990s a plethora of innovative work devoted to denaturalizing commonsensical ideas about territory has emerged from a range of epistemic communities, such as sociology (e.g. Sassen, 2006, 2013; Brighenti 2006, 2010a), anthropology (e.g. Gupta and Ferguson 1997; Thom 2009, 2014), and of course human geography (e.g. Agnew 1994; Taylor 1994, Delaney 2005; Antonsich 2009; Brenner and Elden 2009; Painter 2010; Murphy 2012, 2013; Elden 2010, 2013). The new journal *Territory, Politics, Governance* is yet another indication that territory is very much an ongoing pragmatic and theoretical concern. This chapter has engaged with a number of ways of understanding territory, each implying a different approach to territorial analysis. The aim of this concluding section is twofold: first, to synthesize different ways of conceptualizing territory; and second, to argue that a socio-relational conception of territory offers a productive lens through which to understand and address overlap disputes. This is not to suggest that the conventional, modernist conception of territory can be easily dismissed, nor should it be. The ties between explicitly bounded territory and claims for Indigenous self-determination, peoplehood, and land in some contexts are fundamental to the advancement of Indigenous rights (e.g. Castree 2004). Yet accommodating nuanced Indigenous territorialities in processes of Indigenous-Crown negotiation also requires imagining and enacting territory in relational terms.
Robert Sack (1986) and Claude Raffestin (1984, 2012) have become emblematic of two ways of thinking about territory (see, especially, Murphy 2012). For Sack, territory is an overt human strategy of spatial classification and enforcement. For Raffestin, territories are produced and reproduced by the invocation of mediators that make different kinds of boundaries visible at different times. Both Sack and Raffestin are concerned with different aspects of the same phenomena – territories and boundaries – yet they engage with fundamentally different scholarly projects. English language Geography’s engagement with territory has generally followed a Sack-ian approach, in which territory refers to areally bounded, enforceable political space (e.g. Agnew 1994; Taylor 1994; Ford 1999; Leckey 2004; Elden 2013). This understanding of territory is generally associated with the emergence of the modern state system in which the concepts of sovereignty and territory are often considered mutually constitutive (Taylor 1994; Ford 1999; Leckey 2004).

A Raffestin-ian approach, on the other hand, ascribes a much broader meaning to territory. At the heart of Raffestin’s program is an ambition to shift focus from essentialized space to sociospatial relations. A relational approach to territory “reverses the usual geographical approach. Its starting point lies not in the analysis of space but in social actors’ instruments and codes which are leaving marks and indications in territory” (Raffestin 1986, 94, quoted in Klauser 2012, 114). Raffestin (1984) calls these instruments and codes mediators, that operate to enact spatial imaginaries and referents to the material world. To adopt a Sack-ian conceptual framework is to start and finish with a particular constellation of ideas about how space is divided and controlled. The tendencies of territory discussed earlier provide a useful framework for analyzing this powerful, “modernist” sociospatial practice that continues to shape social relations. As a conceptual framework it is well-suited to
analyses of territorial arrangements that spatially classify, communicate, and enforce political power through their objectifying, reifying, and depersonalizing tendencies. However, the conceptual limitations of such an approach flow from its focus on territorial outcomes and not their sources. To adopt a Sack-ian framework exclusively is to accept that territory produces sociospatial relations, rather than one that is also produced by sociospatial relations (Murphy 2012, 2013).

Raffestin’s territorology, on the other hand, is primarily concerned with exposing underlying normative implications of particular sociospatial arrangements; that is, how should territory be enacted? This approach understands territory not only as a strategy to achieve particular social ends but as an ongoing production mediated by the material and discursive environments in which interpersonal and inter-institutional relationships are situated (Raffestin 2012). To adopt a Raffestin-ian approach is to focus on how relational interactions, imaginaries, ideological norms, and material inscriptions produce particular sociospatial outcomes. This is not to suggest that all relationally constituted territorial inscriptions are created equal. No sociospatial arrangement is ever truly fixed (Massey 2005), but neither are they all equally unstable (Murphy 2012, 2013). The visibility and tenacity of particular territorial inscriptions depends on the accumulated labour of mediators, such as policies, imaginaries, and knowledges (Raffestin 2012). The limitation of such an approach is that it tends to neglect the profoundly dominant role that territories, once inscribed and institutionally formalized, often transcend the mediators that brought them into being (Murphy 2012). Territory, once inscribed, can take on a life of its own. Both Sack-ian and Raffestin-ian territorologies provide valuable insights into the territories at work in processes of Indigenous-Crown negotiations in BC.
The BC Treaty Commission (BCTC) has to some extent institutionalized the territorial inscriptions of First Nations participating in the BC treaty process, and these territories have indeed taken on a life of their own. Through institutionalization, First Nations’ assertions of territory submitted to the BCTC display the reifying, displacing, depersonalizing, and place-clearing tendencies identified by Sack (1986). Classification by space has resulted in the depersonalization of relations, so that overlapping claims are now often understood as conflicts over the location of territorial boundaries rather than an indication of how people are connected through their relationships with land and each other. As noted by Thom (2014), overlap disputes are “pressing and intractable problems because the solutions demanded by the state—the delineation of contiguous, bounded, exclusive territories—require Indigenous peoples to fundamentally reimagine both territory and territorial relations” (18). Indeed, in the context of overlap disputes, the territorial boundaries of First Nations are now often the primary object of attention, rather than the relations that produced them. The place-clearing, erasing effects of these territories are keenly felt by First Nations that have chosen to not to participate in the BC treaty process, as well as by those with claims that overlap settled, or soon to be settled, treaties. The idea that territory is a container of enforceable political power maintains a tenacious hold on the geographical imaginaries at work in processes of Indigenous Crown negotiation in BC.

But Sack’s (1986) framework alone neither explains the production of these territories nor reveals alternatives that might support the effective and lawful management of overlap disputes. At least some First Nations engaged in treaty negotiation in BC employed, and still wish to employ, a relational conception of territory rather than a territorial definition of relations (e.g. Brown 2009; Thom 2011, 2014). The inability of explicitly bounded
territory to fully reflect Indigenous sociospatial relations is often an underlying cause of overlap disputes (Thom 2011, 2014; Turner 2011; Nadasdy 2013; Turner and Fondahl 2015). The tension between a social definition of territory and a territorial definition of society can be bridged by admitting that explicit areal boundedness is just one kind of territory, albeit a highly visible one. Thom (2014) asks, “are there better ways to represent Indigenous territorial relations in claims processes?” (17). The relational work of scholars such as Raffestin (1984, 2012), Brighenti (2006, 2010a, 2010b), dell’Agnese (2013) and others suggest that there are.

This is not to underestimate the importance of explicitly bounded territory to First Nations seeking recognition of their rights and claims. The territorial maps of First Nations are a profoundly important challenge to exclusive state authority concerning land and resources (Castree 2004). Just as no account of state space can be complete without territory, no account of Indigenous jurisdiction is complete without the articulation of interpersonal and inter-institutional relations, including those pertaining to space. Equally important, though, is to recognize the limitations of areally bounded territories, and particularly their problematic nature in the context of overlap disputes. Addressing the challenge requires more than just “adding on” relational networks to the Sack-ian notion of territory. It requires that relations among people and institutions be at the conceptual core of territory.

Territories are important, particularly in the context of irredentist challenges to exclusive state authority. But territory can also be understood relationally, and boundaries a mechanism that make inter-personal and inter-institutional relations visible. As Massey and others (2009, 417) remind us, “the job is to take responsibility for the drawing of those lines
on the one hand, but also to recognize that the social relations which cross those boundaries aren’t only ones of antagonism.”

Agnew (1999, 504) suggests that dominant modes of sociospatial organization will change “as material conditions and associated modes of understanding of them change.” I argue that Indigenous-Crown negotiations in BC can and should be such a moment of change. Territory can be imagined and enacted in a way that makes Indigenous territorialities and law cognizable to courts, processes of indigenous-Crown negotiation, and to Indigenous communities themselves. Understanding and giving material effect to territory in relational terms presents the best way, and perhaps the only way, to understand and accommodate the Indigenous territories at work in processes of Indigenous-Crown negotiation in BC. In Chapter 9 I propose a method for doing so.
CHAPTER 5: OVERLAP DISPUTES IN BC: BETWEEN LAW AND POLITICS

Federal and Provincial Governments have a legal duty to act honourably in their dealings with Indigenous peoples within their respective jurisdictional spheres (Haida Nation 2004; Slattery 2005). The British Crown’s Royal Proclamation of 1763 represents an early expression of the Crown’s intention to act honourably concerning Indigenous interests in land. The Proclamation held that “any lands whatsoever” not “ceded to, or purchased by” the Crown were to be “reserved” for the “Nations or Tribes of Indians”. Canada recognizes 70 treaties settled prior to the cessation of treaty-making in 1921 (Canada 2017a). Other than a few, small pre-confederation “Douglas treaties” on Vancouver Island, and a treaty covering the northeastern corner of the province, historic treaties were not concluded in BC.

The Crown has a legal duty to negotiate treaties with First Nations in areas where historic treaties were not settled (Haida Nation 2004, para. 20). The economic and moral imperatives for treaty settlements are also compelling (e.g. BCTC 2008; Deloitte 2016). Yet overlap disputes are a significant barrier to effective and lawful Indigenous-Crown relations in BC: they forestall treaty settlements, they delay and can preclude land development, and they undermine the imperative for First Nations to exercise decision-making jurisdiction in partnership with the Crown and its licensees. If not properly managed, overlap disputes undermine key imperatives of Indigenous-Crown negotiations: to achieve clarity of Indigenous jurisdiction through lawful settlements and to avoid Aboriginal rights litigation.

46 The constitutional division of powers provides Canada with exclusive legislative authority over “Indians and Lands reserved for the Indians” (Constitution Act 1867, s. 91(24)). Provincial jurisdiction also substantively affects Aboriginal and treaty rights, particularly those aspects related to land and natural resources. In BC, provincial Crown land comprises 94% of the land base, whereas federal Crown land is only one percent. Indian Reserves comprise less than one half of one percent of land in BC (Canada 2017b).

47 See, e.g., Miller 2009 for an account of historic treaty making in BC.
The purpose of this chapter is threefold: 1) to explain the contexts in which overlap disputes arise; 2) to describe how overlap disputes have been managed; and 3) to argue that a better approach is needed. The chapter is structured accordingly. The first section traces the evolution of Crown policy concerning overlap disputes, as well as other aspects of Crown policy related to how overlap disputes arise and have been managed. In the second section I present several case examples, and discuss how the Crown’s legal duty to consult and accommodate First Nations relates to the management of overlap disputes. The third section explores current barriers to the effective management of overlap disputes – discursive, tactical and systemic. A central argument of this chapter, and of this inquiry as a whole, is that treaties, overlap disputes, and Indigenous-state relationships more generally, need to be consistent with legally defined Aboriginal rights. Law can and should be a source of common understanding and legitimacy in the context of overlap disputes. Effective management of overlap disputes requires a process that produces outcomes that are politically derived and consistent with both state and Indigenous legal systems.

**Treaty Negotiation Policy and the Land Selection Model**

In the mid-1960s, the Nisga’a Nation of northwestern BC commenced litigation seeking a judicial declaration of their continuing Aboriginal title to their ancestral lands. On appeal, the Supreme Court of Canada held that Aboriginal title is indeed a legal right recognized in Canadian law but split evenly on whether Nisga’a title continued to exist or had been extinguished by the assertion and exercise of Crown sovereignty (*Calder 1973*).48 The Chief Justice tipped the balance against the Nisga’a on a procedural matter and

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48 *Calder et al. v Attorney-General of British Columbia 1973 (SCC).*
dismissed the claim.\textsuperscript{49} The \textit{Calder} decision is often cited as a catalyst for the federal government’s decision to renew its treaty-making policy in 1973 (e.g. Macklem 2001; but see Scholtz 2006).\textsuperscript{50} In August, 1973, Jean Chrétien, then Canada’s Minister of Indian Affairs and Northern Development, formally announced the federal government’s intention to negotiate modern treaties with First Nations “where their traditional interest in the lands concerned can be established” (Canada 1973, 1). The term “comprehensive claims” was adopted to indicate that negotiations were to involve a range of issues, including financial compensation, land title, resources harvesting rights, and self-government.

Under Canada’s first modern treaty policy, First Nations were required to submit to the federal government ethno-historical information supporting the veracity of their territorial claims (Canada 1981). Canada published a more detailed version of its policy in 1981 that reiterated a requirement for First Nations to establish the evidentiary basis of claims.\textsuperscript{51} The policy acknowledged that claims are “based on the concept of ‘aboriginal

\begin{footnotesize}
\textsuperscript{49} The appeal was dismissed because the Nisga’a had not obtained permission from the federal attorney general to sue the Government of BC.

\textsuperscript{50} According to Scholtz (2006), federal “cabinet documents show that it was not the prospect […] of the Calder decision] that drove the decision […] to renew Canada’s treaty negotiation policy. Key to the situation was that Indian’s political mobilization and the wider politicization of land claims made it possible for native people to capitalize on the situation of judicial uncertainty” (68). The renewal of Canada’s treaty policy was precipitated by a number of factors prior to the Calder (1973) decision, such as the appointment of an Indian Claims Commissioner in 1969 to fund research and review claims, and the federal government’s stated intention, prior to 1973, to seek negotiated solutions to Aboriginal claims in the Northwest Territories and Northern Quebec (Scholtz 2006).

\textsuperscript{51} Criteria for establishing claims were not explicitly defined in the 1981 policy. Subsequent federal policy of 1993 explicitly defined the criteria based on a test for Aboriginal title established by the federal court in \textit{Hamlet of Baker Lake v. Min. of Indian Affairs 1979}. Except in BC (as will be discussed), in order for a claim to be accepted for negotiation, a First Nation must demonstrate all of the following:

\begin{itemize}
\item \textit{1. The Aboriginal group was and is an organized society.}
\item \textit{2. The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.}
\item \textit{3. The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies.}
\end{itemize}
\end{footnotesize}
title”, and established a settlement model that “releases” and “exchanges” “general and undefined Native title” for specific treaty rights and benefits (Canada 1981, 3). Treaties settled under this policy resulted in the exchange of Aboriginal rights under the common law for treaty rights enumerated in modern treaty agreements, an approach sometimes characterized as “blanket extinguishment” (e.g. BC Claims Task Force 1991; Egan 2013; Eyford 2015). The 1981 policy also explicitly recognized situations where the claims of First Nations overlap, holding that

[w]here this sort of overlapping exists and where there appears to be no ready agreement among the different users, some appropriate and timely means must be found to resolve the differences. Until this is done, no land in these areas will be granted (Canada 1981, 23).

By the early 1980s, Canada’s blanket extinguishment policy had become a significant barrier to concluding modern treaties, particularly in the wake of the constitutional entrenchment of Aboriginal and treaty rights in 1982. First Nations’ opposition to the policy was reflected in two government-commissioned reports: the “Penner Report” (Canada 1983) and the “Coolican Report” (Canada 1985). Both reports recommended eliminating the blanket extinguishment policy. The federal government announced a new claims policy in 1986, much of which remains in effect (c.f. Canada 2014). The 1986 policy provided for “the cession and surrender of aboriginal title in non-reserved areas, while

4. The Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes.
5. The group's Aboriginal title and rights to resource have not been dealt with by treaty.
6. Aboriginal title has not been eliminated by other lawful means” (Canada 1993, 5-6, emphasis added; see also Hamlet of Baker Lake 1979, 45).

52 The unique relationship between the Canadian state and Indigenous peoples is reflected in Section 35 of the Constitution Act 1982 that recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal people.
allowing any aboriginal title that exists to continue in specified or reserved areas…” (Canada 1987, 12). This “land selection model” of treaty negotiation remains in effect today. In order to settle a treaty a First Nation must agree that their Aboriginal rights are “modified and continue as modified” rights defined in the treaty, and that their Aboriginal title persists only in selected Treaty Settlement Land. Modern treaties thus recognize two types of treaty land rights: 1) exclusive rights within Treaty Settlement Land (that is, exclusive to the First Nation settling the treaty); and 2) non-exclusive treaty rights occurring outside of Treaty Settlement Land, such as wildlife and fish harvesting rights. Treaty Settlement Land has comprised a very small percentage of the total area claimed by First Nations that have settled treaties under the BC treaty process to date. Aboriginal rights within the vast majority of asserted traditional territories “are modified, and continue as modified, as set out in [the] Agreement” (Tla’amin treaty 2014, 29).

The federal treaty policy of 1986 also reiterated Canada’s position with respect to overlapping claims:

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 1987, 12).

Until recently, treaty rights were only recognized in land claimed exclusively by one First Nation (i.e. no overlap) or where there was agreement among First Nations concerning the shared use of land subject to multiple claims. Treaty negotiation in BC has taken a

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53 All modern treaties settled in BC contain the same language concerning the modification of Aboriginal rights (e.g. Tla’amin treaty 2014, 29).

54 See, e.g., Yukon Umbrella Agreement (1993, s. 2.9.3).
markedly different approach than in the rest of Canada, particularly with respect to overlap
disputes and the criteria by which claims are accepted for negotiation. Lawyer and First
Nations advocate Christopher Devlin explains:

Canada’s treaty making policy was to make treaties congruent with each other, but
now Canada takes the position that treaties can overlap. They are … no longer
adopting a congruent treaty making approach, like a quilt. [Instead], they say “we’re
going to stack them like pancakes.” And the reason they can do this is that the only
thing they can’t stack is the Treaty Settlement Lands and … most of the time there’s
very little Treaty Settlement Land in the treaties. Everything else ends up being
nonexclusive.

If everybody is following the same kind of model, the same assumptions, it’s not a
bad model, [as long as] there is no conflict over the actual Treaty Settlement Lands.
It’s going to be excruciatingly difficult not to have overlapping [Treaty] Settlement
Lands in certain regions of the province. And where the stacking model really falls
down is where different groups aren’t following the same model, in terms of the
harvesting rights and the wildlife management rights (interview 2013).

As Devlin suggests, only some First Nations in BC are prepared to settle treaties
under a model which requires that they modify their Aboriginal land rights in the vast
majority of their asserted traditional territory (e.g. Alfred 2000; Egan 2013; Thom 2014).
Indeed, people I interviewed often cited the land selection model as a major reason for the
slow progress of treaty making in BC, and for a significant number of First Nations
choosing not to participate in the BC treaty process at all. As anthropologist and First
Nations advocate Brian Thom explains,

… there may be a few [First Nations] that are in the process right now that have
bought into the vision … of the kind of modification treaty Canada is insisting on.
But look at the off-TSL [Treaty Settlement Land] chapters of the treaties. The
chapters really crystallize that the governance role off-Treaty Settlement Lands is over for First Nations [after treaties are settled]. They don’t have a governance role. They have a neighbourly role. They have an advisory role. I think it’s a deal breaker for most First Nations. They just see that as fundamentally unacceptable (interview 2013).

For instance, even though the Gitanyow Nation is technically engaged in the BC treaty process, they are not willing to settle a treaty under the land selection model. Joel Starlund, Executive Director of the Gitanyow Hereditary Chiefs, argues that

… the treaty process and the treaty model that is being forced upon us is about Treaty Settlement Lands … it’s about giving up your territory, and extinguishing your rights and title to the territory. We are fundamentally against the Treaty Settlement Lands and extinguishing our rights (Interview 2014).

As Devlin notes (above), the fact that so many First Nations in BC have rejected the land selection model has added to the challenge of effectively managing overlap disputes. Overlap disputes often involve First Nations with very different understandings of their Aboriginal rights, a disjuncture impossible to avoid where overlap disputes involve First Nations that expressed their territories with very different goals in mind. For example, an overlap dispute may be between a First Nation that intends to negotiate non-exclusive treaty rights in areas also claimed by other First Nations, while another First Nation may believe that it has a right to govern its territory to the exclusion of other First Nations. Devlin contends that “there is such a vast gulf now between those positions, you just have inherent conflict because there’s no way to bridge those gaps” (interview 2014). While I agree that there is often a significant divide between the positions of First Nations involved in overlap disputes, I suggest that these differences can be bridged.
The BC Treaty Process


Accordingly, the BC treaty process differs from treaty negotiations elsewhere in Canada in a number of significant ways:

- In BC, First Nations are self-defining for treaty negotiation purposes, which has resulted in a range of variously constituted First Nations at the treaty table, from small communities of less than 200 people (e.g. small Indian Act Bands) to larger political aggregations comprising thousands of members (e.g. multiple Indian Act Bands or other forms of Indigenous political agency) (BCTC 2017b; see also Thom 2010).56

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55 The Task Force was comprised of two members appointed by the federal government, two appointed by the provincial government, two appointed by the First Nations Congress, and one appointed by the Union of BC Indian Chiefs. The First Nations Congress was later renamed the First Nations Summit and currently serves as a discussion forum for First Nations engaged in the BC treaty process (BC Claims Task Force 1991; McKee 2009).

56 Indigenous sociospatial organization in BC is discussed in Chapter 6.
• In BC, First Nations claims are accepted for negotiation without an assessment of whether a First Nation “was and is an organized society,” as required under federal policy (Canada 1993, 5);

• In BC, First Nations territorial claims are accepted on a presumptive basis; that is, there is no assessment concerning the legal or evidentiary merit of First Nations’ territorial claims; and

• Treaty negotiations in BC are facilitated by the BCTC, which has responsibility for, among other things, ensuring timely negotiations, and allocating loaned negotiation support funding to First Nations engaged in the BC treaty process (BC Treaty Commission Agreement 1992).

At the outset of the BC treaty process it was anticipated that “as many as thirty separate negotiations” would be completed by the year 2000 (BC Claims Task Force 1991, 30). It is now clear that the principals misunderstood how First Nations would organize for treaty purposes, and the rate at which Treaties would be settled. After more than two decades of negotiations, only four treaties have been settled under the BC treaty process. Sixty-five First Nations, organized as 53 negotiation tables, are now participating in the BC treaty process (BCTC 2017a), and this represents just over half of Indian Act Bands in BC (BCTC 2015). Depending on how First Nations are organized for treaty purposes, well over a hundred First Nations may eventually seek treaty settlements, over three time as many as was anticipated.

Brad Morse, who was Chief of Staff to the federal Minister of Indian Affairs in the early 1990s, describes a disjuncture between the way the BC treaty process was initially
envisioned and the way the process has actually played out:

… the way it was looked at [by] the leadership of the Summit and participants in the Task Force was that the negotiations would be done on the Nation level, not the First Nation or Indian Act Band level. But the dilemma for government and for the Summit is how do you tell an individual First Nation that it can't have its own [treaty] table when the Summit and AFN [Assembly of First Nations] have said that each First Nation is just as sovereign as every other First Nation? And no one within the Summit was prepared to crunch that issue. People talked about it but wouldn't make a decision. Government, and particularly Indian Affairs, didn't have the guts to stand up to it. And the BC government was in a similar position.

And the BCTC didn't have the guts to deal with it either. The BCTC could have said that it won't certify an individual First Nation as being able to negotiate. BCTC Commissioners make the decision [whether] a claim moves on to the next stage [of negotiation]. The BCTC would need to provide a basis for that decision, such as the view that for treaty settlements to be achieved they must be achieved on a Nation basis, not an Indian Act Band basis. That [decision] may be challenged in court, but then you'd know. Do they have the authority or not? You can't have 200 First Nations in BC resulting in 200 sets of negotiations. We knew this was going to be a disaster (interview 2014).

Paul Kariya, who was executive director of the BCTC in the early 1990s, describes some of what he calls the “necessary chaos” of getting the BC treaty process off the ground:

One of the questions asked was “have we got the right First Nations in the process? [BCTC Chief Commissioner] Alex Robinson57 said “you guys opened the door to however many came through the first little while – that’s a huge mistake.” We ended up going to the principals and said, “it’s not too late, although we’ve accepted so many [claims], we think we have not accepted the right First Nations.” And the First Nation’s Summit essentially said to Alex and I, “go away and … don’t ask these

57 Alex Robinson was the second Chief Commissioner of the BC Treaty Commission (1995-1997).
fundamental questions that are only going to upset the apple cart.” And Canada and British Columbia said the same thing. And Alex said, “you know, we’re doomed to fail on this.” Now in retrospect one could say, “well, it’s not anybody’s fault. It’s part of colonialism. You’re not going to throw back the clock and say, “well you’re not a First Nation, you don’t qualify.” We could have never of won that war. So realistically what could we have done? Deal with it. You just have to deal with it (interview 2013).

Later in this chapter I argue that the BCTC can and should play a more assertive role in the management of overlap disputes than it has. For now it suffices to emphasize that overlap disputes – whether within or among First Nations – to a some extent are a product of the way First Nations have organized for treaty purposes, which has been very different than was initially anticipated. Negotiation of claims of smaller First Nations (e.g. Indian Act Bands), as opposed to larger Nations, has resulted in many more overlap disputes than was anticipated, and also provoked disputes concerning which kinds of Indigenous polities are the appropriate representative entities to negotiate with the Crown.

*Traditional territory and statements of intent*

First Nations wishing to negotiate a treaty in BC are required to submit to the BCTC 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” (BCTC Agreement 1992, 4). The term “traditional territory” is not defined in statutes enabling the commission and is only vaguely described in BCTC policy as the “distinct traditional territory that is generally recognized as being their own” (BCTC 2017b, n.p.). Concerning overlap disputes, BCTC policy is partially consistent with the recommendations of the BC Claims Task Force (1991). Claims are accepted for negotiation
with the expectation that First Nations will “resolve issues related to overlapping traditional territories among themselves” (20). The Task Force Report (1991) also specified that “a process for resolution should be in place before conclusion of the treaty” (20). Yet in most instances no such process has been established.\footnote{As was noted in Chapter 1, I interpret this statement as a recommendation of the BC Claims Task Force (1991), while also acknowledging that there are varied opinions on whether the parties to the BC treaty process would be honour-bound to adhere to it. Moreover, I do not believe that having overlap disputes end up in court, as is contemplated by the non-derogation language included in all modern treaty in BC (discussed below), is what the BC Claims Task Force had in mind when it said that a “process for resolution should be in place before conclusion of the treaty.”}

BCTC policy concerning overlap disputes has also changed over time. In 1994 the BCTC stated that “First Nation[s] will not be deemed to have achieved readiness to proceed into negotiations [until] First Nations have a procedure in place for resolving overlaps” (BCTC 1994, 22). By 1997, BCTC policy had shifted from a requirement to establish a process for addressing overlap disputes to a requirement that First Nations make best efforts to establish such a process (BCTC 1997). Current BCTC policy is consistent with its 1997 statement on the issue. During stage two\footnote{BCTC policy and procedures outline six stages of negotiation:}
of negotiations “First Nation[s] must: [1] make best efforts to establish an agreed process for resolving the overlaps with each of the affected neighbours; and [2] describe the way in which the First Nation will report to the

\begin{itemize}
  \item \textbf{Stage 1: Statement of Intent to Negotiate} – First Nations file with the BCTC a “Statement of Intent” to negotiate that describes the political organization of the First Nation and its asserted traditional territory.
  \item \textbf{Stage 2: Readiness to Negotiate} – The BCTC assesses the readiness of each party to enter into negotiations.
  \item \textbf{Stage 3: Framework Agreement} – The parties negotiate an agenda for substantive negotiation.
  \item \textbf{Stage 4: Agreement-in-Principle (AIP)} – The parties negotiate the substantive elements of treaties, such as those pertaining to existing and future interests in land and resources, relationship of laws and regulatory processes, et cetera.
  \item \textbf{Stage 5: Treaty Finalization} – The parties finalized the treaty, and the treaty is ratified (or not) by a majority of First Nation community members, and federal and provincial legislatures.
  \item \textbf{Stage 6: Treaty Implementation} – provisions of the treaty are put into effect or phased in as agreed by the parties (BCTC 2017b).
\end{itemize}
Commission on the progress of overlap discussions” (BCTC 1997, 18; BCTC 2017b, emphasis added). Furthermore, BCTC policy states that during stage three of negotiations … the First Nation is expected to implement its agreed process for resolving overlaps… 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 … explain how its dispute resolution process is working and the potential for settlement (BCTC 1997, 24; BCTC 2017b).

According to BCTC policy, “overlap disputes should be resolved before the conclusion of stage 4” (signing of an Agreement-In-Principle) (BCTC 1997, 30; BCTC 2017b). “Where an overlap dispute is not resolved near the end of stage 4 negotiations,” the BCTC is to assess the nature of the dispute, assess whether best efforts have been made to resolve it, and to report its findings to the First Nations concerned and the Provincial and Federal Governments (BCTC 1997, 30; BCTC 2017b). While this policy has been in place since 1997, in 2010 a BCTC report admitted that its “policies and procedures for reporting on overlapping and shared territory disputes ha[d] not been widely utilized,” citing “factors such as the evolution of the Crown’s duty to consult … lack of resources for First Nations … [and] lack of incentive and progress generally on the issue of overlaps” (BCTC 2010, 9). These three issues – the Crown’s duty to consult, lack of incentive, and lack of resources to support management of overlap disputes – are discussed in the next section.

**Overlap Disputes and the Crown’s Duty to Consult and Accommodate**

Modern treaties in BC are not negotiated on the basis of legally defined Aboriginal rights. Rather, the geographic extent of rights recognized under modern treaties are defined by First Nations’ political assertions of traditional territory, which may or may not accord with how courts have characterized Aboriginal rights and the Indigenous polities in which
these rights are vested. In the context of the BC treaty process, First Nations’ statements of traditional territory are political, not legal, claims. This approach creates space for all First Nations at the treaty negotiation table, regardless of whether their claims satisfy legal criteria. However, the Crown also has a legal obligation to consult and accommodate First Nations where its actions or decisions may diminish Aboriginal rights. These two processes – one based on political assertions of First Nation jurisdiction, and the other based on the legally defined Aboriginal rights – can and often do come in conflict.

It is now well-established law that the Crown must consult with and accommodate First Nations where its decisions may diminish Aboriginal rights (e.g. Haida Nation 2004; Newman 2014). The Crown’s duty of consultation is triggered in the context of overlap disputes because the settlement of a treaty with one First Nation may diminish the Aboriginal rights of other First Nations with overlapping claims. The scope and depth of the Crown’s duty to consult and accommodate as-yet-unproven Aboriginal rights is “proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (Taku River 2004, para. 29; see also Haida Nation 2004, paras. 37, 39, 43-44). The Supreme Court of Canada’s 2004 Haida Nation decision in particular provides guidance on how the Crown must fulfill its duty to consult and accommodate:

“The content of the duty … varies with the circumstances. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims

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60 The sociospatial dimensions of Aboriginal rights are discussed in Chapter 6.

61 Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) 2004 (SCC).
possessing a strong prima facie case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist (para. 37 emphasis added).

… the concept of a spectrum may be helpful … to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice … (para. 43, emphasis added).

At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. ... The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases” (para. 44, emphasis added).

The Crown is thus responsible for assessing the strength-of-claims of First Nations in order to determine an appropriate process of consultation and accommodation, although it may also delegate this function to a commission or a tribunal (see, e.g., Paul 2003; Taku River 2004).62 As was discussed in Chapter 3, the legal duty of consultation and accommodation is a source of the Crown’s duty to learn. The crown has a legal obligation to inform itself of the nature, content, and strength of asserted Aboriginal rights, and act to minimize, avoid, or justify adversely impacting Aboriginal rights (see, e.g., Sparrow 1990, 1077-1080; Haida Nation 2004, para. 47; Newman 2014).63 Overlap disputes thus occur in a space that is both political and legal, a space where political claims are accepted for

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63 R. v Sparrow 1990 (SCC).
negotiation with little regard to their evidentiary basis, yet are subject to legal assessment in the context of the Crown’s duty to consult and accommodate.

Many of the people I interviewed expressed strongly-held opinions regarding strength-of-claim assessments, and particularly concerning how these assessments might inform the management of overlap disputes. Starlund, for instance, argues that the Crown needs to look at the First Nations that are affected by the overlap. They have to look at their cultures and traditions, and their land tenure system. I think they would have to do a strength-of-claim analysis, taking into account the land tenure system of the First Nations … and take that into account when moving into these treaties (interview 2014).

Many of the people interviewed contend that the Crown is not sufficiently objective to conduct strength-of-claims assessments on the respective claims of First Nations involved in overlap disputes. As Starlund explains,

… there are interests within government. They're not objective. That's what we've found. There are economic interests. Canada and BC want to see this modern treaty template move forward, and they want to demonstrate … that it is working and that it is a positive thing. I don't think they could be objective in their analysis of that (interview 2014).

Beverly Clifton Percival, Chief negotiator for the Gitxsan, argues that not only is the Crown insufficiently objective to complete such assessments, but that government personnel conducting assessments do not have the necessary knowledge to do so:

You have people in Victoria doing strength-of-claim analysis with little-to-no training in who or what we are, making legal decisions through the Department of the Attorney General. You have people in Ottawa in the Department of Justice making
the same claims, yet they have a very narrow view of what our Section 35 rights are. It's like putting a fox in charge of a henhouse! (interview 2014)

Gerald Wesley, Chief Negotiator for the Tsimshian Treaty Society, suggests that the Crown might take a different approach to strength-of-claim assessments:

One of the things that we don’t have comfort in is this thing called strength-of-claims. They do an assessment but I’m suspect, though, that their assessment isn’t always consistent between two groups. I think that it is a process that First Nations are going to continue to have problems with. Is the Crown seen as sufficiently impartial to do that kind of assessment? How far should the Crown be going in strength-of-claim [assessments] when it’s clear that they have interests and the objective to enter into agreements with First Nations wherever they can? Their interest is also in protecting Victoria and Ottawa. Common fact-finding and coming together would be much better than being nose to nose and saying “here is why I am right” (interview 2014).

The sentiment expressed by Starlund, Clifton Percival, and Wesley was echoed by many of the First Nation leaders and advocates I interviewed. The Crown is not well-suited to conduct such assessments for two reasons: 1) much of the information on which strength-of-claim assessments should be based is held by First Nations people (e.g. oral history concerning Indigenous legal systems); and 2) the Crown is often seen as too invested in concluding treaties and other agreements with particular First Nations to objectively conduct such assessments (e.g. Devlin interview 2013; Thom interview 2013; Clifton Percival interview 2014; Starlund interview 2014). At least some people within the Provincial Government also recognize a problem with the Crown conducting such assessments. For instance, a senior BC Government official had this to say on the issue of who should be conducting strength-of-claim assessments in the context of overlap disputes:
The problem with the provincial Crown doing it is we’re seen as having a vested interest. Part of the reason we do these assessments is to ensure that we’re respecting who the rights-holders are. In some cases, those assertions are actually taking away from somebody else’s rights. In fact, they frequently are. But it’s still not the same as being seen as a completely neutral, independent, objective body. And that’s what I feel quite strongly, in my heart of hearts, would be the right model. The Province doesn’t have the legislative authority to create that, but the Federal Government does. In the absence of federal authority, at some point a Provincial Government decision-maker has to make a call on where the boundary is. Decisions need to be made (Anonymous interview 2013).

I argue that overlap disputes are precisely the kinds of “complex or difficult cases” the Supreme Court of Canada had in mind when it advised that “impartial decision-makers” may be better suited to conduct strength-of-claim assessments than the Crown (*Haida Nation* 2004, paras. 37, 44). In Chapter 9 I argue that a tribunal comprised of impartial decision-makers can and should bring people together and facilitate strength-of-claims analysis and common fact-finding, among others things.

**Case Examples**

Prior to the settlement of the Nisga’a treaty in 1999, the Federal Government maintained the position that treaties would not be settled in areas where overlap disputes had not been resolved. In response to concerns raised by First Nations with unsettled claims that overlap the (then proposed) Nisga’a treaty, provisions were added to the treaty specifying that it would not affect the Aboriginal or treaty rights of First Nations other than the Nisga’a. These provisions are often referred to as “non-derogation clauses” and have
been included in all modern treaties settled in BC. Some argue that these non-derogation provisions provide a remedy for First Nations whose rights may be impacted by the treaties that overlap their asserted territories (e.g. Arvey 2007; East 2009). The Crown’s position is that they would make “best efforts” to amend the offending treaty in the event that a First Nation was to prove in court: 1) the existence of an Aboriginal right; and 2) that the Aboriginal right has been adversely impacted by the treaty. The Crown maintains that if a First Nation were to prove these two facets in court, it would amend the treaty to the extent required to eliminate the adverse impact on the proven Aboriginal right (e.g. Arvey 2007; East 2009). While there has yet to be a legal challenge seeking implementation of non-derogation provisions, they have provoked controversy (e.g. Devlin and Thielmann 2009; Turner 2011; Turner and Fondahl 2015). The BC Supreme Court has ruled on several legal challenges brought by First Nations because of overlap disputes. More recently, the Federal Court has ruled on similar disputes in the Northwest Territories and Northern Quebec. These cases are discussed below.

**Overlap disputes and the Nisga’a Treaty**

After political efforts to address the overlap dispute between the Gitanyow and

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64 All of the modern treaties settled in BC contain the same so-called “non-derogation clauses”. For example, non-derogation provisions from the Tla’amin treaty (2014) are as follows:

“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 Tla’amin Nation.

52. Where 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 Tla’amin Nation, 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. where 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” (Tla’amin treaty 2010, 32; see also Nisga’a treaty 1999, 22-23; Lheidli T’enneh treaty 2006, 27; Tsawwassen treaty 2007, 29; Maa Nulth First Nations treaty 2006, 10-11).

65 See also arguments of the Crown in the “overlap cases” discussed below.
Nisga’a failed, the Gitanyow sought a remedy from the BC Supreme Court. In this action, generally known as “Luuxhon”, Gitanyow sought two declarations from the court: 1) that the Crown owed a legal duty to negotiate in good faith in the BC treaty process; and 2) that the Crown had breached this duty by settling an Agreement-In-Principle with the Nisga’a without first establishing a process for resolving the overlap dispute (Luuxhon 1999, paras. 2-3). The court granted the first declaration in part, holding that the Governments of Canada and BC are indeed “obliged to negotiate in good faith with the Gitanyow” (Luuxhon 1999, para. 75; see also East 2009; Turner 2011).

Arguments concerning the second declaration were scheduled to be heard in 2001. In the interim, and after the Nisga’a treaty was settled, the Gitanyow amended its statement of claim to seek a declaration that the Crown had violated its fiduciary duty to the Gitanyow by settling the treaty that adversely impacted Gitanyow rights (Luuxhon 2000, para. 2). The court did not allow the amendment. Given that the Nisga’a treaty had already been settled, and faced with the cost of litigating an Aboriginal rights and title case, the Gitanyow put the case into abeyance (Sterritt interview 2013; Starlund interview 2014; see also Sterritt 1999).

The Gitanyow were thus in effect denied the judicial oversight they sought, which at its core was a request for the court to compel the Crown to consider and account for the asserted Aboriginal rights of Gitanyow prior to settling the Nisga’a treaty. The Gitanyow presented considerable evidence supporting their claim (Sterritt et al. 1998), made submissions to the federal parliamentary Standing Committee of Aboriginal Affairs (Canada

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66 The case was reported in two parts: Gitanyow v. Canada 1999 (BCSC), and Luuxhon et al. v HMTQ Canada et al. and Nisga’a Nation 2000 (BCSC) (hereafter “Luuxhon 1999” and “Luuxhon 2000”, respectively).

67 The court held that allowing the amendment would “shift the issue [to be decided] from the conduct of the Crown in treaty negotiations with the Gitanyow to the legal effect of the Nisga’a treaty upon not only the Gitanyow treaty process, but upon Gitanyow aboriginal rights or title” (Luuxhon 2000, para. 12).
1999), and ultimately petitioned the BC Supreme Court for a remedy. The court held that the Crown must act in good faith but declined to provide specific guidance as to what this duty of good faith entails in the context of overlap disputes. The overlap dispute between the Gitanyow and the Nisga’a remains unresolved, as does the overlap dispute between Nisga’a and the Gitxsan. Moreover, Starlund argues that the non-derogation provisions in the Nisga’a treaty have been ineffective:

When the [Nisga’a] treaty was signed back in 1999, we were assured by Canada that we would not be impacted because of the non-derogation clause. To date, there has been no implementation of this clause. The non-derogation clause needs to be implemented for us to have some satisfaction. We’ve attempted to bring forward the non-derogation clause as an issue, [but] they don't know how to deal with it. [The Crown] said they would be in a conflict with their own agreement because they are part of the Nisga’a final agreement. The way we see it right now, there are not too many options other than litigation. We are trying to pursue different routes [but] we keep coming up against these walls. We have nowhere else to turn (interview 2014).68

The BC Supreme Court, however, has indicated its preference for overlap disputes to the addressed in the political sphere, as noted in Luuxhon:

“… myriad Court applications seem inevitable unless the treaty negotiation process deals with overlapping claims … I think it inevitable that if the parties fail to deal with the conspicuous problem of overlapping claims, they may well face Court

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68 The Gitanyow originally filed its notice of legal claim for Aboriginal title in 2002. The case was put into abeyance to allow negotiations with the Crown to proceed. In 2016 the Gitanyow reinstated its legal claim by filing an amended notice of claim that seeks, among other things: a judicial declaration recognizing Gitanyow aboriginal title and rights in and to the Gitanyow Laxcyup (territory) (10); a declaration that the Crown unlawfully and unjustifiably infringed upon Gitanyow aboriginal title and rights (11); a declaration that the Gitanyow are entitled to damages resulting from unlawful Crown conduct (12-13); and an order for general, aggravated and punitive damages (13) (Malii v. Her Majesty the Queen 2016).
imposed settlements which are less likely to be acceptable to them than negotiated solutions” (1999, para. 41).

The court’s comments have proven prescient. In 2007, when steps were taken to ratify the first three treaties under the BC treaty process, a number of First Nations with overlapping claims sought declarations from the BC Supreme Court to delay or prevent the ratification of the treaties pending meaningful consultation and accommodation concerning potential impacts on their Aboriginal rights.

**Overlap disputes and the Lheidli T’enneh Treaty**

Based on the Lheidli T’enneh First Nation’s statement of intent, the Lheidli T’enneh treaty area covers a large area of the interior of BC, including area also covered by historic Treaty 8, a 1899 treaty between Canada and groups of Cree, Beaver, Slavey, and Chipewyan peoples (Miller 2009; Turner and Fondahl 2015). In 2007, six Treaty 8 First Nations commenced a legal action seeking an injunction to prevent ratification of the Lheidli T’enneh treaty. In the case generally known as “Apsassin,” the Treaty 8 First Nations (the plaintiffs) argued that the Crown had failed to consult with them concerning the potential impact of the Lheidli T’enneh treaty on their asserted rights, and that opportunity to accommodate their interests would be diminished if not precluded by ratification of the treaty (Apsassin 2007, para. 17). The counter-argument of the Crown and the Lheidli T’enneh (the defendants) was threefold: 1) that the Lheidli T’enneh treaty rights in question – harvesting rights and rights to participate in wildlife and parks management – were non-exclusive, and thus would not conflict with the plaintiffs’ rights; 2) that the plaintiffs’ petition was based on a speculative assumption of long term harm, rather than demonstrated immediate and

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69 Chief Allan Apsassin et al. v Attorney General (Canada) et al. 2007 (BCSC).
irreparable harm; and 3) that even if the Lheidli T’enneh treaty were to cause long-term harm to the plaintiff, the non-derogation provisions provided adequate protection to the Aboriginal and treaty rights of First Nations with overlapping claims (*Apsassin 2007, outline of the Attorney General of Canada, 8*).

The court held that “the plaintiffs had made a strong *prima facie* case that there had been no consultation” prior to the trial (para. 23). Moreover, the court found it “astonishing that this matter has been allowed to come this far without resolution,” particularly given the recommendation of the BC Claims Task Force Report and BCTC policies concerning unresolved overlap disputes (para. 37). The court nonetheless dismissed the application, holding that Lheidli T’enneh would suffer greater harm than the Treaty 8 plaintiff if an injunction were granted to stop ratification of the treaty (para. 38).

As was discussed in Chapter 3, a process intended to address this overlap dispute was proposed and agreed to by the Lheidli T’enneh and the Treaty 8 First Nations, but the process was not funded, as Devlin explains:

Val [Napoleon] proposed the Indigenous Legal Lodge as a solution. We tried to get funding to host it but the province said “no. There’s no more negotiating funding for Lheidli because that’s the final agreement and there’s no funding for Treaty 8 [First Nations] because they’re outside of the BC treaty process.” For fifty or eighty thousand dollars they could have set it up. I knew one of the lawyers who was advising Lheidli through the whole thing and he said, “you know, this is just so

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70 The plaintiffs sought a declaration in the order of *mandamus*, which requires a court to consider whether the contemplated action (in this case, treaty ratification) would result in immediate and irreparable harm to the plaintiff.

71 A similar, second legal action seeking an injunction to block the ratification of the Lheidli T’enneh treaty was initiated by the Secwepemc Nation in *Chief Matthew et al. v. Canada et al 2007*. The *Chief Matthew* case was put into abeyance because the Lheidli T’enneh voted not to ratify the treaty (Krehbiel interview 2012).
perverse, they’ll pay for war but they won’t pay for peace.” It was ridiculous (interview 2013).

Failure to allocate sufficient time and resources to overlap dispute management, particularly in the context of disputes involving First Nations not engaged in the BC treaty process, has been a significant barrier to achieving successful outcomes (Krehbiel interview 2012; Devlin interview 2013; Starlund interview 2014; Wesley interview 2014; Percival Clifton interview 2014; see also, e.g., BCTC 2010, 2014). By 2007, the Lheidli T’enneh treaty had been under negotiation for fourteen years. The Lheidli T’enneh First Nation, a group of less than five hundred members, by 2007 had accumulated a debt of over six million dollars in negotiation costs (Lheidli T’enneh treaty 2006). The governments of Canada and BC had likely spent over twice that much on these negotiations. Costs associated with the proposed Indigenous Legal Lodge would have been much less than one percent of the total cost of negotiations.

Overlap disputes and the Tsawwassen treaty

The Tsawwassen First Nations’ traditional territory, as submitted to the BCTC, overlaps with the asserted territories of over fifty other First Nations. Among these are the Tsawout, Tsartlip and Pauquachin First Nations of Vancouver Island (collectively the Sencot’en), and the Semiahmoo First Nation, located within the municipality of Tsawwassen. These four First Nations are not participating in the BC treaty process. In 2007, these First Nations submitted two petitions to the Supreme Court of BC seeking a court order to prevent the Provincial Minister of Aboriginal Relations and Reconciliation from signing the Tsawwassen treaty until meaningful consultation had occurred concerning the potential impact of the Tsawwassen treaty on the petitioners’ asserted Aboriginal and historic treaty
The two petitions were heard together in the case generally known as “Cook”.73

The crux of the Sencot’en and Semiahmoo (the petitioners) argument in Cook was that consultation concerning the potential impact of the Tsawwassen treaty should occur prior to treaty settlement. To delay consultation until after the treaty settlement, they argued, “effectively precludes any meaningful consultation” (Cook 2007, para. 124). Specifically, the Sencot’en and Semiahmoo petitioned the court for a number of orders, including orders requiring the Minister to: 1) “Identify, in consultation with the Petitioners, the Petitioners’ aboriginal and Douglas treaty rights, the exercise of which is impacted by the [Tsawwassen] treaty; and 2) an order requiring the Minister to “Accommodate the Petitioners’ aboriginal and Douglas treaty rights prior to signing the [Tsawwassen treaty]” (Cook 2007, paras. 16-17).

The Sencot’en and Semiahmoo First Nations thus petitioned the court to compel a well-informed consultation process prior to the settlement of the Tsawwassen treaty (para. 131). In its defense, the Provincial Government argued that “the time to engage in consultations is … after a Final Agreement has been initialled thereby ensuring that the consultations have utility” (paras. 87, 110). As in the Apsassin case, the position of the Crown was that: 1) consultation before the details of the Tsawwassen treaty were “firm” would not be useful; and 2) the rights of the Tsawwassen First Nation recognized by the treaty in the contested area would not be exclusive to the Tsawwassen, and thus would not adversely affect the rights of the plaintiff First Nations (para. 110). Moreover, the Crown argued that it would be impossible to conclude a treaty if every overlap had to be resolved before a treaty was finalized (para. 185). As in the Apsassin case, the Crown relied upon the non-derogation

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72 The Sencot’en First Nations are parties to a historic "Douglas Treaty" settled in the 1850s.

73 Cook v. The Minister of Aboriginal Relations and Reconciliation 2007 (BCSC).
clauses in the treaty, arguing that if a First Nation could prove in court that they held Aboriginal or treaty rights that are infringed by the Tsawwassen treaty the Crown would “make best efforts to amend” the Tsawwassen treaty to the extent necessary to remedy the infringement (para. 130).

Because of the scarce and conflicting nature of evidence presented at trial, the court in Cook declined to make a specific finding concerning the strength-of-claims of the disputing First Nations, and ruled instead that the Sencot’en and Semiahmoo First Nations had presented a “credible claim” sufficient to trigger the Crown’s duty to consult and accommodate (para. 151). Concerning potential impacts of the treaty, the court concluded that the petitioners had failed to establish an “obvious infringement” of asserted rights (para. 179), or that such rights would be “irretrievably harmed” by the settlement of the treaty (para. 199). While agreeing that “the Crown cannot run roughshod over one group’s potential and claimed aboriginal rights in favour of reaching a treaty with another,” the court accepted the argument that consultation undertaken after the treaty had been settled could still be meaningful, and that the non-derogation clauses sufficiently protected the interests of First Nation with overlapping claims (paras. 197, 199).

**Between Law and Politics**

In the case of the Tsawwassen treaty, a group of First Nations argued that they could not, without adequate time and resources, provide the kinds of specific information needed for well-informed and meaningful consultation and accommodation. They specifically asked the court to compel the Crown to identify, in consultation, the specific Aboriginal and historic treaty rights that might be impacted by the Tsawwassen treaty (para. 16). In doing so, they were essentially asking the Crown to fulfill its duty to learn: to proactively conduct,
in consultation with the First Nations, a strength-of-claims assessment on which to base meaningful consultation and accommodation. The court in effect declined to intervene. Unlike subsequent overlap jurisprudence discussed shortly, the court in *Cook* did not find it important to determine whether the Crown had conducted a strength-of-claim assessment at all. Without such an assessment it is difficult to know what criteria, except for the non-derogation clauses, the Crown used to decide that consultation should not be required prior to the Tsawwassen treaty being settled. Instead of fact-finding and dialogue, the Sencot’en and Semiahmoo were left with a process they described as an “after the ship has left the dock” approach to consultation (*Cook* 2007, para. 155).

It is worth considering whether such an approach is consistent with the purpose of the duty of consultation and accommodation; that is, to further the process of reconciliation between the Crown and all First Nations, while also having consideration for the interests of society as a whole (*Haida Nation* 2004, para. 38, 45). Three foundational principles of the duty to consult are particularly relevant in this context. First, *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account before making a decision that may have an adverse impact on them. The duty is prospective, fastening on rights yet to be proven (*Rio Tinto* 2010, para. 35).74

Second, “[t]here is no duty to agree; rather the commitment is to a meaningful process of consultation” (*Haida Nation* 2004, para. 42, emphasis added). And third, “[c]onsultation that excludes from the outset any form of accommodation would be meaningless” (*Mikisew Cree* 2005, para. 54). While it may be technically correct to argue that modern treaties may be

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74 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 (SCC).
amended to accommodate the (once proven) rights of First Nations with overlapping claims, or that a First Nation may be compensated for infringement of Aboriginal rights caused by a treaty settlement, one can imagine the ethical dilemmas such a scenario would provoke. Are treaties really amendable when only “minor changes” can be made after settlement, and then only with the consent of the treaty signatories? Is it ethical for the Crown to settle treaties with little regard to the evidentiary merit of claims, and then later realize that a mistake was made and offer aggrieved First Nations compensation, such as in the form of different land? Which land would the Crown offer as compensation? What would happen in the event that the Gitanyow are successful in their recently reinstated legal claim for Aboriginal tile and rights in an area covered almost entirely by the Nisga’a treaty?

Current approaches to the overlap issue are forcing such questions to the fore. There is a fundamental challenge at the crux of the BC treaty process, as Devlin explains:

One of the challenges with the BCTC process is that anyone can draw a line on a map anywhere they want. And in the BC treaty process, if you get to the end, [even though] you’ve never had to prove anything, if you’ve got the longevity and if you’ve got a shrewd negotiating team, presto, you can get treaty rights where you may not have had Aboriginal rights before. But now you’ve got treaty rights and they’re entrenched under Section 35 [of the Constitution Act 1982]. So even if a First Nation has a very strong case for Aboriginal title, their neighbour can basically race to the bottom and get their BCTC treaty. Governments are naturally going to defer to established treaty rights because they’re written, they’re defined. So you can get a situation where a First Nation or a part of First Nation is able to get treaty rights, and frankly potentially stronger constitutional rights than it had before. And even if a [neighbouring] First Nation can show their lineages, their crests, their names, which go back a thousand years or more, it doesn’t mean
anything because another First Nation was first out of the gate with a modern treaty (interview 2013).

Clifton Percival, Chief negotiator for the Gitxsan, makes this argument sharply in relation to the recent settlement of Agreements-In-Principle with Kitsumkalum and Kitselas First Nations:

When you're first past the post, it means you fundamentally agree with the [BC treaty] process. If I'm the AIP guy [with a signed Agreement-In-Principle], I don't give a rat's ass what you've got, because “I've got my agreement already. And it's only a matter of time before my agreement gets implemented.” We saw that with the Nisga'a [treaty]. We're seeing it again [with the Tsimshian Kitsumkalum and Kitselas treaties]. It's *deja vu*, like a bad Groundhog Day movie.

There are six Gitxsan *wilp*\(^75\) that are impacted by these [Tsimshian] AIPs. Our title is affected by this. The Crown needs to take a look at what they're doing. Gitxsan title is on those lands. And they're doing this not only on our lands. They're doing this across the province. So, this is going to be a very troublesome issue that will probably cause a lot of litigation for the Crown, and I think that resources could be better spent (interview 2014).

It would be an oversimplification to suggest that people I interviewed fall neatly into two categories on the question of whether Agreements-In-Principle (or treaties) should be settled in areas subject to overlap disputes. However, a common argument among people who represent First Nations with territories that overlap with proposed treaties is that settlements should not proceed without First Nation agreements concerning areas claimed by multiple First Nations (e.g. Devlin interview 2013; Starlund interview 2014; Percival Clifton interview 2014). On the other hand, a common argument of people who represent

\(^{75}\) Under Gitxsan law, *wilp* are the fundamental political and land-owning subgroups of the Gitxsan Nation (e.g. Overstall 2004; Daly 2005; Napoleon 2009; also Marsden 2002 on Tsimshian).
First Nations that have settled treaties, or are nearing treaty settlement, is that the Crown should honour its commitment to settle with the First Nations with which it has negotiated despite unresolved overlap disputes (e.g. Krehbiel interview 2012; Wesley interview 2014). Wesley, for instance, contends that the Crown has a duty of due diligence, but that treaty settlements should proceed despite unresolved overlap disputes:

I think that they [the crown] have to do their due diligence enough to satisfy themselves that “yes, there may be [overlapping] interests in some fashion, but based on where we are today, and where we want to go tomorrow, we’re prepared to [settle] on this basis.” Canada and BC have got to provide themselves some assurances that I’m not some Johnny-come-lately, as far as a First Nation group, [and] verify it to a good level. Then they need to suck in their guts and proceed [to settle the treaty] (interview 2014).

The underlying argument here is that historical antecedents, from which legally defined Aboriginal rights derive, are not the only criteria that should determine which First Nations should have modern treaty rights in which areas. As Wesley suggests, some people believe that treaties should be based on “on where we are today, and where we want to go tomorrow” (interview 2014). Other First Nations, such as the Gitanyow and Gitxsan, argue that they hold legally defined Aboriginal rights protected by Section 35 of the Constitution, that their rights are exclusive to other First Nations, and that this should be the basis for determining which First Nations should have treaty rights in which areas. Both perspectives are genuine and heartfelt, but they differ fundamentally in the criteria they choose to privilege.

**Barriers to the effective management of overlap disputes**

*Discursive barriers*
A common argument concerning overlap disputes is that one First Nation should not have a veto over another First Nation’s treaty (e.g. Krehbiel interview 2012; Wesley interview 2014; Keopke interview 2014; BCTC 2014; also arguments of the Crown in Cook 2007, para. 13). The reasoning often invoked for this argument derives from the Supreme Court of Canada’s decision in *Haïda Nation*, which held that the Crown’s duty of consultation “does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim” (para. 48). The argument omits the nuance of the Crown’s duty to consult and accommodate, and thus mischaracterizes its purposive intent. As was held in *Haïda Nation*, “what is required is a process of balancing interests, of give and take” (para. 48). Consultation and accommodation means “seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation” (para. 48). It “requires good faith efforts to understand each other’s concerns and move to address them” (para. 48). Similarly, the argument that First Nations are to resolve overlap disputes among themselves omits the Task Force’s recommendation that a process for dispute management should be in place before treaties are settled, and that in some situations it may be necessary to “implement the provisions of a treaty in all but the disputed territory” (BC Claims Task Force 1991, 20).

Three arguments in particular contribute to a profoundly dysfunctional – yet all too common – narrative concerning overlap disputes: 1) non-derogation clauses provide a remedy for First Nations with Aboriginal and historic treaty rights impacted by treaties; 2) First Nations do not have a veto over another’s treaty; and 3) First Nations are to resolve overlap disputes among themselves. These arguments have been used to justify not
addressing overlaps,\textsuperscript{76} and thus are discursive barriers to effective dispute management. Given the prevalence of this dysfunctional narrative, however, it is perhaps not surprising that significant barriers to the effective management of overlap disputes have not been addressed. A more productive narrative is one that: 1) acknowledges the need to understand and acknowledge underlying sources of disputes; 2) recognizes that the Crown is squarely implicated in overlap disputes through its duty of consultation and accommodation; and 3) acknowledges that the now twenty-five-year-old Task Force recommendations concerning overlap disputes have not been implemented, and cannot be implemented without systemic change.

\textit{Tactical barriers}

A significant tactical barrier to the effective management of overlap disputes is that First Nations leaders and advocates – both within and outside of the treaty process – often have neither the time nor resources to seriously engage with the issue. Wesley explains the magnitude of the challenge in the context of settling the Kitsumkalum and Kitselas Agreements-In-Principle:

\begin{quote}
Nobody can create the time – the recognition of priority for it. Maybe if it was a priority that would have been an outcome. It’s just difficult to imagine that for the next three months my only task is going to be dealing with overlaps. I absolutely disagree with the wholesale principle that Canada and BC should not make offers to anybody until the First Nations have addressed the overlap[s]. Look around our borders: the Gitxsan, perhaps the Gitanyow, the Wet’suwet’en, the Haisla, Metlakatla, the Allied Tribes, and even the Nisga’a Nation are all [overlaps] that would have had to have been addressed. But who do we bring in that has got success at doing this
\end{quote}

\textsuperscript{76} See, e.g., Arvey 2007; \textit{Cook v. The Minister of Aboriginal Relations and Reconciliation} 2007; East 2009.
kind of thing? The treaty commission has helped us in providing some minor, minor financial support … and we did use them over the course of the year to facilitate and co-ordinate a couple of meetings, with effort to find resolve [on overlaps]. At the end of the day we said … thank you [BCTC]. You have helped us keep things alive, but quite honestly, we think we are making better progress by ourselves.

Wesley’s comment exemplifies two arguments common to most of the First Nations leaders and advocates I interviewed. First, lack of time and resources dedicated to addressing overlap disputes are profound barriers to achieving clarity of Indigenous jurisdiction (e.g. Devlin interview 2013; Krehbiel interview 2012; Wesley interview 2014; Percival Clifton interview). And second, ad hoc meeting facilitation rarely results in agreements concerning overlap disputes. As Wesley notes, the BCTC has in some cases attempted to facilitate discussions among disputing First Nations. However, BCTC-facilitated discussions have had limited success (BCTC 2010, 2014). Rick Krehbiel, former treaty negotiator for the Lheidli T’enneh, describes the challenge:

[The BCTC] brought the parties together and attempted to get the two parties talking politically, but again they couldn't enforce participation. They have the ability to bring willing partners to the table and facilitate some process to resolve an overlap [but] I don't know if that power has accomplished much. They certainly didn't accomplish anything in the Shuswap–Lheidli T’enneh circumstance. Their mandate is simply to facilitate the process.

Systemic Barriers

Wesley’s and Krehbiel’s comments thus also evince the argument that lack of incentive is a significant barrier to addressing disputes (see also, e.g., Devlin and Thielmann 2009; Rush 2009; BCTC 2010, 2014). Krehbiel argues that First Nations not engaged in the BC treaty process in particular have little incentive to address disputes:
For First Nations that are inside the process at least there is a starting point. … First Nations that are part of the treaty process are expected – as a condition of being accepted into the process – to resolve their overlaps. … If two First Nations within the treaty process had an irreconcilable overlap it would be at least open to the parties not to proceed to ratification. The big issue in my mind is those First Nations who are outside of the treaty process. By and large there is very little reason for First Nations who are not in the treaty process to address these overlaps. They can cling to their views of their territories and have nothing to lose (interview 2012).

However, as was discussed earlier, it is also arguable that First Nations nearing treaty settlement may also lack incentive to address overlap disputes. According to some of the people I interviewed, both the Crown and its treaty partners nearing settlement have a profound disincentive to seriously engage in dispute management, particularly if it might delay treaty settlement, as Devlin explains:

The problem is there’s no incentive … and in fact, our experience with Lheidli and with Tsawwassen was that … once the Province saw that these [treaties] were on the cusp of being done, they poured in enormous resources and put a lot of pressure on those tables to get a final agreement. And a lot of what we heard was “we don’t care if you haven’t resolved all your overlaps, this is going ahead,” the Province needs this to make political capital. The Province needs to have some success stories (interview 2013).

Lack of incentive and resources, and pressure to settle treaties without delay, was often noted by people I interviewed (Devlin interview 2013; Krehbiel interview 2012; Sterritt interview 2013; Clifton Percival interview 2014; Starlund interview 2014). To this I would also add that narrow interpretations of court decisions discussed above, the Crown’s approach of delaying consultation, and the failure of the BCTC to adhere to its own policies are also systemic barriers to effective management of overlap disputes.
In some circles, the decision in *Cook* has been narrowly interpreted and conflated to circumstances beyond those at issue in the case. East (2009), for instance, contends that the *Cook* decision evinces the principle that “[a]t the stage of negotiating … [an] Agreement-In-Principle …, and in the absence of any obvious infringement, the Crown’s duty to consult with overlap groups is at the low end of the consultation spectrum” (East 2009, 9-10), which requires the Crown only to notify First Nations with claims that overlap proposed treaties (e.g. arguments of the Crown in *Apsassin 2007* and *Cook 2007*). This interpretation is also apparent in Crown practice and Canada’s arguments in subsequent overlap litigation (discussed below). While it is entirely uncontroversial to contend that the scope of the Crown’s duty to consult with First Nations with overlapping claims depends on the stage to which treaty negotiation has progressed, this is only one criterion on which the depth of consultation and accommodation is to be determined. The Crown, or its designate (e.g. a Tribunal), is required to assess the strength of First Nations claims in the context of overlap disputes, and this necessarily encompasses assessing the respective strength of First Nations claims. A common argument of First Nations leaders and advocates I interviewed is that the Crown’s reluctance to engage in consultation and accommodation until late in the negotiation process has been a barrier to the effective management of overlap disputes (e.g. Devlin interview 2013; Clifton Percival interview 2014; see also arguments of the plaintiffs in *Apsassin 2007*; *Cook 2007*; and Federal Court cases discussed below).

Clifton Percival, for instance, argues that the time to engage in dispute management is well before Agreements-in-Principle are finalized, as she explains with reference to the recent settlement of Kitsumkalum and Kitselas Agreements-in-Principle:
We knew the [Tsismshian] were coming close [to settling], and we said [to the Crown] “we’re interested in the boundaries and what the offer is going to be, because we have a feeling that it may impact us.” And they said that “you guys have no say because you’re not at that stage.” We always ask about when can we talk about land …, and “why can’t we talk about it now?” We asked two years ago, “why not support us engaging in discussion with our neighbours?” We all know the trains are going to crash. Why do they let them crash? I think they Crown is doing this knowingly. It’s creating an unfair playing field and causing problems. In that sense, it’s bad faith on the part of the Crown, and no honour (interview 2014).

Some of the people I interviewed, such as Clifton Percival and Devlin, argue that the Crown’s approach to the issue is symptomatic of its reluctance to engage in any activity that might delay settlement of treaties. In some contexts at least, lack of incentive to address overlap disputes may apply to both First Nations and the Crown.

Two recent Federal Court decisions demonstrate a number of problems with this approach, not least that it contravenes the purposive intent of the law of Aboriginal rights; that is, to further recognition and reconciliation. Issues raised in the *Sambaa K’e* (2012)\(^\text{77}\) and *Huron-Wendat* (2015)\(^\text{78}\) decisions are similar to those in *Apsassin* and *Cook*. These decisions speak to the timing, scope, and content of the Crown’s duty to consult and accommodate in the context of overlap disputes. For instance, in *Sambaa K’e* the Crown argued that: 1) it would be “premature” for it to engage in consultation prior to an Agreement-In-Principle being settled (para. 151); 2) non-derogation clauses provided sufficient protection to the rights of First Nations with overlapping claims (para. 143); and 3) the duty to consult prior to settlement of an Agreement-In-Principle was at the low end of the consultation spectrum,

\(^{77}\) *Sambaa K’e Dene First Nation v. Duncan* 2012 (FC).

\(^{78}\) *Huron-Wendat Nation of Wendake v. Canada* 2014 (FC).
and thus was limited to providing First Nation with overlapping claims mere notice of the ongoing negotiations (para. 153). First Nations with claims that overlap with the proposed treaty settlement argued that to delay consultation until after the Agreement-In-Principle was settled would preclude meaningful consultation, and thus constituted a breach of the Crown’s legal duty to properly consult and accommodate (para. 67).

The *Sambaa K’e* case, though, differs from *Apsassin* and *Cook* in two important respects. The first is that *Sambaa K’e* was heard after the Supreme Court of Canada’s decision in *Rio Tinto* (2010), that held that the duty to consult is triggered even if contemplated Crown conduct may have no immediate adverse impacts on asserted rights (paras. 44, 47). A potential for adverse impact on Aboriginal rights is sufficient to trigger the duty. The duty to consult extends to “strategic, higher level decisions,” “because such structural changes … may set the stage for further decisions that will have a direct adverse impact on land and resources (*Rio Tinto* 2010, paras. 44, 47; see also Newman 2014). A second distinction between *Sambaa K’e* and the overlap cases of 2007 concerns the relevance of strength-of-claim assessments. In *Sambaa K’e* the court rightly found it necessary to determine if the Crown had conducted a strength-of-claim assessment, and found that the Crown had not completed any meaningful strength-of-claim assessment at all (para.122).

Moreover, the court in *Sambaa K’e* also emphasized that even if the First Nation applicants were determined to have only a “credible claim” (as had been the case in the *Cook* decision), the duty to consult still requires the Crown to “discuss any issues raised in response to the notice” (*Sambaa K’e* 2012, para. 159, quoting *Haida Nation* 2004, para. 43). The court in *Sambaa K’e* ultimately ruled that the Minister’s decision to delay consultation until after the Agreement-In-Principle was settled was unreasonable, incompatible with the
honour of the Crown, and a breach of the Crown’s duty to consult and accommodate ( paras. 206, 209). That the Crown cannot delay meaningful consultation until after Agreements-in-Principle are settled was affirmed in Huron-Wendat (2014, para. 123). The following passage from Huron-Wendat captures the essence of both Federal Court decisions:

What is most important is that the applicant’s positions be considered, that true consultations be held and that sincere efforts be made to reach a compromise that is acceptable to all parties. In this respect, the [Crown] may properly encourage the [disputing First Nations] to hold discussions in order to seek common ground; these discussions between Aboriginal Nations, although desirable, cannot, however, relieve the Crown of its duty to act in good faith by ensuring that the rights and interests of all the parties are carefully reviewed and that every effort is made to accommodate them (Huron-Wendat 2014, para. 128).

The rulings in Sambaa K’e and Huron-Wendat are a significant shift from the Cook and Apsassin decisions discussed earlier, and should provoke a substantive change in the Crown’s approach to overlap disputes. Reliance on non-derogation clauses does not further the imperative of reconciliation, and may indeed have the opposite effect (Sambaa K’e 2012, paras. 183, 187; Huron-Wendat 2014, para. 99). The Crown cannot delay consultation with First Nations with overlapping claims until after Agreements-in-Principle are settled, nor can it rely upon First Nations to address overlap disputes among themselves. Failure to acknowledge that the Crown is implicated in the issue – by virtue of its duty to act in accordance with the law of Aboriginal rights – has been a systemic barrier to effective management of overlap disputes. The Crown is implicated by default or design.

By failing to be an active gatekeeper of the BC treaty process, the BCTC has also created systemic barriers to the effective management of overlap disputes. In the mid-1990s, BCTC policy was that “First Nation[s] will not be deemed to have achieved readiness to
proceed into negotiations [until] First Nations have a procedure in place for resolving overlaps” (BCTC 1994, 22). By 1997, BCTC policy had shifted to a requirement for First Nations to make “best efforts” to establish such a process. Current BCTC policy is that First Nations are expected to implement an agreed process for resolving overlaps in stage three of negotiations, and that overlap disputes are to be resolved prior to signing of Agreements-In-Principle (BCTC 1997, 30; BCTC 2017b). As was noted earlier, however, for the most part even these soft policies have not been implemented. The settlement of two Agreements-in-Principle in 2015, without an agreed dispute management process in place, demonstrates the “flexibility” of the BCTC’s approach to the issue. The BCTC can and should be much more assertive on the issue than it has been, as Morse explains:

…the BCTC has gone down the path of least resistance. It has not done what it should have done, which is be an active gatekeeper. The Commission could say that it will not agree for a claim to move onto the next stage until the [overlap] issue has been resolved. Instead, what the parties have done is they’ve pushed it through, because governments need progress, they need results. So you end up with the situation we’re in, where there is no way to deal with this except for governments to prioritize. “We need agreements so we will focus on the tables moving fastest. Which ones are least demanding? We'll focus on them.” So that's not a particularly attractive outcome but we're there because no one will say “no”. No one will say “no” to individual First Nation claims. No one will say “no” to overlaps. No one will say “you must resolve it”. But to end up in court on this stuff is nuts. But that's our only option right now. Why? Because we have created no other option (interview 2014).

At least five significant barriers stand in the way of effectively managing overlap disputes:

1. A dysfunctional narrative which purports to justify avoiding having to address overlap disputes at all;
2. The parties to the BC treaty process failing to make overlap disputes a priority by devoting time and resources to their proactive management;
3. A dearth of funding to support the management of overlap disputes;
4. Lack of incentive among all parties to address overlap disputes; and,
5. Lack of a structured framework that addresses the systemic reasons for these barriers.

All of these barriers are a product of the BC treaty process proceeding in contravention with one of its founding principles; that is, overlap disputes are to be addressed throughout the treaty negotiation process and, failing that, an agreed upon process of overlap dispute management is to be established before treaties are settled. Moreover, as a last resort, the BC Claims Task Force recommended that contested areas may need to be excluded from treaty settlements (1991). The BC treaty process has a twenty-five year history of ignoring and downplaying the importance of overlap disputes. The issue is no longer avoidable.

**Conclusion: A Systemic Solution is Needed**

Courts have now made it abundantly clear that the Crown can no longer rely upon First Nations to resolve overlap disputes among themselves, if it really ever could. While not dishonourable for the Crown to encourage First Nations to reach overlap agreements, ultimately the Crown has a duty to avoid or minimize adverse impacts on the asserted Aboriginal rights of First Nations with overlapping claims. Fundamental to this process is the Crown’s duty to ascertain the character and strength-of-claims of the First Nations involved in overlap disputes, which imposes on the Crown a duty to learn. Overlap disputes are not a First Nations-only issue.

Three times as many First Nations have been accepted into the BC treaty process as
was anticipated, and these represent only about half of First Nations in the province. By accepting the treaty claims of smaller *Indian Act* Bands, as opposed to larger Nations, the BC treaty process has fostered many more overlap disputes than expected, as well as provoked disputes concerning which kinds of Indigenous polities are the appropriate representative entities to negotiate with the Crown. Because economic opportunities for First Nations are often tied to a specific territory – e.g. related to pipelines, mines, and forestry – there is an incentive for First Nations to make ambit territorial claims and aggressively pursue and defend opportunities that derive from them, both within and beyond the BC treaty process. Over 500 overlap disputes would need to be effectively managed in order to achieve clarity of First Nations jurisdiction throughout the province, and this cannot be accomplished using *ad hoc*, last minute meeting facilitation on the eve of treaty settlements.

Moreover, politically-derived First Nation-to-First Nation agreements that conflict with legally defined Aboriginal rights are vulnerable to legal challenge, particularly where different First Nations have employed different criteria to define their territorial claims. Treaties settled with little regard to the legal and evidentiary basis undermine effective and lawful Indigenous-Crown relations. The BC treaty process has a twenty year history of ignoring, downplaying, and postponing addressing the overlap issue largely because it raises two difficult questions at the heart of the BC treaty process itself: 1) to what extent will First Nations, post treaty settlement, retain governance authority outside of small areas of Treaty Settlement Land?, and 2) based on what criteria should First Nations and their territories be defined? The argument that treaties can overlap and operate perfectly well, in the absence of lawful agreements between First Nations concerning jurisdiction, is predicted on a fundamentally flawed premise – that First Nations jurisdiction outside of Treaty Settlement
Lands is of little importance. To continue to postpone addressing overlap disputes is to implicitly accept the proposition that clarity of Indigenous jurisdiction does not matter. Clarity of First Nation jurisdiction matters a great deal because without it First Nations cannot effectively exercise decision-making concerning their territory in partnership with the Crown and, where applicable, other First Nations.

Twenty-five years ago, the idea that treaty making could be an entirely political process may have seemed plausible, but the common law has developed and in doing so has put the BC treaty process on a collision course with legally defined Aboriginal rights. The collision is nowhere more apparent than in overlap disputes, which at their core are a product of ambiguity concerning the second question posed above: based on what criteria should First Nations and their territories be defined? To argue that the criteria should be solely political is to accept another fundamentally flawed premise – that is, that geopolitical history does not matter, political “might makes right”, and the law of Aboriginal rights can be overridden by political deal making. Settling treaties that are inconsistent with legally-defined Aboriginal rights would provoke a glut of litigation. Moreover, the Crown’s duty to consult and accommodate, even if it were properly fulfilled, will not alone achieve clarity of Indigenous jurisdiction. Achieving and sustaining clarity of Indigenous jurisdiction in BC requires the Crown to do more than just fulfill its minimum duty of consultation and accommodation in the context of overlap disputes. A systemic solution is needed.

The first step in solving any problem is admitting that there is one. After more than two decades and around two billion dollars spent on negotiations – not including the cost of litigation and settlements themselves – only four treaties have been settled, and we are only
nominally closer to achieving clarity of Indigenous jurisdiction. Of the 60 or so First Nations that remain in the BC treaty process, less than ten are expected to settle a treaty in the foreseeable future (Eyford 2015). Depending on how First Nations are organized, current approaches to treaty making would likely leave more than one hundred First Nations without a treaty. Good intentions of twenty-five years ago have been overtaken by the common law of Aboriginal rights. The question to be asked, therefore, concerns not only how to manage overlap disputes related to the few treaties that have and may be settled under the current treaty model, but rather how should we, as a society, design a process that achieves clarity of Indigenous jurisdiction on a province-wide basis. How do we design a process that addresses political and legal imperatives?

Questions provoked by overlap disputes are at the heart of Indigenous-Crown relations in BC. Is it possible to achieve effective and lawful Indigenous-Crown reconciliation though an entirely political process of negotiation? In which types of present-day Indigenous polities are Aboriginal rights vested? Is it possible to simultaneously apply Indigenous and state legal systems in the management of overlap disputes and, if so, how? These questions are addressed in the next chapter.

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79 First Nations engaged in the BC treaty process have been loaned funding in excess of five hundred million dollars to support negotiation, and have received another one hundred and fifty million in non-repayable negotiation support funding (BCTC 2016). It is arguable that the federal and provincial governments have spent at least twice this amount on negotiations, not including costs associated with litigation and settlements.
CHAPTER 6: BETWEEN RECOGNITION AND RECONCILIATION

Overlap disputes are often a product of disagreement concerning the criteria by which the sociospatial dimensions of claims and settlements should be defined. Some believe that assertions of traditional territory should be based on present-day Indigenous occupancy and political organization. Others argue that assertions of traditional territory should be based on legally defined Aboriginal rights. I argue that overlap disputes reflect the failure of law to provide a basis of common understanding and legitimacy concerning Indigenous territorial jurisdiction. Ambiguity and contradictions within and between Indigenous and state legal systems confound common understanding. To negotiate settlements with little regard to the legal basis of claims undermines law’s legitimacy. The purpose of this chapter is to make two critical arguments. First, settlements with First Nations in BC need to be consistent with both Indigenous and state legal systems. Second, I argue that law can and must develop to allow people to use it as a basis of common understanding and legitimacy in the management of overlap disputes, and elsewhere. To be accepted as legitimate, state and Indigenous legal systems – and their interactions – need to reflect present-day values and imperatives, which requires that they be substantively articulated and harmonized where conflicts in and between legal systems exist.

This chapter is presented in three major sections. In the first section I explore the contested nature of Aboriginal rights, the spatial dimensions of these rights, and how different types of Aboriginal rights can overlap and come in conflict. The second section engages with different types of Indigenous sociospatial organization, and disputes that can arise between, within and among Indigenous polities. In the third section I highlight some ambiguities and internal contradictions in law, and some related challenges associated with
applying state and Indigenous legal systems to the management of overlap disputes. I argue that overlap disputes are often a product of fundamentally different understandings of, and contradictions in and between, state and Indigenous legal systems. Effective and lawful Indigenous-Crown relations, and particularly the management of overlap disputes, requires a process that creates space for understanding and reconciling these differences.

**The Sociospatial Dimensions of Aboriginal Rights**

The characterization of Aboriginal rights is a highly contested aspect of law. This is particularly the case in the context of the Crown’s duty to consult and accommodate because the degree to which First Nations influence decision-making concerning land depends not only upon assessed strength-of-claim but on the way Aboriginal rights are characterized. Contestation concerning the characterization of Aboriginal rights is particularly evident in the *Tsilhqot’ín* case, where the Tsilhqot’in’s legal claim for Aboriginal title came up against the Crown’s argument that Tsilhqot’in Aboriginal rights should be narrowly construed as specific practices such as hunting and fishing, or small, geographically site-specific areas of Aboriginal title (*Tsilhqot’ín Nation* 2007, paras. 603-610; *William* 2012, paras. 205-211; *Tsilhqot’ín Nation* 2014, paras. 50, 55, 60). The trial judge found that Aboriginal title exists in a contiguous area comprising about forty percent of the area claimed (*Tsilhqot’ín Nation* 2007, paras. 959-960), and that the Tsilhqot’in also have specific rights to hunt and trap animals throughout the entire territory claimed (para. 680).

The BC Court of Appeal disagreed with the trial judge’s findings concerning the character of the Tsilhqot’in Aboriginal rights, holding that the Tsilhqot’in had not

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80 *Tsilhqot’ín Nation v. British Columbia* 2007 (BCSC); *William v. British Columbia* 2012 (BCCA); *Tsilhqot’ín Nation v. British Columbia* 2014 (SCC). The *Tsilhqot’ín* case is the first and only time the Supreme Court of Canada has made a declaration of Aboriginal title in Canada.
established an intensity of prior exclusive occupation sufficient to prove Aboriginal title (William 2012, para. 241). Instead, the BC Court of Appeal held that the Aboriginal rights at issue are better characterized as small, “specific sites over which [Aboriginal] title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised” (William 2012, para. 238). Moreover, the BC Court of Appeal in the Tsilhqot’in case suggested that territorial claims to Aboriginal title (as opposed to small, site-specific areas) are “antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians …” (para. 220).

Arguably, the BC Court of Appeal’s decision was symptomatic of the tendency of courts and the Crown to characterize Aboriginal rights in constricting ways (e.g. Borrows 1999b; Burke 2000; Christie 2006, 2013). The Supreme Court of Canada overturned the BC Court of Appeal on the grounds that Aboriginal title is, in the case of the Tsilhqot’in at least, territorially contiguous in character, as opposed to a patchwork of small, site-specific locales.

**Overlapping Aboriginal rights and shared exclusivity**

The concept of exclusivity is another important criterion in the characterization of Aboriginal rights, particularly in the context of overlap disputes. In the legal sphere, the concept of exclusivity is tied to the degree to which particular Aboriginal rights are connected to specific geographic locales. Thus,

Aboriginal rights … fall along a spectrum with respect to their degree of connection with the 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. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. … At the other end of the spectrum, there is aboriginal title itself (Delgamuukw 1997, para. 138).

Aboriginal rights deriving from specific practices such as hunting and fishing thus may or may not be tied to specific geographic locales, depending on Indigenous laws and practices. Aboriginal title, on the other hand, encompasses a right to “proactively use and manage the land” – “a right to the land itself” (Tsilhqot’in Nation 2014, para. 94; Delgamuukw 1997, para. 140). Different kinds of Aboriginal rights thus invoke different spatialities, be they site- and/or practice-specific, or broader territorial rights of jurisdiction.

Criteria by which Aboriginal rights are judicially recognized are similarly dependent on how rights are characterized. In order to establish Aboriginal title,

(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, para. 146).

Prior occupation can be established either by continued physical occupation of land or by reference to Indigenous laws, or both (Delgamuukw 1997, paras. 148, 157; see also McNeil 1999, 2006; Slattery 2000, 2006). Physical occupation “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, para. 149). Prior occupation of lands can also “be gleaned, in part, but not exclusively, from [First Nations’] traditional laws, because those
laws were elements of the practices, customs and traditions of aboriginal peoples” (para. 148).

Canadian courts have yet to rule on a situation where two or more First Nations claim joint Aboriginal title or shared exclusive rights; that is, rights that are shared among two or more First Nation but exclusive of other First Nations. In Delgamuukw (1997), the Supreme Court of Canada was at pains not to preclude such a possibility, noting 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” (para. 156). Indeed, the court in Delgamuukw addressed the issue of overlapping claims directly, noting that

[t]he 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 (11, emphasis added; also paras. 155-158).

The common law criterion of exclusivity, then, does not preclude “shared exclusivity” or “joint Aboriginal title”. The law of Aboriginal rights also provides the flexibility for recognition of non-exclusive rights deriving from specific practices; that is, “rights short of Aboriginal title” (Delgamuukw 1997, 11). Recognition of joint title would require two or more First Nations to demonstrate that they had the ability to exclude First Nations other than those with which exclusivity was shared (para. 158). The timing of historic geopolitical events is thus important in the legal sphere, and particularly whether a First Nation’s occupation was exclusive, or shared exclusive, at the time Crown sovereignty was asserted, a date courts have held is 1846 in BC (e.g. Haida Nation 2004, para. 65; Tsilhqot’in Nation 2007,
The preceding discussion exposes two considerations particularly important in the context of overlap disputes. The first is that while Canadian courts have yet to hear a case in which two or more First Nations have claimed Aboriginal title in the same area, there may well be instances where the claims of both would be legally valid, such as where two or more First Nations together exercised exclusive control of an area to the exclusion of other First Nations. A second important consideration flows from the Supreme Court of Canada’s characterization of different kinds of Aboriginal rights having varying degrees of connection to specific geographic locales, depending on Indigenous laws and continuing practices. Different kinds of Aboriginal rights thus enact different spatialities. The Aboriginal rights of one First Nation may derive from exclusive occupation (or governance control) of land, while the rights of another may derive from specific practices such as fishing and hunting, that may be exclusive or non-exclusive to other First Nations.

Within this complexity are different “threshold dates” for differently characterized Aboriginal rights. Jurisprudence to date has held that Aboriginal title is based on First Nations occupation and/or control of land at the time of Crown assertion of sovereignty. Aboriginal rights based on specific practices are those that “existed prior to contact with European societies” (Van der Peet 1996, paras. 46, 89, emphasis added; also especially Slattery 2000). Discrepancy between these threshold dates may itself be a source of overlapping claims, where for example a First Nation may have gained territorial control from another in the period between early colonial contact and assertion of British sovereignty, a period

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81 However, as will be discussed later in this chapter, it is arguable that the threshold date for establishing Aboriginal title has yet to be fully determined for all situations.
spanning close to 100 years in some areas. This discrepancy between threshold dates may indeed provoke situations in which different kinds of legally defined Aboriginal rights may be incompatible.

For example, one First Nation (call it “First Nation A”) may hold rights deriving from specific practices extant prior to colonial contact, such as hunting and fishing in a particular area. Another First Nation (call it “First Nation B”) may have gained exclusive territorial occupation and control of the same area in the period between early colonial contact and assertion of British sovereignty, perhaps with the benefit of trade alliances with the European colonizer (e.g. access to weapons). In such situations the law of Aboriginal rights would recognize two types of conflicting Aboriginal rights in the same area, the first based on specific practices (e.g. hunting and fishing), the second based on the exclusive right of Aboriginal title that encompasses “an exclusive right to the use and occupation of land, i.e., to the exclusion of both nonaboriginals and members of other aboriginal nations” (Delgamukw 1997, para. 185).

This is not to say that exclusive occupation may not be established if more than one First Nation was present in or frequented the area in question. Exclusivity can be “demonstrated by the intention and capacity to retain exclusive control” (Delgamukw 1997, para. 156). However, unless it can be shown that the two First Nations jointly occupied or jointly exercised governance control of an area at the threshold date for Aboriginal title, or that “First Nation A” continued to engage in hunting and fishing with the permission of

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82 See, e.g., Marsden and Galois (1995) for a thoughtful discussion of Tsimshian geopolitical transformation in the northwest coast of BC during the fur trade era.

83 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 fishing and hunting, but may be able to prove a right of Aboriginal title, which paradoxically would include these specific rights (Slattery 2000).
“First Nation B,” overlapping claims weaken if not preclude a judicial finding of Aboriginal title. Thus the manner in which the Aboriginal rights of different First Nations are characterized has a profound effect not only on the degree to which legal claims may overlap, but on the extent to which overlapping rights and claims may be legally compatible under state law.

Courts are one space where disagreement concerning the character of Aboriginal rights and strength-of-claims plays out. Processes of consultation and accommodation, including Crown consultation related to overlap disputes, are another. Given the varied ways that Aboriginal rights can be characterized, it follows that both First Nations and the Crown strive to characterize rights in a manner that best supports their interests and ambitions. The motivation of the actors is clear. The Crown often seeks to characterize rights as specific practices because its legal duty to First Nations concerning such rights is narrowed to avoiding or mitigating impacts on the specific right, and only the specific right (Van der Peet 1996, para. 53). First Nations, on the other hand, often seek to characterize Aboriginal rights as a broader right to influence decision-making that may affect their way of life (Christie 2013; FNLC 2013).

The concept of exclusivity thus poses a paradox for both the Crown and First Nations. Because Aboriginal rights are often claimed in the same area by multiple First Nations, the Crown is often required to consult and negotiate with multiple First Nations concerning the same territory. On the other hand, if a claim is characterized as Aboriginal title – a jurisdictional right to the land itself – the Crown may argue that such territorial claims are “antithetical to reconciliation,” and place an “unnecessary limitation” on Crown sovereignty (William 2012, para. 220). The characterization of Aboriginal rights also poses a
dilemma for First Nations. In the judicial realm there is of course no option for First Nations other than to try to fit their claims into the legal framework established by Canadian courts. Non-exclusive, specific rights short of Aboriginal title may be more easily recognized by the Crown and the courts but to characterize rights in such a way results in First Nations having less influence on decision-making concerning land. The characterization of territorial claims as Aboriginal title, on the other hand, is significantly more difficult to have recognized but once recognized encompasses an exclusive (or shared exclusive) right to use and occupy the land.

Overlap disputes in many instances are symptomatic of different First Nations having profoundly different understandings of the character of their Aboriginal rights, and the criteria – whether legal, political, exclusive, or non-exclusive – on which their territorial claims are based. First Nations that settle treaties under the current land selection model accept that their Aboriginal title will persist only in a small portion of their asserted traditional territory, and that all other Aboriginal land rights in the territory are modified and persist as non-exclusive treaty rights. Many First Nations reject the treaty land selection model because they believe that their Aboriginal rights encompass a right to exercise decision-making over their entire traditional territory. The effective and lawful management of overlap disputes requires a process that makes time and space for exploring, understanding, and reconciling these different understandings.

**Indigenous Sociospatial Identity and the Proper Rights Holder**

The preceding section outlined a framework for understanding the contested character of Aboriginal rights and their spatial dimensions. Overlap disputes are also often linked to contestation concerning First Nations political identity and representation – the
sociopolitical dimensions of claims. Overlap disputes in some instances are between two or more First Nation polities that each claim to represent the same Indigenous constituents. Here again there is tension between legal criteria and political processes of Indigenous-Crown negotiation. First Nations negotiating within the BC treaty process are self-defining, regardless of whether such assertions accord with the legal definition of Indigenous collectives in which Aboriginal rights vest (e.g. the “Baker test”, discussed in Chapter 5). Intra-Indigenous contestation concerning the respective authority of two or more First Nation polities raises two difficult questions in the context of Indigenous-Crown relations: 1) with which Indigenous political organizations should the Crown negotiate in situations where two or more Indigenous political organizations claim to represent the same Indigenous constituents? And 2) with which Indigenous political organizations should the Crown negotiate where the political claim of one First Nation overlaps and conflicts with the legal claim of another? Meaningful answers require understanding not only the different kinds of Aboriginal rights at issue (discussed in the previous section), but also the diversity of Indigenous organizational entities that converge and overlap on the Indigenous sociospatial landscape of BC.

Indian Act Bands

Indian Act Band jurisdiction is delegated, at least in part, through the Indian Act from the exclusive federal jurisdiction over “Indians and Lands reserved for the Indians” under Section 91(24) of the Constitution Act 1867. Strictly speaking, the statutory powers delegated to Indian Band Councils under the Indian Act have no application to land outside of Indian Act Reserves (Krehbiel 2009). However, in addition to powers conferred by statute, Indian Act Bands may also possess an inherent right to govern, resulting in a unique hybrid
governing authority within the Canadian constitutional framework (McNeil 2007; Krehbiel 2009). The BC Court of Appeal has held that First Nations have a “diminished but not extinguished” right of self-government deriving from the existence of self-governing Aboriginal peoples prior to assertion of Crown sovereignty (Campbell 2000, para. 180). But how do these “pre-existing systems of Aboriginal law” on which Aboriginal rights are based, relate to Indian Act Bands, that are a product of federal statute?

If the jurisdiction of Indian Act Bands flows, in part at least, from an inherent right, this proposition is predicated on the idea that the membership of a Band can be traced back to one of the original “Nations or Tribes” identified in the Royal Proclamation of 1763 (McNeil 2007). If not an inherent right, from where do Indian Act Bands derive their authority to negotiate concerning land outside of Indian Reserves? This question becomes unavoidable where overlap disputes are between Indian Act Bands and other types of Indigenous polities, such as tribal councils, traditional governance structures, and other forms of Indigenous political agency.

Nations and “intra-national” subgroups

The Royal Commission on Aboriginal Peoples (RCAP 1996) defined an Indigenous Nation as “a sizable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories” (21). Depending on the legal system of a particular Nation, within a Nation may be intra-national

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84 Campbell et al v. AG BC/AG Cda & Nisga’a Nation et al 2000 (BCCA).

85 Delgamuukw 1997, para. 114.
subgroups, such as tribes, houses, clans, and other types of kin-based aggregation. In *Delgamuukw* (1997), for instance, the Supreme Court of Canada recognized that Gitxsan and Wet'suwet'en peoples were and are organized in *wilps* (houses) structured according to matrilineal kin groupings, the fundamental political and land-owning subgroups of these Nations. To provide another example, the traditional sociospatial institutions of the Tsimshian include the house, tribe, and, cross-cutting these, the clan (Marsden 2002). The Tsimshian are also recognized as seven *Indian Act* Bands, all of which are now pursuing their own separate treaty. The Indigenous sociopolitical landscape of BC is complex and often contested. The following example illustrates aspects of the challenge.

**A principled process or divide and conquer?**

A proposal for a major oil pipeline brought to a head a rift within the Gitxsan Nation during the winter of 2011-2012. Part of the dispute concerned which Gitxsan institution has the authority to speak for Gitxsan as a whole concerning pipeline development (CBC News 2011). Exposed here were also questions concerning whether the Gitxsan Treaty Society—which is purportedly organized and governed according to Gitxsan law—is properly authorized to negotiate with the Crown and continue to accept loaned treaty negotiation funding on behalf of constituents also represented by Gitxsan *Indian Act* Bands and *wilp* Chiefs who claim that they are not represented by the Gitxsan Treaty Society. In a related legal action known as *Spookw*, four Gitxsan *Indian Act* Bands and six hereditary *wilp* Chiefs

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86 See, on BC generally, Turner and Jones 2000; also, e.g., Brown 2002 and Larsen 2006 on Dakelh; Marsden 2002 on Tsimshian; Mills 1994 on Wetsuwet’en; Thom 2005 on Coast Salish; Overstall 2004 and Napoleon 2009 on Gitxsan.

(the plaintiffs) argued that

[Over the years the GTS [Gitxsan Treaty Society] has unduly restricted the involvement of the plaintiff hereditary Chiefs and Indian bands in treaty negotiations … that, amongst other things, GTS has declined to take direction or input from the Gitxsan Chiefs, restricted debate on matters of concern to all Gitxsan, and conducted its affairs in a secretive and ‘oppressive’ manner that was unfairly prejudicial to the plaintiffs (Spookw 2011, para. 20).

The Spookw plaintiffs argued that “a large percentage” of the wilp Chiefs had been barred from participating in the Gitxsan Treaty Society, and that Chiefs representing “two-thirds of Gitxsan territory” had stated publicly that the Gitxsan Treaty Society does not represent them (2014, para. 83). The plaintiffs’ claim was threefold: first, that the BCTC was negligent in its responsibility to ensure that the Gitxsan Treaty Society was properly mandated by Gitxsan citizenry to negotiate within the BC treaty process (Spookw 2010, paras. 10, 38); second, that the Gitxsan Treaty Society was not representative of the Gitxsan Nation as a whole in the BC treaty process, and therefore should be shut down (Spookw 2014, para. 1); and third, that the Crown had breached its fiduciary and honourable duties by continuing to conduct treaty negotiations with the Gitxsan Treaty Society after receiving notice that the plaintiffs had not consented to be represented by the Gitxsan Treaty Society (Spookw 2014, paras. 97, 108). Moreover, they argued that the Crown was in breach of its duty of honour by providing loans to the Gitxsan Treaty Society without their consent, for which the plaintiffs may be liable (Spookw 2014, para. 108).88

On the first issue, the court characterized the question to be decided as whether the

88 Loaned treaty negotiation funding accrued by the Gitxsan Treaty Society is over 21 million dollars (Spookw 2017, para. 3).
BCTC owed a duty of care to the individual plaintiffs, rather than whether it owed a duty to Gitxsan citizenry as a whole (Spookw 2011, para. 47). The court held that the BCTC does not owe a duty of care to individual members of the Gitxsan Nation who may be affected by the actions of the Gitxsan Treaty Society, and thus dismissed the claim against the BCTC (Spookw 2011, paras. 47-48). Concerning the second issue, the court found that the Gitxsan Treaty Society was improperly constituted under the Society Act 1996 (Spookw 2012, para. 1), and ordered the society to correct the defect in its bylaws. In 2013 the treaty society asked the court to approve a process whereby its membership – which was then comprised of nine members – would be opened up to all 64 wilp Chiefs of the Gitxsan Nation (Spookw 2013, para. 37). The treaty society argued that its proposed process provided an opportunity for all wilp Chiefs to become members of the society, after which they would have an opportunity to influence its policy “from within” (Spookw 2013, para. 45).

The plaintiffs, on the other hand, argued that for the court to sanction the proposed remedy would “legitimize exclusion and will effectively give support to a faction in the Gitxsan community that seeks to limit rights of a segment of the population” (Spookw 2013, para. 62). Moreover, they argued, the proposed regime was predicated on “discriminatory membership provisions” which contravene the Canadian Human Rights Act, particularly those related to discrimination on the basis of sex and gender (Spookw 2013, para. 62). The plaintiffs also argued that for the court to approve the proposed process would in effect affirm a particular structure of governance, and in doing so implicitly indicate that the Gitxsan Treaty Society has the support of the broader community to negotiate in the treaty process (Spookw 2013, para. 64). The court nonetheless considered the issue to be decided as narrow and technical, and ruled that the proposed remedy was sufficient to bring the treaty
society into compliance with the *Society Act 1996*. Eighteen of sixty-four *wilp* Chiefs did not join the Gitxsan Treaty Society (*Spookw 2013*, para. 36). Democratically elected Band leaders had no opportunity to become members.

The court ruled on the two outstanding original claims in 2014. Concerning the claim against the Gitxsan Treaty Society, the court again framed the question to be decided as technical and narrow, and held that the plaintiff *Indian Act* Bands and *wilp* leaders were not “proper persons” with standing within the society and thus could not seek its dissolution (*Spookw 2013*, paras. 125, 134-136). Central to the court’s reasoning was that the elected Band leaders had no standing in the society according to the society’s bylaws, and that the plaintiff *wilp* Chiefs had in effect chosen to “remain outside the process” by not becoming members of the society (*Spookw 2014*, para. 121). Concerning the alleged breach of the Crown’s fiduciary and honourable duty, the court held that for the Crown to intervene in an internal dispute would conflict with the principle of First Nation self-governance embedded in the BC treaty process, and thus found no breach (*Spookw 2014*, para. 130). The lower court’s decision was reviewed by the BC Court of Appeal, which upheld the decision on all counts (*Spookw 2017*). The lower court’s decision to dismiss the claim against the BCTC – which has the statutory responsibility to ensure that First Nations negotiators have the support of their communities – was not appealed. The BCTC continues to support the treaty society’s engagement in the BC treaty process, even though some Gitxsan *wilp* Chiefs argue that their constituencies and territories are independent First Nations in their own right, and are not represented by the treaty society (*Spookw 2015*, para. 6).

Tensions just described are symptomatic of an uncomfortable interaction between Indigenous and state legal systems. In this case, an attempt was made to constitute a treaty
society according to an adaptation of Indigenous law in order to engage in the BC treaty process and receive negotiation support funding. At its inception it was decided that treaty society directors would not be appointed by society members, as is required under the *Society Act 1996*. The assumption was that such a system would be seen as legitimate among Gitxsan citizenry even if not consistent with state law. Yet law does not exist in a vacuum. All legal systems are always continuously contested, and to some extent are constructed in relation to the legal systems with which they interact (Melissaris 2013; Anker 2014). Here, when people felt wronged by the way Indigenous law was being applied, they turned not to the Indigenous legal system but to the relational other – state law – as a potential source of legitimacy and justice. Mechanisms within the Indigenous legal order that might have allowed the conflict to be addressed in a functional way were thus supplanted by state law. The treaty society now may be technically compliant with the *Society Act 1996*, but a significant number of Gitxsan remain deeply unhappy with the situation. State law, once again, failed to provide a present-day remedy to the dispute, and instead focused on a narrow, technical question within the law of societies. Questions provoked by overlap disputes are not narrow and technical, but rather raise broader questions concerning how legitimacy is judged. Is law understood as a source of common understanding and legitimacy among, for example, Gitxsan people? Is legitimacy found in state law or Indigenous law, or, as I argue, in a space comprising both legal systems? I return to these questions later in this chapter.

It is naïve to think that such disputes play out in isolation of Crown and BCTC decisions and actions. For instance, in the summer of 2014 the Government of BC offered 12 million dollars directly to a select number of Gitxsan *wilp* Chiefs as economic
accommodation for two liquid natural gas pipelines proposed to traverse Gitxsan traditional
territory (Hoekstra 2014). The offer was made only days after negotiations between the
Provincial Government and the Gitxsan Development Corporation – a corporation
overseen by the Gitxsan Treaty Society – broke off. John Rustad, then Provincial Minister of
Aboriginal Relations and Reconciliation, was quoted as saying that “it was important to
address the offer directly to the Chiefs who are the ultimate decision makers” (Hoekstra
2014, 2). Clifton Percival characterized the Provincial Government’s approach as an effort to
make an “end-run” around negotiations (Hoekstra 2014, 2). That the Provincial
Government made monetary offers of accommodation directly to particular wilp Chiefs may
be indicative of the Provincial Government’s opinion that, in the case of the Gitxsan at least,
some kinds of Aboriginal rights vest in individual Gitxsan wilps, rather than in the Gitxsan
Treaty Society. That the offers were made only after negotiations with the Gitxsan
Development Corporation broke down may suggest a more ad hoc approach on the part of
the Provincial Government.

Indigenous polities in which Aboriginal rights vest

The preceding discussion described several kinds of Indigenous polities – Indian Act
Bands, Nations, and intra-national subgroups. Often cross-cutting these sociospatial
identities are other forms of political agency, such as treaty societies and tribal councils,
which often purport to represent the interests of multiple Indigenous groups and subgroups.
Even though such sociospatial identities overlap in complex ways, it is still possible – indeed,
necessary – to identify the Indigenous sociospatial identities most closely associated with
different kinds of Aboriginal rights. It is also important to recall (from Chapter 3) that
modes of Indigenous sociospatial organization are not static, including those said to derive
from “pre-existing systems of Aboriginal law” (*Delgamuukw* 1997, para. 114). Through its inherent governmental authority, a First Nation may reconfigure its institutions of governance and spheres of jurisdiction, wherein allocation of rights within a Nation is determined *inter se*; that is, according to internal rules. As Slattery (1987) notes,

> These rules dictate the extent to which any individual, family, lineage, or other subgroup has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices (745).

Slattery’s contention is certainly consistent with the notion that the *inter se* allocation of rights is a fundamental aspect of Indigenous self-determination. A challenge arises, however, when the allocation of rights within First Nations is not clear, such as where Indian Act Bands contest the authority of a treaty society to represent the interests of membership common to both polities, as in the Gitxsan example discussed above. These kinds of disputes raise not only political questions, but also legal questions concerning which Indigenous polities hold Aboriginal rights on behalf of collectives. While courts are not the best fora to address overlap disputes, the common law provides a number of emerging principals that support related inquiries and resolutions.

Generally, courts have employed a three step approach: 1) characterizing the Aboriginal right/s at issue; 2) identifying the historic collective that held the right/s; and 3) identifying the present-day successor collective that holds the present-day right/s. To succeed in a legal claim, a First Nation must establish that it is the successor of the Indigenous community that possessed the Aboriginal rights in question prior to the
appropriate threshold date discussed earlier. The terms courts have used to describe this successor collective is “the proper rights holder” (e.g. Tsilhqot’in Nation 2007, paras. 437-472; William 2012, paras. 51-57) or “proper claimant group” (e.g. Ahousaht 2009, paras. 287-292).  

The foundational case concerning the proper rights holder is the Supreme Court of Canada’s 2003 decision in Powley. Although largely concerned with criteria for identifying Métis, the Powley decision has been relied upon in subsequent jurisprudence concerning other Indigenous societies (Tsilhqot’in Nation 2007, para. 444; Ahousaht 2009, para. 290). An important principle articulated in Powley is that a lack of present-day political structure, or changes in self-identification, is not a valid basis for disentitling present-day Indigenous collectives (paras. 13, 18). That a rights-holding Indigenous collective may not be “visible” or have “gone underground” for an extended period of time does not necessarily mean that it disappeared entirely (Powley 2003, para. 27). In the context of claims for specific Aboriginal rights such as hunting and fishing, the Powley decision evinces the principle that courts will emphasize continuing practices of members and not the degree to which the Indigenous polities in which rights vest are easily recognized (Powley 2003, paras. 23-24, 27).

The Tsilhqot’in case is one of the few where, because of the arguments raised at trial and on appeal, the court was compelled to rule directly on questions concerning the character of the collectives in which present-day Aboriginal rights vest (Tsilhqot’in Nation 2007, paras. 437-472; William 2012, paras. 132-151). The trial judge relied heavily upon the

89 Ahousaht Indian Band and Nation v. Canada (Attorney General) 2009 (BCSC).
91 The general lack of judicial attention paid to issues related to the proper rights holder is likely due to the fact that most Aboriginal rights litigation has involved the prosecution of Aboriginal individuals for contravening statutory
Tsilhqot’in’s own understanding of their collective identity and present-day allocation of rights within the collective, holding that because “Tsilhqot’in people make no distinction amongst themselves at the band level as to their individual right to harvest resources…” both specific Aboriginal rights (e.g. to trap and hunt) and Aboriginal title vest in the whole of the Tsilhqot’in Nation, rather than in individual Tsilhqot’in Indian Act Bands, as the Crown had argued (para. 459). The trial judge held that the six Tsilhqot’in Indian Act Bands are “caretakers” of specific rights such as the right to hunt and trap (paras. 437-472). Aspects of the trial judge’s ruling related to the proper rights holder were upheld by the BC Court of Appeal and not appealed to the Supreme Court of Canada (Williams 2012, para. 135-150).

Echoing Slattery’s (1987) argument quoted above, the reasoning employed in Tsilhqot’in evinces the principle that the proper rights holder is to be determined largely from the perspective of the Indigenous group itself, and that allocation of rights within First Nations is subject to both formal and informal change. In Tsilhqot’in, the court found that the proper rights holder is the broader Tsilhqot’in Nation even though evidence presented at trial did not support a conclusion that there was a pan-Tsilhqot’in governing entity at the time the Crown asserted sovereignty. Determinative of the proper rights holder, in the court’s view, is self-identification, which “may shift from [Indian Act] Band identification to cultural identification depending on the circumstances” (Tsilhqot’in Nation 2007, para. 457). Such shifts may be informal in the sense that an Indigenous group, the Tsilhqot’in in this case, may not entirely formalize the character of a rights-holding collective with a present-day governing institution that is easily recognized, such as a corporate body (para. 465). That prohibitions concerning hunting and fishing. In such situations it is only necessary for courts to determine whether the individual being prosecuted is a member of a rights-holding collective, rather than to define the collective with precision (see, e.g., Ahousaht 2009, para. 288).
there was no “visible” pan-Tsilhqot’in political entity at the time when the British Crown asserted sovereignty, and that some aspects of collective decision-making had been assumed by Tsilhqot’in Indian Act Bands, did not sway the court from ruling that Aboriginal rights vest in the Tsilhqot’in Nation as a whole (para. 470). Although important not to conflate the Tsilhqot’in decision to other First Nations and contexts, Tsilhqot’in evinces the principle that Indian Act Bands in some contexts may be considered “caretakers” of rights vested in larger collectives (para. 468). Taken literally, the term “caretaker” can be understood to mean that Indian Act Bands may have decision-making rights subservient to those of larger polities, even when such polities are neither clearly defined nor easily recognized.

As was discussed earlier with reference to the Gitxsan, in other contexts intra-national subgroups – e.g. houses (wilps), tribes, and extended families – have argued for rights distinct from those of a larger collective of which they are a part. Canadian courts have yet to fully articulate a principled basis for identifying the proper rights holder in such situations. Questions concerning the Aboriginal collectives in which Aboriginal rights vest are far from fully settled, as noted by the BC Court of Appeal in the Tsilhqot’in case:

It will, undoubtedly, be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in this area is in its infancy (William 2012, para. 151).

Substantive Articulation of Law

Three critical points concerning the law of Aboriginal rights need to be underscored. First, the law of Aboriginal rights, like all law, can and must continue to develop. The law

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92 See, e.g., Benn v. Moulton Contracting Ltd. 2013 (SCC).
contains inherent contradictions and has yet to be fully articulated. Second, the
characterization of Aboriginal rights is, in part, dependent on the legal systems and practices
of Indigenous people. Yet in many instances Indigenous land laws have not yet been
substantively articulated and applied in a manner that makes them cognizable to courts,
“visible” to broader society, or functional for Indigenous people themselves (Borrows 2002,
2010; Napoleon 2004, 2007b; Napoleon and Overstall 2007). Indigenous law, like all law,
cannot be frozen in the past – it too can and must evolve. And third, where state and
Indigenous legal systems conflict, or where the legal systems of different First Nations
conflict – as is sometimes the case with overlap disputes – legal orders can and must be
substantively articulated and harmonized to allow people to use law as a basis of common
understanding and legitimacy. This is what it means to effectively and lawfully manage
overlap disputes: to employ a principled process that fosters common understanding, allows
constructive contestation, and is accepted as legitimate even when some people may not like
the outcome. Overlap disputes are often a product of fundamentally different
understandings of, and contradictions in and between, legal systems. Indigenous-Crown
relations generally, and particularly the management of overlap disputes, requires a process
that creates space for understanding and reconciling these differences. I quote legal scholar
Val Napoleon at length, with deference to her eloquence and insight:

[We need to] … start with the reality that all societies have messy human problems,
that there is human violence and that there are vulnerabilities in all societies. All
societies had to have some means of responding to those internal human realities,
some of which would have included force in along with other mechanisms. In lots of
situations the loss of a complete understanding of Indigenous law has resulted in
Indigenous peoples also mischaracterizing the relationship with land and generating
disputes where historically those disputes either wouldn’t have existed or would have been dealt with in a much more constructive way.

What we have with colonization, with the imposition of Canadian law, is that the parts of Indigenous criminal law that required force were criminalized by Canada. What was left were the other principles – different kinds of responses that people have in a community about healing, culture, [and so on] – which are just as important but they’re incomplete. They’re not recognized as part of a legal system. A similar kind of thing has happened with [Indigenous] law relating to land.

For instance, you’ve got people who historically have very clear relationships to land that go back in time. But [now …] you have only some aspects of [Indigenous] land law being fulfilled. You have people recounting the boundaries in a feast hall. You have people raising [totem] poles that describe people’s relationship with that land. You have different kinds of activities going on but you don’t have the enforcement mechanisms that enabled people to actually meaningfully exercise authority and jurisdiction over that land. So you have partial elements of [Indigenous] land law but it’s incomplete.

The issue is not just one of lack of recognition. There is a need to support people to rebuild law in their communities. Unless you support people to do that in a constructive way, what you end up with are really general rhetorical statements about what Indigenous law is, which people are going to have real trouble applying to real human conflicts. What’s happening [with overlap disputes] is that there’s an articulation of Canadian law [but not an] articulation of Indigenous law. And it’s an asymmetrical power imbalance that’s perpetuated by attempts to try to resolve [overlap] disputes without doing the groundwork. That’s the homework that has to get done.

It doesn’t mean that somehow history or the organization of communities today can be disregarded. It means that you have to figure out what the important things are in the law that need to be carried forward and incorporated into how people are
managing things today. You can’t do that unless you know the full history of it. That’s [part of] a substantive articulation of Indigenous laws that relate to land.

So the question around these kinds of [dispute management] mechanisms is will they allow and support people to do the homework? Not to do it for people but allow that it has to be done, and not perpetuate the notion that Indigenous peoples are lawless and just have culture. To what extent do the [dispute management] processes we create perpetuate those underlying assumptions? What’s the damage? What are you importing from those deeper kinds of assumptions into new processes? That’s an ethical question that needs to be part of a transparent conversation where there aren’t any privileged truths – creating space for those complicated conversations to happen. It’s not about going back in time. It’s about not allowing unexamined freight in the work we’re doing, [and] imagining those institutions that will support people to have complicated conversations. It requires a substantive articulation of law (interview 2013).

As Napoleon indicates, an effective and lawful strategy for managing overlap disputes requires a mechanism that creates space for complicated conversations concerning geopolitical history, law, and present-day ambitions and realities. Part of making room for this dialogue is recognizing that the intellectual spaces of law are already occupied by both Indigenous and state legal systems. Having meaningful conversations about history, law, and present-day goals requires closely examining assumptions – what Napoleon calls unexamined freight – that currently occupy these intellectual spaces. Effectively managing overlap disputes requires that assumptions be interrogated, and that they be pushed out of those spaces if they are inconsistent with present day values and imperatives.

For instance, the overlap dispute between the Nisga’a and Gitanyow has been discussed at several points in this work. Napoleon contends that this dispute remains unresolved because the “homework” was never done, and that addressing the dispute
requires that Indigenous law be substantively articulated to understand why Nisga’a and Gitanyow hold differing opinions concerning which group has authority over the disputed territory (interview 2014). Echoing Sterritt and others (1998), Napoleon suggests that the source of the dispute is that a number of Gitanyow Chiefs moved into Nisga’a territory. The legal question to be decided, then, is what authority did the Chiefs take with them when they moved?

The people in Gitanyow say [that] when they left [Gitanyow] they severed their authority. And then, on the other side, [the Nisga’a] say they are full Chiefs. And so what ended up happening is that it wasn’t dealt with because state law intervened and took up the space. So the conversations needed didn’t happen. The legal issues within Nisga’a and Gitxsan law were never dealt with (Napoleon interview 2013).

Instead, Indigenous legal systems were supplanted by the Nisga’a treaty and its ineffective non-derogation clauses. As a result, the Nisga’a treaty is vulnerable to legal challenge because the Gitanyow now have no remedy available other than to litigate under state law. A legally durable strategy for managing overlap disputes must address underlying sources of conflict, which in this case is that there are different interpretations of Indigenous laws, or that Indigenous laws were simply ignored when the Nisga’a treaty was settled (e.g. Sterritt et al. 1998; Sterritt 1999). Settlements that codify rights contrary to Indigenous laws are not legally durable.

The lawful management of overlap disputes requires a process that also adheres to European derived aspects of the common law, but here too these aspects of law, and particularly how state and Indigenous legal systems interact, have yet to be substantively addressed.

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93 As noted in the previous chapter, in 2016 the Gitanyow reinstated its legal claim for Aboriginal title in the Supreme Court of BC.
articulated. For instance, as was discussed earlier in this chapter, the law of Aboriginal rights invokes different threshold dates for different kinds of Aboriginal rights. In some situations, these different threshold dates may give rise to two types of Aboriginal rights – specific, non-exclusive rights, and the exclusive right of Aboriginal title – between which there can be inherent conflict. Discrepancy between different threshold dates is often a source of overlap disputes, as Morse explains:

[Overlap disputes are] are fueled in part by the absence of agreement around key points, one of which is the date that determines territorial use [and occupancy]. Are we talking about when BC joins confederation in 1870, are we talking [when] Captain Cook [landed], or are we talking 1000 AD? Let’s say that Kwakiautl pick 1400 AD and Nuu-Chah-Nulth picks Captain Cook. Both are in a sense as legitimate as anything else and there is no real legal guidance here, beyond prior to [the date at which the] Crown asserted sovereignty. So I say that on an evidential level there is inevitable uncertainty because you are talking about completely different centuries. Kwakiautl and Salish raided back and forth against each other for many generations, and their boundaries shifted. So where is the point in time where you take the snap shot and say who was where? (interview 2014).

As Morse notes, it is often assumed that the threshold date on which Aboriginal title is based is the date at which the Crown asserted sovereignty, yet, as with questions concerning the proper rights holder and incompatible rights, I argue that this aspect of law has yet to be substantively articulated.

For instance, Delgamuukw (1997) is the most widely cited court decision concerning the threshold date on which Aboriginal title is based (e.g. Tsilhqot’in Nation 2007, para. 601). Yet in separate but concurring reasons, two of the six Justices who took part in the in Delgamuukw (1997) decision – La Forest and L’Heureux-Dubé – argued that the date at
which Crown sovereignty was asserted should not be the only date considered when determining whether land was occupied and by which Indigenous collective/s. As La Forest notes, where “aboriginal peoples may have all moved to another area” – perhaps “due to natural causes, such as the flooding of villages, or to clashes with European settlers … I would not deny the existence of ‘aboriginal title’ in that area merely because the relocation occurred post-sovereignty” (para. 197). A third Justice – now Chief Justice McLachlin – substantively agreed with the reasons of La Forest and L’Heureux-Dubé. Thus it is arguable that the court in Delgamuukw (1997) split evenly on whether the date of Crown sovereignty is the only date to be considered when determining the point in time at which exclusive occupation or territorial control must be proven to establish Aboriginal title. That courts in subsequent Aboriginal title cases have not yet applied a threshold date for Aboriginal title other than at the assertion of British sovereignty does not necessarily indicate that the matter is fully settled. I argue that threshold dates should be determined on a case-by-case basis with reference to the geopolitical history of each area, preferably by agreement.

**Conclusion: Between Recognition and Reconciliation**

Aboriginal rights are collective rights deriving from the fact that Indigenous peoples occupied, used, and governed the land prior to the arrival of colonial settlers. In the legal sphere, these rights are demonstrated through continuing practices, prior occupation, and Indigenous law. As with all law, Indigenous law continues to evolve and adapt to keep pace with societal changes. Where such adaptation is contested it is sometimes unclear which present-day Indigenous polities have the authority to speak on behalf of the collectives in which Aboriginal rights are vested, and concerning what territory. What is clear is that overlap disputes are a significant challenge for the Crown and Indigenous people. This
chapter has sought to provide a framework for understanding the legal nature of the challenge.

As in any society, Indigenous people have differing opinions on how rights within a collective should be allocated, and reflecting this diversity their political leaders can advance different interests and ambitions. The landscape of Indigenous sociospatial identity in BC is particularly complex, where polities such as Nations, intra-national subgroups, Indian Act Bands, treaty societies, and tribal councils converge, often overlap, and sometimes come in conflict. Such conflict is common to humanity the world over and is symptomatic of an inherent tension between the interests of individuals and collectives, and between smaller and larger polities. It is a romantically essentialist notion to think that such debates and conflicts do not play out in a field of political power mediated by factors such as the BC treaty process, law, and the policies and actions of the Crown. Disputes among and within Indigenous polities are correctly considered “First Nations business.” However, a corollary to this is that the courts and the Crown are also deeply implicated in such disputes, not least because they are often required to make decisions concerning which Indigenous collectives are holders of Aboriginal rights, and which First Nations the Crown will negotiate with concerning specific territory.

Courts have consistently held that the purposive intent of constitutional entrenchment of Aboriginal rights is twofold: 1) to recognize, define, and protect Aboriginal rights; and 2) to reconcile the Aboriginal rights of Indigenous peoples and the interests of society as a whole. Issues raised by overlap disputes are vexing because answers are only

found in a space that is between the constitutional principles of recognition and reconciliation – in an implicit third principle – relationship. In the space of recognition, courts have laid out a framework for the recognition of Aboriginal rights and, to a limited extent, the proper rights holder. The law of Aboriginal rights holds that different kinds of Aboriginal rights can vest, depending on present-day Indigenous legal systems, in Indigenous Nations, Indian Act Bands, or in intra-national subgroups. In the space of reconciliation, however, this legal framework can and has come in conflict with political processes of Indigenous-Crown negotiation.

It is only a matter of time until an Indigenous intra-national subgroup puts forward a clear, well-argued legal claim that their rights are paramount to those of a broader collective. In this event the tenuous path the courts, First Nations, and the Crown must inevitably tread requires balancing the legal rights of proper rights holders with the imperative of reconciliation. It may be in the interest of First Nations, and of society as a whole, to recognize and empower Indigenous polities at a scale different than that of a legal rights holder. On the other hand, there is also a legal imperative to recognize the interests of proper rights holders, which may be contrary to the interests of broader collectives. To disregard such disjunctures within and between law and political negotiation would be to implicitly accept the idea that law does not matter, which would inevitably undermine efforts to achieve a legally durable Indigenous-Crown relationship in the interest of all British Columbians.

Law, when working properly, is a source of common understanding and legitimacy. When a legal system is accepted as legitimate, its outcomes are respected even when some people may not like the result. To achieve this kind of legitimacy in the context of overlap
disputes, Indigenous and state legal systems need to be substantively articulated and harmonized where conflict within and between legal systems exists. Ordinary courts are not suitable for addressing this challenge, which at its core is about relationships. These relationships are not only within and among First Nations, but also between First Nations and society as a whole, as represented by the Crown. First Nations and Crown both have a profound interest in supporting the groundwork – the substantive articulation and harmonization of legal systems – from which legitimate solutions can emerge. First Nations and the Crown should proactively engage in and support such efforts. In Chapter 9 I propose a framework for doing so.
CHAPTER 7: OVERLAP DISPUTES IN NEW ZEALAND

Since the early 1990’s, Maori and the Government of New Zealand have engaged in negotiations intended to settle Maori claims against the Crown. These grievances reach as far back as the signing of the treaty of Waitangi in 1840, and often involve fraudulent transfers of land, illegal confiscations of land at the hands of the British military, loss of access to food resources, loss of spiritual places, and loss of other taonga (treasures) (Bennion 2004; Boast 2008; Belgrave 2012; Wheen and Hayward 2012). The Crown acknowledges that “[a]s a result of these and other types of permanent alienation, Maori today possess only a small portion of the land that they held in 1840, … [they] have lost most of their land as an economic resource and turangawaewae [a place to stand], and have [been] deprived of traditionally used natural resources and places of spiritual and cultural value” (OTS 2002, 18). New Zealand’s treaty settlement process is intended to address harms suffered by Maori as a result of the Crown’s failure to comply with the Treaty of Waitangi. The purpose of this chapter is to explore aspects of New Zealand’s treaty settlement process critical to understanding one of the core questions with which this inquiry engages: how have overlap disputes been managed in New Zealand, and would principles and processes employed in New Zealand have utility for managing overlap disputes in BC?

This chapter is presented in four sections. It begins with an exploration of the historical and legal contexts in which overlap disputes arise. Key moments in the evolution

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95 “Maori” refers to the Indigenous peoples of Aotearoa New Zealand and their indigenous language.

96 There are two versions of the treaty, one in Maori and one in English. The term “taonga” appears in Article II of the Maori version of the treaty, which has been translated as “The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures” (Kawharu 2002, 7). Kawharu (2002) interprets “taonga” to mean “all dimensions of a tribal group’s estate, material and non-material – heirlooms and wahi tapu [sacred places], ancestral lore and whakapapa [genealogies], etc.” (8).
of the settlement process are then discussed, and particularly how the Waitangi Tribunal has shaped, and been shaped by, the political process of settlement negotiation and jurisprudence of ordinary courts.  

I then turn to the role of ordinary courts and the Maori Land Court in treaty settlements, and the limitations of these courts for addressing overlap disputes. As will be shown, the Waitangi Tribunal has become the “go to” place for Maori who believe their interests are prejudiced by Crown actions, including the negotiation of treaty settlements. The Tribunal has developed an important body of principles and recommendations concerning overlap disputes that I argue have significant utility for Indigenous-Crown relations in BC. I discuss these principles in the fourth section of this chapter, and thereby add to the argument that an Indigenous Territories Tribunal — with many of the attributes of the Waitangi Tribunal — should be implemented in BC.

The Historical and Jurisprudential Backdrop

The circumstances leading to the signing of the Treaty of Waitangi have been well canvassed elsewhere (e.g. Hamer 2004; Love 2004), as has its meaning within New Zealand’s constitutional framework (e.g. Belgrave et al. 2005; Palmer 2008). In very general terms, the Treaty was an agreement between the British Crown and Maori leaders in three articles: the Crown acquired the right to establish civil government (article 1); Maori retained absolute chieftainship of their lands, estates and treasures (article 2); and Maori were granted the rights and privileges of British subjects (article 3) (Hayward and Wheen 2004; Kawharu 2002). Unlike the British Crown’s treaties with Indigenous peoples in other parts of the world, the Treaty of Waitangi affirmed, rather than extinguished, Indigenous title in land.

The Crown created the Native Land Court soon after the treaty of Waitangi was

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97 By “ordinary courts” I mean New Zealand’s district courts, High Court, Court of Appeal, and Supreme Court.
signed in 1840. The mandate of the Native Title Court was to survey, allocate, and vest land in individual Maori in order to bring the land under a European-style tenure system (Stokes 2002; Boast and Edmonds 2008). As Carrie Wainwright, former Chair of the Waitangi Tribunal, explains,

[the Native Land Court was intended to] … reduce Maori interests [in land] to a form which made them transferrable. [The Court] apportioned ownership interests according to [the Court’s] understanding of what they were told. So boundaries were imported into the concept of land rights, which formally had not existed in any hard and fast way. It’s from that, of course, that a lot of dispute arose and arise. The system of Maori landholding wasn’t intended to make, for them, a user-friendly land tenure system. The intention was to get it out of Maori hands and sell it to the would-be farmers who were coming to New Zealand in great numbers (interview 2014).

Through its laws, policies, and actions, the Crown also assumed ownership of rivers and lakes, denied Maori the right to harvest natural resources, and failed to protect Maori legal interests as they were made virtually landless through dubious land deals, fraud, and land confiscations – sometimes by military force (OTS 2002; Boast 2008). Maori now retain title to about 6% of the land mass of New Zealand (OTS 2002, 17). Moreover, Maori title in land is now often vested in the descendants of Maori who were identified by the Native Land Court at the time of land “sale”, who in some cases now number in the hundreds and are spread across many different tribes. Having land vested in hundreds of individual shareholders, rather than a collective, makes it difficult for Maori to actually use what little land they own. Wainwright describes the situation bluntly: “What they ended up with is a crock. The Maori Land Court, [the successor to the Native Land Court, is now] essentially a brokering house between Maori people and their terrible land tenure system” (interview 2014).
New Zealand’s ordinary courts have long held that treaty claims are not justiciable, which is to say that ordinary courts have very limited jurisdiction on matters related to the treaty. The Treaty of Waitangi has the status of an international treaty, and as such is unenforceable unless specifically referenced in domestic legislation (Melvin 2004). Rather than ordinary courts, the Waitangi Tribunal has jurisdiction to interpret and make recommendations on the implementation of the Treaty. Over its remarkable 40-year history, the Waitangi Tribunal has gone from being primarily an inquirer into historical fact – a sort of vast royal commission on colonization – to, increasingly, an ombudsman for the settlement process. Understanding the political influence of the Tribunal is essential to understanding the Tribunal’s role of providing independent oversight of the settlement process, and thus its involvement in the management of overlap disputes. "Eddie" Taihakurei Durie, the longest-serving Chair of the Waitangi Tribunal (from 1980 to 2000), describes the Tribunal’s inception:

The protest movement was the impetus for the Tribunal. There was a major march from the most northerly point of the North Island down to Wellington [in 1974]. It started rather dramatically in what I would imagine was a rather well orchestrated view of an old lady with her walking stick. She said that she was going to walk to Wellington to talk to the government about what it was doing and the way it was treating Maori people. And she headed off with her granddaughter beside her … all captured by a *New Zealand Herald* photographer. By the time she got to Auckland, that photograph and the publicity that went with it captured the imaginations of Maori right through the country. By the time they got to Wellington, it was just massive. And the people were saying “honour the treaty of Waitangi!”

I was appointed as a judge in 1974. The [then] Minister of Maori affairs, a Maori chap, Matiu Rata, had sent me a draft of a bill at about the same time. He was also responsible for sending me to Canada to have a look at what you were doing there in
the Mackenzie Valley Inquiry,98 and he said “that is the sort of body I am looking for.” The bill went through the house because everyone was pretty scared by the dramatic numbers of people who had turned up for the march. Although the [Treaty of Waitangi] Act came in 1975, the Tribunal did not get off the ground until some years afterwards. [The Tribunal] had a first hearing in a big flash hotel with this series of lawyers in front of them and the Maori just walked away. They just stopped filing any claims to it, so it sat there and did nothing.

Then in 1980 … another Minister came in, Ben Couch, a Maori chap, … and he asked me if I would take on the job. So I was appointed to the Chair of the Tribunal, which was now five years after I had seen how Berger was doing it in Canada. I set it up on those same lines as soon as I came in (interview 2014).

At its inception in 1975, the Waitangi Tribunal was intended to investigate Crown breaches of treaty principles and make recommendations concerning the interpretation and practical application of the treaty (Hamer 2004; Melvin 2004; Boast and Edmonds 2008; Waitangi Tribunal 2012). Two significant events occurred in the mid-to-late 1980s that shaped the role of the Waitangi Tribunal in the settlement process. First, in 1985 the Tribunal's jurisdiction was extended to allow it to consider and make recommendations concerning treaty breaches dating back to 1840 ([Treaty of Waitangi Amendment Act 1985]). Second, in 1987 treaty grievances found a new and significant foothold in ordinary courts.

**State-owned enterprises cases**

In 1986 the government introduced a Bill in Parliament intended to transfer large areas of land and other assets to new state-owned enterprises, which were intended to operate as profitable businesses (Dawson 2004; Hayward 2004; Wheen and Hayward 2012).

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98 Durie is referring to the Mackenzie Valley Pipeline Inquiry, also known as the Berger Inquiry. The Berger inquiry was led by Judge Thomas Berger, who was commissioned to investigate the social, environmental, and economic impacts of a proposed gas pipeline that would have run through the Yukon and the Mackenzie River Valley of the Northwest Territories, Canada. The inquiry was notable for the way it gave voice the Indigenous people whose traditional territory the pipeline would have impacted (Berger 1977).
As details emerged, it became clear that much of the land designated for transfer – roughly 10 million hectares (Hayward 2004) – was also subject to claims being heard or scheduled for hearing by the Waitangi Tribunal. The Tribunal heard arguments to the effect that the Bill itself was a breach of treaty principles because once the land was transferred to state-owned enterprises it would no longer be available for treaty settlements. The Tribunal agreed, and issued an interim report indicating that the claimants would likely be prejudicially affected by the Bill, and recommended that passage of the Bill be delayed until all claims currently before the Tribunal were investigated (Waitangi Tribunal 1986). In response to these concerns, the government added a provision to the Bill specifying that nothing in the Act would authorize Crown conduct that breached treaty principles. This was the first time a parliamentary Act included specific reference to the Crown’s obligation to adhere to treaty principles.

Provisions of the State-Owned Enterprises Act 1986 enabled ordinary courts to scrutinize the transfer of state-owned assets to ensure such transfers did not violate treaty principles. Several related court cases concerning the transfer of Crown assets followed (Andrew 2008; Wheen and Hayward 2012). The first of these cases – the well-known “Lands Case” – remains one of New Zealand's most celebrated judicial decisions, and represents one of the most significant judicial statements on treaty principles made to date (see, e.g., Andrew 2008; Wainwright 2008; Boast and Edmonds 2008; Williams 2008). Concerning treaty principles, in the Lands Case the Court of Appeal ruled that:

The treaty signified a partnership between pakeha\(^99\) and Maori requiring each to act towards the other reasonably and with the utmost good faith. The relationship

\(^{99}\) *Pakeha* is a Maori term for non-Maori New Zealanders.
between the treaty partners creates responsibilities analogous to fiduciary duties. The duty of the Crown is not merely passive but extends to active protection of Maori people in their use of their lands and waters to the fullest extent practicable” (642).

In addition to elaborating on principles of Maori self-determination (663), good faith (702), and active protection (703), concerning the transfer of Crown assets the court directed the Crown and the New Zealand Maori Council100 (the plaintiff in the Lands Case) to negotiate a “scheme of safeguards giving reasonable assurance that lands or waters will not be transferred to state enterprises in such a way as to prejudice Maori claims…” (665). The negotiated regime has two components. First, Crown land transferred to state-owned enterprises is “memorialized”, which is to say that a covenant is placed on the title of the land notifying would-be buyers that the land may be taken back (at fair market value) if it is needed for settlement redress (Dawson 2004; Melvin 2004). Second, the Treaty of Waitangi Act 1975 was amended to give the Tribunal “powers of resumption”: the jurisdiction to order the Crown to transfer specific parcels of land from state owned enterprises to Maori claimant groups.

The legal case and resulting legislative amendments concerning forest land are particularly important to the issue of overlap disputes for two reasons: 1) they prompted the creation of the Crown Forestry Rental Trust to manage the rentals charged to forest companies, a large portion of which has been invested in research to support the treaty settlement process;101 and 2) forest land, because it comes with the rentals accumulated since

100 The New Zealand Maori Council was set up under the Maori Community Development Act 1962 to advocate for Maori on a country-wide basis.

101 From 1990 to 2010 the Crown Forestry Rental Trust provided $127.89 million to Maori to advance their claims, an average of approximately $5.3 million per settlement reached. The ability of the Trust to continue these levels of funding has diminished since 2010 because the accumulated rentals, and the forest land, continue to be transferred to Maori as part of settlements (Cowie 2012).
1990, is a highly sought-after form of settlement redress, and is often subject to overlap disputes. The Tribunal has only used its powers of resumption jurisdiction to order the Crown to return specific land to Maori once.\textsuperscript{102} Nonetheless, the specter of this power encourages both the Crown and Maori claimants to reach political agreements (Dawson 2004; Melvin 2004; Wheen and Hayward 2012).

The Problematic Nature of Overlap Disputes

Despite the fairly standardized process of negotiation and increase in the pace of settlements in the last decade, the process is almost always fraught with intra- and inter-Maori group conflict. These disputes arise in two related ways: 1) as representation disputes, which are at their core about difficulties associated with designating Maori political entities to negotiate and receive settlement benefits on behalf of a Maori collective; and 2) as “cross claims”, which arise in situations where multiple Maori groups seek the same settlement redress in the same geographic areas (see, e.g., Waitangi Tribunal 2000, 2001, 2002, 2003, 2007a, 2007b, 2010; Dawson and Susko 2012; Joseph 2012; Vertongen 2012). As was noted in previous chapters, I consider these two related issues to be inseparable aspects of overlap disputes. The spatial dimensions of claims are impossible to clearly define unless and until the collective in which claims are vested is defined.

Overlap disputes in New Zealand can be a relatively simple matter of two Maori groups competing for a particular block of would-be settlement redress. A concern often raised is that conferral of particular redress to one Maori group will result in fewer redress...

\textsuperscript{102} An order of resumption was issued by the Tribunal in the Turangi Township Remedies Report (Waitangi Tribunal 1998). However, in this case the Crown and the Maori claimant were able to reach a political agreement prior to the order coming into effect (Dawson 2004; Vertongen 2012).
options being left for later negotiations, or that conferral of assets to one group will be
detrimental to the relationships of other groups with government and industry (Waitangi
Tribunal 2007a; Dawson and Susko 2012; Joseph 2012; Vertongen 2012). Related questions
concern who should be included in the group, whether a particular Maori organization is the
most appropriate entity to represent the collective in negotiations, whether a Maori sub-
group should have a separate settlement of its own, and/or which Maori entity should
ultimately receive and manage settlement assets on behalf of the Maori collective (see,
most areas of the country today, there is no representative Maori body that would claim to
speak for all members of a particular tribe on all matters – including all aspects of the
settlement process.”

Almost all of the 20 individuals I interviewed in New Zealand indicated that overlap
disputes are the most difficult aspect of achieving treaty settlements. The Crown, by
choosing to negotiate with some groups and not others, and by offering contested redress to
some groups and not others, is recognized as being squarely implicated in these disputes.
Lawyer and Maori advocate Baden Vertongen echoes a sentiment expressed by many
interview participants: “these kinds of disputes have been a response to the fact that the
Crown has come in and started talking to one group, which causes a lot of friction and sets
up a lot of these tensions and infighting” (interview 2014). In New Zealand, as in BC and
Australia, the Crown is often seen as complicit in, if not an instigator of, overlap disputes.

Overlap disputes are problematic for both the Crown and Maori. If a Maori group is
unable to substantively address disputes concerning group constitution and representation,
unstable mandates may unravel part way through negotiations or negotiations may not be
initiated at all (Dawson and Susko 2012; Vertongen 2012). Overlap disputes also often cause significant delays to treaty settlements. For some of Vertongen’s clients, “overlapping claims have been the reason settlements have been delayed three or four years easily, just to work through overlap issues” (Vertongen interview 2013). Lillian Anderson, former Director of the Crown’s Office of Treaty Settlement, describes contestation concerning group constitution and representation as a “dead in the water issue: negotiations have been brought to a halt because of these disputes and it’s now fifteen years later and it’s still just sitting there” (interview 2013).

In the meantime, the Crown may proceed to negotiate with neighbouring Maori groups, and subsequently confer land to a settling group to which it may not have customary interests or exclusive claim. Because of the scarcity of Crown land available for settlements, earlier settlements can determine which lands and resources are left for groups that settle later. Groups that come later to their settlement can therefore suffer prejudice as a result of the settlement of a neighbouring group’s claim (Waitangi Tribunal 2002, 2007a). In its most widely-cited report concerning overlap disputes, the Waitangi Tribunal described this dynamic as “first cab off the rack” – the result of which is that groups that settle early are privileged to the detriment of those that settle later (Waitangi Tribunal 2007a, 9). Lawyer and Maori advocate Donna Hall suggests that the process favours groups that are “first in–best dressed: if you get to the process first, you win, because you got there first” (interview 2014). Maori scholar Paul Meredith echoes the sentiment: “the first one to settle gets first dibs on redress.” The approach to treaty settlements in New Zealand has thus fostered intense competition among neighbouring Maori groups for scarce land and resources. Depending on one’s perspective, the Crown is seen as an instigator of such conflict or just caught in the
middle. Either way, the Crown is squarely implicated in the issue.

Almost all, if not all, treaty settlements have been challenged in ordinary courts and/or the Waitangi Tribunal because of overlap disputes (Dawson and Susko 2012; Joseph 2012; Vertongen 2012). In 2007, the Waitangi Tribunal released two particularly important reports on the Crown's approach to the issue (2007a, 2007b). Both illustrate the Crown's failure to understand the implications of the settlement process on claimant groups and on Maori society generally. Wainwright, who was the Tribunal’s Presiding Officer on the Tamaki Makaurau (Auckland) inquiry, found that the Crown has a treaty obligation to actively protect inter- and intra-tribal relations, and recommended that a particular treaty settlement be “stopped in its tracks” until relationships were repaired (Waitangi Tribunal 2007a, 107). As will be discussed later in this chapter, the Tamaki Makaurau inquiry provides important principles for the effective management of overlap disputes in BC.

Litigating Overlap Disputes

Overlap disputes and the ordinary courts

Maori groups that believe their interests are prejudiced by the settlement of another group can also take their case to the High Court. However, the circumstances in which the group might be successful in such cases are limited. As was noted earlier, this is because treaty issues, and most aspects of the settlement process, have been determined to be non-justiciable unless the treaty is specifically referenced in applicable domestic legislation. The Treaty of Waitangi Act 1975 establishes the framework for making claims against the Crown, and mandates the Tribunal to inquire into and make recommendations concerning claims. Yet neither this Act nor any other legislation regulates the political process of settlement negotiation, except in the narrow circumstances in which the Tribunal might, or is required
to, exercise its powers of resumption. The settlement negotiation process is thus almost entirely driven by Crown policy and prerogative power. In order to be heard in ordinary courts, such challenges are generally based on procedural shortcomings in the Crown’s process of reaching decisions, rather than based on the outcomes of these processes (Dawson and Susko 2012; Vertongen 2012).

For instance, in 2001 the Court of Appeal considered a case concerning the impact of the Ngai Tahu settlement legislation on the claim of the Ngati Apa, a group that also asserted interests in part of the area covered by settlement. The question put to the court was whether the Ngai Tahu settlement’s enabling legislation precluded the jurisdiction of the Waitangi Tribunal to inquire into Ngati Apa’s claim. Was the Ngai Tahu settlement “full and final” for the region, or was there still room for Ngati Apa to have their own settlement? Ngati Apa argued that the Tribunal should still hear its claim even though it concerned an area already covered by the Ngai Tahu settlement. Ngai Tahu argued that the legislation conferred to it exclusive tribal authority in the region. Ngati Apa replied that the legislation did not reflect a sufficiently clear intention to confer exclusive authority within the disputed region on Ngai Tahu, and that to deny groups with claims that overlapped with treaty settlements would constitute a new form of injustice on the part of the Crown (Ngati Apa 2001, 668; see also Dawson 2004).

The Court of Appeal largely agreed with the Ngati Apa, holding that their claim with the Tribunal could continue. Because of the passage of the Ngai Tahu settlement legislation, however, the court also held that certain lands were no longer available as redress for Ngati Apa because they were now owned by Ngai Tahu. So while the court rejected the argument

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103 Ngati Apa Ki Te Waipounamu Trust v. The Queen 2001 (NZCA).
that the passage of the legislation prevented Ngati Apa from having its claim heard by the Tribunal and subsequently settled, settlement options for the Ngati Apa were nonetheless limited by the Ngai Tahu settlement (Ngati Apa 2001, 669; see also Dawson 2004). The court thus precluded the possibility that the Ngai Tahu settlement, once enacted, could be amended in order to reallocate settlement redress in favour of Ngati Apa. By concluding their settlement first, Ngai Tahu were thus in a privileged position, to the detriment of Ngati Apa.

The Ngati Apa case concerned a challenge to an already-settled agreement. “Milroy”\textsuperscript{104} and “Maori Council”\textsuperscript{105} are examples of legal challenges pursued while negotiations were still ongoing. Milroy concerned the processes which led to the Ngati Awa settlement. Here, Tuhoe, a group with a “cross claim”, argued that Ministry officials had made material errors in advising their Minister to finalize the settlement, and argued that these errors should be reviewable by ordinary courts. The Court of Appeal disagreed, holding that “courts will not interfere” where “action is undertaken in the course of policy formation preparatory to the introduction to Parliament of legislation” (para. 18). The Court of Appeal thus declined to review the substance of the claim because to do so would draw the courts “into the very heart of the policy formation process of government” (para. 11). The Court of Appeal considered a similar situation in the Maori Council (2008) case, which concerned contestation over a large area of Crown forest in the Central North Island. Here, the Court of Appeal held that “the courts will not grant relief which interferes or impacts on actions of the executive preparatory to the introduction of a Bill to Parliament, because to do so would

\textsuperscript{104} Milroy v. Attorney-General 2005 (NZCA).

\textsuperscript{105} New Zealand Maori Council v. Attorney-General 2008 (NZCA).
be to intrude into the domain of Parliament” (Maori Council 2008, para. 60).

Cases such as these reflect reluctance on the part of ordinary courts to intervene in what are generally seen as purely political affairs. When ordinary courts have been asked to rule on questions concerning the suitability of representative entities, or on how spatially-specific redress should be allocated among Maori claimants, courts have struggled to identify legal criteria to recognize and enforce, including those deriving from Indigenous legal systems (Dawson and Susko 2012; Joseph 2012; Vertongen 2012).

**Overlap disputes and the Maori Land Court**

The Native Land Court was originally established to enable conversion of Maori land into land vested in individual Maori (Stokes 2002; Boast 2008). In 1954 the name of the court was changed to the Maori Land Court. In 1993, the *Te Ture Whenua Māori Act 1993* expanded the Maori Land Court’s jurisdiction to cover all matters related to Maori land. Details concerning the definition of “Maori land” are complex and need not detain this discussion. It suffices to note that the jurisdiction of the Maori Land Court mainly concerns the disposition of land already in Maori hands, and thus does not include land that is being considered for treaty settlement redress, which is often subject to overlap disputes. The function of the Maori Land Court now includes identifying and, as a last resort, appointing, specific Maori representatives to manage specific blocks of land already vested in Maori.

The Maori Land Court also has a seldom-used jurisdiction under Section 30 of the *Te Ture Whenua Māori Act 1993* to determine Maori representation, including which entities are appropriate to negotiate and receive treaty settlement redress. The intent of the legislation in this regard is clear: The Maori Land Court is a specialist court that employs judges and other court members who typically have greater knowledge of Maori custom than those working
in the ordinary courts. Court members, who are not judges, may be appointed to consider disputes on a case-by-case basis should they “possess knowledge and experience relevant to the subject matter” (Ibid., s. 33(2)). Moreover, other courts and tribunals, such as the Waitangi Tribunal, are empowered to refer overlap disputes to the Maori Land Court (Ibid., ss. 30(1), 30B). The Land Court’s jurisdiction in this area is entirely discretionary. It “may” respond to requests to appoint representatives “as the court thinks proper”, or decline to do so if it believes the issues “are more appropriately addressed in another forum” (Ibid., s. 30C(4)). There are also significant limits to the Maori Land Court’s power in this area. It has no power to enforce representation orders nor to compel any party to cooperate with representatives it appoints. The Maori Land Court cannot “bind the Crown in relation to applications concerning treaty settlement negotiations unless the Crown agrees to be bound” (Ibid., s. 30H(2)). Regardless of how the Maori Land Court may rule on an overlap dispute, the Crown retains the ultimate authority to decide on the Maori representative entities with which it will negotiate and settle.

Any court, commission, or tribunal can ask the Maori Land Court (appellant level), to investigate and rule on which Maori groups have interests and where. This situation arose for the first and last time in the context of the Ngai Tahu negotiations, which was one of the first, and largest, negotiations to reach settlement. In 1990 the Maori Land Court was asked to determine a boundary between Ngai Tahu and its neighbours at the north end of the South Island. The Maori Land Court based its decision on its historical records of land transactions and upon evidence of historic battles among Maori groups. Durie describes the case:
[I]t was an impossible case. The question was “where is the boundary line?” And the [Maori Land] Court had a whole lot of evidence about battles and said, “as of 1840, the [tribe] who is winning the battle at that time was this one over here, so therefore this is where the line is. And my position was, don’t even try to answer the question, because the answer to the question “where is the boundary line” is that in custom there wasn’t one!

And the effect of that was that no one would go back to the Maori Land Court to have those decisions determined. It was too much of a winner and loser situation. I thought that the best place to deal with these issues would be the Waitangi Tribunal (interview 2014).

Many of the people I interviewed echoed Durie’s view of the Maori Land Court’s decision in this case. For example, Waitangi Tribunal historian Barry Rigby contends that “there was no basis for the Crown to settle with Ngai Tahu without any recognition of the overlapping interests of the Northern people” (interview 2013). Vertongen contends that the Land Court’s approach “resulted in 20 years of litigation”, and has “meant that the Land Court tends not to play a role in these kinds of issues” (interview 2013). Thus, while the Maori Land Court has the legislative jurisdiction to become involved, it appears to have neither the “teeth” nor the political capital to be an effective body for the management of overlaps. I contend that the reasons for this are the same as they would be for any institutional body that attempts to address such disputes: 1) difficulties with adjudicating disputes while also respecting the right of Indigenous self-determination, which includes Indigenous peoples’ right to determine dispute resolution processes of their choosing; 2) the futility of trying to impose a decision which may not be accepted by the people it affects; and 3) the need to recognize and address the role of the Crown in such disputes, which includes recognizing the ways that the Crown sometimes provokes disputes. The resolution of overlap disputes often has as much to do with what the Crown does or does not do as it
does Indigenous disputants.

**Overlap Disputes and the Waitangi Tribunal**

As was noted earlier, the principle function of the Waitangi Tribunal is to inquiry into alleged Crown acts or omissions related to the Treaty of Waitangi, and to make recommendations concerning how to address and avoid treaty breaches in the future. The Tribunal is generally thought to be more inquisitorial than adversarial (Hamer 2004; Melvin 2004; Love 2004; but see also Boast 2004; Boast and Edmonds 2008). It has broad discretion to employ its own procedures, the capacity to complete or commission its own research, and the ability to accept any form of evidence it deems useful (*Treaty of Waitangi Act 1975*, Schedule 2, s. 6(1)). However, in some situations, Tribunal procedures can be very adversarial, particularly where there is disputation between the Crown and Maori, and sometimes between Maori groups concerning historical events (Anderson interview 2013; Boast interview 2013; Boast and Edmonds 2008).

Tribunal inquiries proceed through two stages. The first stage involves collection of information – through documentary research and testimony – analysis of Crown’s actions (or omissions) in relation to the treaty, and the production of a report. Many inquiries have been historical inquiries covering defined geographical regions – called district inquiries. Such reports describe, among other things, Maori-Crown land transactions, military confiscations of land, impacts of regulatory Acts, environmental degradation, and the like. If the Tribunal determines that a claim is well-founded – that is, that Crown actions or omissions breached treaty principles – the Tribunal may make specific or general recommendations, and a Maori claimant and the Crown may voluntarily proceed to negotiations intended to address the Crown’s treaty breaches (Waitangi Tribunal 2012). The
second stage of the Tribunal process, known as a remedies inquiry, is activated only if negotiations fail. In such cases, the claimant and the Crown both make submissions to the Tribunal on how the grievance might be addressed, and then the Tribunal makes specific recommendations (Dawson 2004; Boast and Edmonds 2008).

**Tribunal credibility and value for Maori**

As Durie explains (above), the Tribunal was not particularly well-received by Maori in its early days. Under Durie’s leadership, the Tribunal transformed its approach. The Tribunal is now bi-cultural, which is to say that Tribunal Members are equally Maori and non-Maori, and include Maori Land Court Judges, professional historians, Maori leaders, and others held in high regard by society generally. Hearings of the Tribunal are often conducted in Maori (language) and held on claimant’s marae – the cultural, spiritual, and political hubs of Maoridom. In addition to reports submitted by professional historians, the Tribunal considers evidence in any form it deems useful, such as personal accounts, oral history handed down through generations, and ceremonial songs (Phillipson 2004; Durie interview 2014).

Durie explains how the Tribunal, under his chairmanship, created space for Maori to tell their history in their own way:

We had in the Act a provision that said lawyers may appear only by leave of the Tribunal. When I saw these lawyers coming in, I would say, “you can come in at the end. We are going to hear from the people, … then we are going to bring in professional people to look at how this stacks up against the historical record, … and then at the end of the process if there is something that you wish to say on behalf of

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106 In Maori society, a marae is a place, a building, and a cultural institution. Marae are places where customs are explored, debated, celebrated, taught and learned, and where important cultural events and ceremonies take place, such as birthdays, funerals, and welcoming of visitors (Benton et al. 2013).
your [client] group then you can … but you are not going to control the process.”
And the response to that was incredible. The [Maori] people came and just talked.
They gave us the whole history. There was just an outpouring of stories.

The reports used to have a section we called “The People’s Voice”, and it set out the
stories as told by different people. And the public was quite flabbergasted by it. And
it was these stories which sold people on the idea that […] what happened was] not
fair and that something should be done about it. People having the opportunity to
tell their stories, and for those stories to be made publicly known, is a very powerful
way of influencing public opinion. That capacity to capture the people’s voice is
incredibly important. Telling these stories matters (interview 2014).

The importance of telling and recording stories – documenting history – is a theme
to which this inquiry returns at numerous points. For now it suffices to note that the use of
oral history raises a number of issues in the context of quasi-judicial proceedings such as
those conducted by the Waitangi Tribunal. One of the criticisms leveled at Durie and the
Tribunal generally was that the ability of lawyers to cross-examine people providing
testimony was at the discretion of the Tribunal. In Durie’s view, such an approach was
appropriate “because we had our old ways of cross-examination, and they were the Maori
ways of doing it.” Durie explains the approach:

I brought in a series of Maori elders – kaumatua is our word for them – who were the
experts in managing custom and doing things in a traditional way. The protocols by
which we were running were the customary protocols. And these customary rules are
clear-cut. You talk with people with respect. You observe certain rights about who
speaks first and who speaks later, and there is a mandate from family groups to be
representing that family. You just had to listen to the people.

I would not chair the sessions of the tribunal when we were dealing with Maori
people. I would only chair it when the government people themselves were involved.
When the Maori people were speaking I would have the kaumatua chair the meeting,
and chair it according to the way that they knew how. They were applying customary
law (interview 2014).
Joe Williams, also a former Chair of the Tribunal, contrasts the approach of the Tribunal with conventional judicial approaches:

The [conventional] view is that the judge has to know as little as possible about the people. The Maori view is that they have to know as much as possible. The beauty of having senior Maori people on the Tribunal is that they have a profound understanding of the way the Maori world works, who is a real leader and who is just making noise, who is getting fed by the funding process but doesn’t actually have any clothes on.

The great beauty of the Waitangi Tribunal is that you have people on the panel who know as much as the people giving evidence. It’s the equivalent of having expert commercial lawyers dealing with commercial cases, and expert criminal lawyers dealing with criminal cases. You have Maori experts dealing with Maori cases (interview 2014).

As Durie and Williams explain, Tribunal inquiries have provided an opportunity for Maori to tell their history, and, at least to some extent, to tell their history according to Maori protocol. Echoing sentiments expressed by many of the people I interviewed, Wainwright describes this kind of inquiry process as an “important psychological journey for groups to go on” for three reasons: 1) catharsis; 2) internal tribal cohesion; and 3) enhancing and preserving inter-tribal understanding and relations. All three of these benefits directly relate to overlap disputes. First,

there is a catharsis for people, because they are telling their bad experiences to a group of people with status and authority, who are saying “yes, we believe you. You are justified in feeling outraged by that. It should not have happened. You suffered.” [This] is very restorative of people's mana,\(^{107}\) their personal power and authority. [If] you're not engaging with the bad stuff, how are you going to deliver people from it? (interview 2014).

Thus in Wainwright view, settlement processes need to be restorative of people’s honour, of

\(^{107}\) Mana is a key concept that combines psychic and spiritual force, pride, authority, influence, and prestige, and thus also the ability to control events and people (Benton et al. 2013).
people’s *mana*. People’s misgivings associated with overlap disputes do not go away by themselves. Unless they are acknowledged and addressed, they remain to fester and breed, and damaged relationships become ever more difficult of repair (Wainwright 2002). Second, Tribunal inquires have played an important role in fostering intra-tribal cohesion, as Williams explains:

> [a]t the same time as the Tribunal was putting colonialism on trial, [Maori] were educating their own as much as they were educating the Tribunal. One of the great things about [the inquiry] process was the transformative effects in the villages where the hearings were held, of the actual hearing process itself. The hearings became a celebration of survival, … a celebration of tribal identity. They provided a platform on which leaders could bring their constituencies together (interview 2014).

And third, according to many of the people I interviewed, Maori groups that go through the Tribunal’s historical inquiry process are less likely to become embroiled in overlap disputes (Anderson interview 2013; Joseph interview 2013; James interview 2014; Jones interview 2014; Wainwright interview 2014). Wainwright, for instance, argues that a particularly contentious overlap dispute in the Tamaki Makaurau (Auckland) area arose largely because the people involved “hadn't been through the Tribunal process, so they had never heard each other's stories, and the government had never heard their stories” (Wainwright interview 2014). When people hear each other’s stories, they become more knowledgeable about the history of the district and their ancestral relationship to it. Even if some people do not agree, knowledge of different interpretations of history leads to greater understanding and empathy, which leads to greater tolerance and group cohesion. The “psychological journey” of Tribunal inquiries can be just as important as the material aspects of treaty settlements.

Tribunal approaches and outcomes have contributed greatly to the Tribunal’s
credibility and to popular support for the treaty settlement process generally. The Tribunal has provided a forum for Maori to publically air their grievances, which has been a cathartic step along the path of reaching settlements. Catharsis through public recognition of wrongs committed, and an apology from the Crown, helps assuage sense of grievance among Maori (Joseph 2008; Hickey 2012). The sharing of stories has fostered tribal cohesion – mitigated a tendency for groups to split apart – as these identifying stories are rallied around and celebrated.

No one disputes the profound influence of the Tribunal on the political process of settling treaty grievances, or its role in creating space in the consciousness of society for the Treaty of Waitangi generally. Credibility of the Tribunal in the eyes of Maori is built upon the Tribunal providing a platform for Maori to tell their history in their own way, and to make that history accessible to the Crown and the general public. The credibility of the Tribunal in the eyes of the public is built upon the evidentiary integrity of its processes, and the cache of Tribunal members comprised of well-known and respected Maori and non-Maori leaders, judges, and historians. Crown actors generally accept the Tribunal as the ombudsman of the settlement process, if not belatedly and begrudgingly at times. In some instances Crown actors I interviewed indicated that the Tribunal could and should have gone further in its reports to make specific recommendations concerning which Maori representative bodies the Crown should negotiate with, and how redress should be allocated among Maori claimants, particularly in the context of overlap disputes (Anderson interview 2013; James interview 2014). The Tribunal has made such specific recommendations only
On the other hand, Crown actors would have difficulty implementing Tribunal recommendations or binding orders if they were seen as an unworkable intrusion into the political realm of negotiation. The Tribunal thus maintains a difficult but important balance: “perching perilously between the judicial and political spheres of public life, inhabiting neither fully nor conformably but contributing in various ways to both” (Wainwright 2008, 63).

Challenging a treaty settlement process as a breach of treaty principles

Maori who feel wronged by Crown decisions may challenge the process by which the decision was made in the High Court as a breach of a statutory duty. An alternative is to frame the grievance as a breach of Treaty of Waitangi principles. If a claim is framed in this way, the Waitangi Tribunal, rather than the High Court, becomes a possible avenue of recourse for Maori. The Waitangi Tribunal has jurisdiction to inquire into “any act done or omitted” by the Crown, or “any policy or practice” proposed to be adopted by or on behalf of the Crown (Treaty of Waitangi Act 1975, s. 6(I)). In the context of overlap disputes, Crown decisions to negotiate with particular Maori entities, or to offer redress to particular claimant groups, falls within this jurisdiction.

Such claims are within the Tribunal's jurisdiction to conduct what are known as “urgent inquiries” (Waitangi Tribunal 2012, 4). There are two types of urgent inquiries: 1) urgent remedies inquiries; and 2) urgent inquiries into any other aspect of a claim or claims.

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108 Turanga Tangata Turanga Whenua The Report on the Turanganga Kiwa Claims (Waitangi Tribunal 2004). In this inquiry – generally known as the Gisborne Inquiry – the Tribunal took the unusual step of recommending to the Crown which Maori polities the Crown should negotiate with, and recommended a proportional split of settlement redress between two claimant groups.
The former type arises when the Tribunal determines that a claim is well founded but declines to make specific recommendations on redress, including those under its powers of resumption. In such an event, and if subsequent negotiations are unproductive, a claimant may request that the Tribunal make recommendations or a binding order concerning which, and how much, redress should become part of a settlement (Waitangi Tribunal 2012; see also Boast 2004; Dawson 2004). Ever cognizant of its limited resources, in such an event the Tribunal must determine if shifting its limited resources from other inquiries to an urgent inquiry is warranted.

The second type of urgent inquiry is triggered when claimants “demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies”, and “there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise” (Waitangi Tribunal 2012, 4). Thus, in order for the Tribunal to undertake an urgent inquiry in an overlap dispute, a Maori group must **prima facie** demonstrate that a pending treaty settlement will irreversibly prejudice its interests, and that all other potential remedies, such as through ordinary courts, have been exhausted. Urgent Tribunal inquiries of this type have much in common with judicial review proceedings. The Tribunal has the authority to issue summons requiring attendance of witnesses, and may require the production of documents and other records (Waitangi Tribunal 2012, 13). Tribunal members may question witnesses, such as Crown officials, and witnesses are subject to cross-examination with permission of the Tribunal. However, whereas conventional judicial review is typically only available when there has been an exercise of statutory power, in urgent Tribunal inquiries claimants argue that the Crown’s process of arriving at decisions has been contrary to Treaty principles.
Moreover, urgent Tribunal inquiries are quasi-judicial in that the Tribunal cannot, unlike the ordinary courts, quash ministerial or other official discretionary decisions (Boast and Edmonds 2008; Wainwright 2008).

In the past decade the Waitangi Tribunal has been inundated with applications for urgent inquiries into various aspects of the Crown’s treaty settlement practice. The majority of these have concerned overlap disputes of different kinds. The Tribunal has declined to hear the vast majority of these inquiries, partly because of its current focus on completing historical inquiries, and partly due to its desire not to be drawn into the middle of disputes between and among Maori groups (Vertongen interview 2013; Fisher interview 2014). Understandably, then, the Tribunal avoids determining boundaries between and among Maori groups. The reasons for this are threefold: 1) coterminous boundaries often do not fit well with customary systems of land tenure based on layered interests; 2) to draw boundaries between Maori groups – whether geographic or in terms of membership – may be interpreted as constituting de facto adjudication of disputes between and among Maori groups, which would be outside of the Tribunal’s jurisdiction; and 3) to draw such boundaries would likely undermine the credibility of the Tribunal in the eyes of Maori generally, and particularly in the view of groups not favoured by such decisions. The Tribunal is understandably reticent to make decisions which may be interpreted as ruling against any Maori.

In some situations, however, the Tribunal has conducted urgent inquiries concerning overlap disputes. In accordance with the Tribunal’s jurisdiction, these inquiries have focused not on disputation between and among Maori groups, but rather on how the Crown has managed such disputes in the context of settlement negotiations. The following section
discusses these inquiries, with particular attention to the Tamaki Makaurau Settlement Process Inquiry.

**The Waitangi Tribunal’s Tamaki Makaurau Inquiry**

The Waitangi Tribunal’s Tamaki Makaurau inquiry concerned the process followed to arrive at a treaty settlement Agreement-In-Principle with Ngati Whatua o Orakei (hereafter “Ngati Whatua”). The inquiry focused on how the Crown dealt with Maori groups in the Tamaki Makaurau (Auckland Isthmus) area, including those with which the Crown was not negotiating at the time. During Tribunal hearings these “non-settling groups” argued that in settling with the Ngati Whatua the Crown had not properly taken their interests into account, and that to go ahead with the proposed settlement would irretrievably prejudice their ability to achieve fair settlements of their own. While expressing its reluctance to intercede in the political process of settlement negotiation, the Tribunal nonetheless found that serious flaws in the Crown’s approach warranted delaying the Ngati Whatua settlement until the interests of the other groups were addressed.

In previous inquiries concerning overlap disputes, the Tribunal had focused on how settlement processes had been unfair to non-settling groups in particular ways. The Tamaki Makaurau inquiry recognized the need to also investigate and report on systemic problems with the Crown’s approach, not least the Crown’s failure to implement the Tribunal’s previous recommendations on the issue. The Tamaki Makaurau inquiry found that the process of reaching the Ngati Whatua Agreement-In-Principle was “more flawed than any the Tribunal has inquired into,” which prompted the Tribunal to ask a fundamental question: “If these problems keep arising, and are indeed getting worse, is there really something fundamentally wrong with the way treaty claims are being settled?” (Waitangi
Tribunal 2007a, 1) The Tribunal summarized the crux of the problem as follows:

In several urgent inquiries now, the Tribunal has seen at close quarters how the [Crown …] goes about its work. It chooses one strong group in a district and works exclusively with it to agree on a settlement. This achieves the objectives of the Crown and the settling group. But meanwhile, the other Maori groups in the district are left out. The Crown forms no relationship with them, and is interested in their treaty claims and their connection with the district in question only to the extent that they bear on the settlement with the primary group. When face-to-face contact is finally made, it is too late. Meetings are held once there is a settlement on the table, and by then the parties’ interests are polarized (Ibid., 2).

Much of the Tamaki Makaurau inquiry report is devoted to explaining what is wrong with this approach, and how to fix it.

**Concerns identified by the Tamaki Makaurau Tribunal**

By 2007, the Tamaki Makaurau urgency was just the latest of dozens of urgent inquiry applications from Maori groups concerned about aspects of the Crown's approach to overlap disputes (Rigby interview 2013; Fisher interview 2014). By the end of 2007, eight of these applications had been accepted and urgent inquiries conducted.109 Tribunal reports generated by these inquiries expressed serious misgivings about how the Crown had pursued settlements “without sufficiently understanding, acknowledging, or engaging with other groups with interests in the same area” (Waitangi Tribunal 2007a, 8). However, because these settlement processes were well-advanced by the time the Tribunal became involved, the Tribunal concluded that it was too late to address the systemic problems with these negotiations. The reports, however, went to great lengths to explain how the Crown’s

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process of dealing with non-settling groups breached treaty principles. The Tribunal’s reports emphasized, for example:

- The need for the Crown to recognize and minimize the effect of the “first-cab-off-the-rack” phenomena; that is, groups that settle first may be economically privileged to the detriment of groups which settle later (Waitangi Tribunal 2001, 18);

- The need for the Crown, in settling with one group, to preserve its capacity to provide equitable redress to other groups that later may demonstrate a credible claim to the same area (Ibid., 22-23);

- The need for the Crown to avoid allocating culturally important sites in favour of one group when the interests of other groups are not well understood (Ibid., 23-24);

- The need for the Crown to clearly communicate and consistently apply its policy for settling claims, including aspects of its policy related to overlap disputes (Waitangi Tribunal 2002, 85-87);

- The need for the Crown to be pro-active in doing all that it can to ensure that settlements do not result in deterioration of intra- and inter-tribal relations (Ibid., 88-87);

- The need for the Crown to recognize that while it is appropriate, in the first instance, for Maori groups to attempt to address overlap disputes among themselves, the issues raised by overlap disputes often involve the Crown, and as such the Crown must, when required, work directly with the non-settling groups to address their concerns (Waitangi Tribunal 2003, 63-64).
A chief concern identified by these inquiries was the Crown’s practice of delaying engagement with non-settling groups until the very last stages of negotiation. In 2003 the Ngati Tuwharetoa inquiry had this to say on the issue of delayed engagement:

> It is very difficult to deal with cross-claimants fairly if they are brought into the settlement process only as it nears its conclusion. Inevitably, the Crown ends up defending a position already arrived at with the settling claimants, rather than approaching the whole situation with an open mind and crafting an offer with one group that properly addresses the interests of others with a legitimate interest. … We think that officials put too little emphasis on understanding the modern-day tribal landscape within which they were operating, and the potential effect on that landscape of the proposed mechanisms for redress (Waitangi Tribunal 2003, 67, 69).

The principles discussed above were clearly articulated in Waitangi Tribunal reports years prior to the overlap disputes in the Tamaki Makaurau area coming to a head. Yet the Tamaki Makaurau inquiry found that the Crown’s practices had “not changed materially” in the intervening years (Waitangi Tribunal 2007a, 9). The Tamaki Makaurau Tribunal expressed its frustration with the Crown for failing to implement its recommendations:

> Four years since the Tribunal’s last inquiry into the handling of competing tangata whenua[110] interests, we were dismayed to find that the Tamaki Makaurau situation is basically a case of *deja vu*. The [Crown’s] Office of Treaty Settlements may claim that it has heeded our earlier advice, but it seemed to us that nothing has happened in the intervening years that improves the experience of “overlapping” claimant groups (Ibid., 14).

The Tamaki Makaurau Tribunal expressed significant concerns with the Crown’s approach to dealing with overlap disputes while arriving at the Ngati Whatua Agreement-In-Principle, and with the Crown’s approach to overlap disputes generally. These concerns are discussed below.

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[110] In popular usage, the term “tangata whenua” means “people of the land”, and designates Maori generally as Indigenous occupants of New Zealand, which distinguishes them from later arrivals (Benton et al. 2013).
The Crown avoided meaningful engagement with non-settling groups in the area

The Tamaki Makaurau Tribunal “completely reject[ed]” the Crown's argument that engagement with non-settling groups should wait until an Agreement-In-Principle with Ngati Whatua was settled (Ibid., 57). In the Tribunal’s view, the Crown’s relationship with the other groups in the area was just as important as its relationship with Ngati Whatua. In previous inquiries (cited above) the Tribunal had consistently advised the Crown to engage *early* with all groups with interests in areas in which the Crown was negotiating. The Tamaki Makaurau Tribunal found that in the years leading to the Ngati Whatua’s Agreement-In-Principle the Crown had only sent one letter to each of the other groups that had asserted interests in the area (Waitangi Tribunal 2007a, 18). The Tribunal’s interpretation of the letter was that it basically said “send us all your information, but don't call us, we'll call you” (Ibid., 18).

In the Tribunal’s view, “engaging” does not mean only writing letters (Ibid., 89). To initiate face-to-face meetings only after an Agreement-In-Principle has been finalized is “the worst way possible to establish a positive connection with the other tangata whenua groups” (Ibid., 92). Once there is a settlement, the other groups are put in a position where they are basically forced to react and object to it. The Tribunal found that such an approach “renders almost impossible the establishment of a connection of trust between the other tangata whenua groups and the Crown” (Ibid., 92). Moreover, even after the Agreement-In-Principle was made public, the Crown’s position was that it would deal with the other groups only in relation to the Ngati Whatua’s settlement, and not their own claims (Ibid., 18). In the Tribunal’s view, the Crown thus put the Ngati Whatua “in the top spot, and the others in a place where their interests are only relevant to the extent that they relate to the interests of
the primary group” (Ibid., 87).

The Crown’s rationale for delaying engaging with other groups was that the Agreement-In-Principle could and would be amended if warranted. The Tribunal noted that while this may be technically possible, “no one really believes it” (Ibid., 95):

… we all know that when we have been working towards something for three or more years, and we finally have something to show for it (in this case the agreement in principle), we are already emotionally and intellectually committed to its content. We may be prepared to change it, but usually only very reluctantly. And because the agreement in principle is an agreement between the Crown and Ngati Whatua 0 Orakei, the very act of working together to defend their joint achievement will inevitably promote further bonding between those parties. The “us and them” scenario between the Crown and Ngati Whatua 0 Orakei on the one hand, and the other tangata whenua groups on the other, is exacerbated (Ibid., 95).

During inquiry hearings, the Crown identified specific examples in which it had agreed to amend Agreements-in-Principle to accommodate the interests of non-settling groups (Ibid., 95). The Tribunal found that such amendments had only occurred in the wake of Tribunal inquiries and related recommendations (Ibid., 95). As a result, in the Tribunal’s view, “the Crown's dealings with overlapping claimants without Tribunal involvement do not inspire confidence in the Crown's willingness to respond to those claimants’ concerns without that kind of incentive” (Ibid., 95).

The Tribunal found that the Crown’s practice of delaying engagement with non-settling groups until the Agreement-In-Principle was finalized “excluded the possibility of running a parallel process in which relationships with the other groups were built – or at least initiated – at the same time” (Ibid., 41). By taking this approach the Crown failed to “balance the need to pursue and tend a relationship with the Ngati Whatua with its … obligation also to form and tend relationships with the other tangata whenua groups” (Ibid.,
86). Instead, the Crown’s “mode of dealing with the other tangata whenua groups left them uninformed, excluded, and disrespected” (Ibid., 86). The Tribunal found that the Crown’s priority was almost entirely on settling with its chosen Maori group, which resulted in the interests of other groups being treated by the Crown as “an obstacle to be overcome with as little engagement of time and resources as possible” (Ibid., 10). In the view of the Tribunal, “to treat other groups in such a cavalier fashion puts at risk the very objectives of the settlement process – durability of settlements, and the removal of a sense of grievance” (Ibid., 10). Such an approach, in the Tribunal’s view, means that the Crown is really “in the business of picking winners” rather than dealing with all groups in equitably (Ibid., 12).

The Crown withheld historical research

The Crown withheld the historical research upon which the Ngati Whatua’s settlement was purportedly based, even after the non-settling groups formally requested the information (Ibid., 44). The Tribunal found such secrecy to be unnecessary and prejudicial, particularly in light of the fact that such information would have been publically available had the Tribunal conducted a historical inquiry in the district. Instead, the Crown not only kept information from the non-settling groups, in so doing it also denied itself an opportunity to enhance its own understanding of the competing interests in the area by eliciting the non-settling groups’ perspective on the research (Ibid., 44). During hearings, the Crown argued that keeping the historical research confidential was consistent with conventions of commercial bargaining (Ibid., 18). The Tribunal found that such reasoning misrepresents the nature of the treaty settlement process. In the Tribunal’s view, “[w]hat is really at stake in a treaty negotiation is whether the parties can arrive at an accommodation … that will restore a damaged relationship”: to conflate conventions of commercial
bargaining to treaty negotiations is to “promote a fiction as an excuse for secrecy” (Ibid., 89).

The Crown had no consistent process or criteria with which to assess historical information

At the same time that it withheld historical research from the non-settling groups, these groups were expected to provide their historical information to the Crown on a short timeline. Non-settling groups were allowed two months in which to provide the Crown with information concerning their history and interests in the area (Ibid., 45), even though these groups had not been provided funding to support such efforts because they had not yet been accepted by the Crown as a “large natural grouping” (Ibid., 45).111 Moreover, the Tribunal found that the Crown had no clear process or criteria for assessing the information it did receive. In the view of the Tribunal, the Crown instead attempted to create “the appearance of interest and engagement” but “actually did little with” the information it received from the non-settling groups (Ibid., 45).

The Tribunal also identified serious deficiencies in the Crown’s assessment of the (partial) historical information provided by the Ngati Whatua. All treaty settlements contain an agreed statement of history and an apology from the Crown. This “negotiated history” is the factual basis by which settlements are justified, and typically contains a statement concerning how Crown breaches of the treaty impacted the settling group (Hickey 2015, 91; OTS 2002). During the Tamaki Makaurau hearings the Crown argued that it did not need to consider the history of non-settling groups when negotiating the agreed statement of history.

111 “Large natural grouping” refers to the Crown’s policy of accepting or rejecting claims for negotiation on the basis its own criteria for determining whether the constituency represented is sufficiently large to warrant a separate settlement or whether claimants should, in its opinion, be grouped with another, larger claimant entity. The Crown’s rationale for the policy is that it “helps deal with overlapping interests” and that settlements “are only workable and cost-effective for large natural groupings” (OTS 2002, 44; see e.g., Cowie 2012; and particularly Joseph 2012 for a critique of the policy).
The non-settling groups argued that recognizing only the Ngati Whatua’s historical account would result in an incomplete and one-sided version of history of the area in question. They questioned how their account of history would be judged after Ngati Whatua’s version of history had been recognized in legislation.

The Tribunal found that instead of attempting to arrive at a robust account of history, the Crown “was focused on coming up with a version of history that the Crown can live with and Ngati Whatua will agree to” (Ibid., 51). The Tribunal questioned whether having “a raft of different histories” recorded in subsequent settlement legislation might undermine the rationale for and legitimacy of the settlement process generally (Ibid., 94). An article in the New Zealand Herald characterized the Crown’s reasons for keeping the historical research secret as being “less than truthful”, and was pointed in its criticism:

Now that the history has been released it is becoming apparent that at best the history is incomplete – especially in terms of other tribes’ occupation of Auckland. At worst it's a fabrication designed to fit the story Ngati Whatua wants told (Barton 2007, n.p.).

Tribunal findings concerning the Crown’s approach to the historical account were twofold: 1) the historical information the Crown relied upon was inadequate; and 2) the Crown had no established criteria or process for addresses conflicting information (Waitangi Tribunal 2007a, 46-51).

*The Crown did not ensure that the settling group consulted with the non-settling groups*

The Crown’s documented policy concerning overlap disputes states that

[t]he Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed. The Crown will
assist this process by providing information on proposed redress items to all groups with a shared interest in a site or property (OTS 2002, 59).

While the Tribunal agreed with the contention that Maori groups should try to address overlap disputes among themselves, it also recognized that it is “ultimately the Crown's process,” and that the Crown has a “responsibility to manage the self-interest of a settling group so that the interests of other tangata whenua groups are not unfairly jeopardized” (Waitangi Tribunal 2007a, 103).

The Tribunal cautioned that the Crown’s policy of having Maori groups attempt to address their differences “needs to be carefully managed to have a prospect of successfully resolving cross-claims” (Ibid., 90), and to avoid the appearance of “simply brushing off the interests of those whose perception differs, or may differ, from that of the Crown” and the group with which it is settling (Ibid., 90). Moreover, the Tribunal found that the Crown had failed to adhere to its own policy in this regard: not only did the Crown not provide the non-settling groups information which might have assisted groups “at an early stage” to address competing interests, it failed to recognize that the settling group was unwilling to engage in consultation with their Maori neighbours at all (Ibid., 100-101). Accordingly, the Tribunal found that the Crown had “failed to take responsibility for implementing its policy” that the settling group should consult with non-settling groups concerning their interests in the settlement area, and failed to adhere to its policy that it would assist the Ngati Whatua to undertake consultation with the non-settling groups at an “early stage” (Ibid., 41). The Tribunal found that the Crown has a treaty obligation to actively protect the interests of Maori groups with which it has yet to negotiate, and thus cannot simply stand back and rely upon Maori groups to address overlap disputes among themselves (Ibid., 103).
The Crown’s offer of redress to the Ngati Whatua was prejudicial to the other groups

Crown policy states that it is not the Crown’s intention to “resolve the question of which claimant group has the predominant interest in a general area” (OTS 2002, 58). Nonetheless, the Crown also acknowledges that, in the absence of agreement on overlapping interests, “the Crown may have to make a decision” (Ibid., 59). In such situations the Crown is to consider whether and which groups have demonstrated a “threshold level of customary interest”, the availability of redress for future settlements, and the “relative strength of the customary interests in the land” of each of the groups in question (Ibid., 59). Thus, the stated preference of the Crown is not to determine which groups have a predominance of interests in particular land. However, the policy anticipates that the Crown will make such determinations when needed.

In the Tamaki Makaurau inquiry the non-settling groups raised the concern that by being the first group to settle in the area, the Ngati Whatua would obtain redress advantages that would not be available for their later settlements (Waitangi Tribunal 2007a, 64). The Tribunal largely agreed with the arguments of the non-settling groups. The Crown was not sufficiently informed to assess predominance of interests when allocating redress to the Ngati Whatua (Ibid., 44). By allocating exclusive redress to the Ngati Whatua, the Crown had in effect prejudged the strength of the other groups’ claims without sufficient information (Ibid., 64). Moreover, the Tribunal found that the offer of non-exclusive interests to Ngati Whatua was also problematic because the Crown was “in no position to assess the potential strength of others' claims to exclusive interests in those sites” (Ibid., 98). Entrenching Ngati Whatua’s non-exclusive interests would preclude other groups from subsequently having an exclusive interest in those sites. By determining the allocation of economic and cultural
redress in the Ngati Whatua Agreement-In-Principle, the Crown had made decisions concerning Maori custom without the necessary information or expertise to do so (Ibid., 91), and without “real engagement either with the groups or with their customary interests” (Ibid., 98). In the Tribunal’s view, the Crown’s process “fell short of the standard required for a good administrative process in treaty terms, and this is the standard that should apply” (Ibid., 86).

**Treaty breaches and prejudice**

*Failure to act reasonably, honorably, and in good faith*

As was held in the *Lands Case (1987)*,

> [t]he responsibility of one treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant fact and law to be able to say it had proper regard to the impact of the principles of the treaty (682).

The Crown thus has an obligation under the Treaty of Waitangi to be sufficiently informed before making decisions affecting Maori. The Tamaki Makaurau inquiry found that the Crown did not fulfil this obligation to the non-settling groups when arriving at an Agreement-In-Principle with the Ngati Whatua (Waitangi Tribunal 2007a, 100). The Crown made an offer of settlement to Ngati Whatua without knowing enough about the claims and interests of the other groups in the area. The Tribunal characterized this as a failure on the Crown's part “to fulfill its duty to act reasonably, honourably, and in good faith” (Ibid., 100). To reach a treaty settlement with one Maori group, without being sufficiently informed of the customary interests of other groups in the area, is a breach of treaty principles.

*Failure to actively protect Maori interests*
As was noted earlier, the *Lands Case* (1987) also affirmed the Crown’s duty to take active steps to ensure that Maori interests are protected “to the fullest extent practicable” (642). The Tamaki Makaurau inquiry found that by focusing exclusively on reaching a settlement with Ngati Whatua, “the interests of the other tangata whenua groups were overlooked, downplayed, and sidestepped” (Waitangi Tribunal 2007a, 101). The Tribunal found that in doing so the Crown had “insufficient regard for, or understanding of,” the relatedness (*whanaungatanga*) of tribes in the Tamaki Makaurau area. In the view of the Tribunal, relatedness is a fundamental interest of Maori that is protected by the treaty. The Crown thus has a duty not to undermine relationships within and among tribes. Wainwright, who was Presiding Officer of the Tamaki Makaurau inquiry, explains the source and meaning of this duty:

… it comes from the language of the treaty, which has in Article II a guarantee by the Crown of Maori sovereignty, of *te tino rangatiratanga* – absolute chieftainship. The guarantee of *te tino rangatiratanga* means the Crown [has a duty to] support the chiefs and therefore the tribes, because you can't have a chief without a tribe. So the tribe, as the essential unit of Maori society, is supported by the treaty. A related concept in Maori culture is *whanaungatanga*, which is relatedness – a value around kinship. Tribalism and kinship are cornerstones of Maoriness that are supported by the treaty. The Crown is obligated … by the treaty to support and enhance chiefs, tribes, and relatedness. The Crown has a duty not to set up processes which cut across that (interview 2014).

Thus relatedness (*whanaungatanga*) – the manner in which relationships are mediated at all levels within Maori culture – is fundamental to the exercise of absolute chieftainship (*te tino rangatiratanga*), which is guaranteed in Article II of the Treaty (Waitangi Tribunal 2007a, 102). This duty, in the view of the Tribunal, requires the Crown to:

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112 See, e.g., Barton et al. (2013) for a discussion of *whanaungatanga* and *te tino rangatiratanga.*
Understand the relationships within and between Maori groups;

Act fairly and impartially towards all Maori groups, and not to give unfair advantage to any group, especially in situations where inter-group contestation is apparent; and

Wherever possible act to preserve amicable tribal relations (Ibid., 101; see also Waitangi Tribunal 2002, 87-88).

The Tribunal determined that instead of supporting the relatedness that underpins chieftainship, in settling with the Ngati Whatua with little regard to the other groups, the Crown had undermined chieftainship and relatedness of all the groups in the region (Ibid., 102). The Tribunal found that for the Crown to set up a process that effectively invites Maori infighting, and then to step away and leave it for Maori groups to sort it out among themselves, was a breach of the Crowns’ duty to actively protect the tribes, their chieftainship, and their relationships. In the Tribunal’s view, if the price of securing a deal with Ngati Whatua is to jeopardize Intra- and inter-tribal relationships – as well as relationships between Maori and the Crown – then the price of settlement may well be too high (Ibid., 7).

**Recommendations specific to the situation in Tamaki Makaurau**

The Tamaki Makaurau inquiry issued two sets of recommendations; the first specific to the situation in Tamaki Makaurau, the second intended to prevent other Maori groups from being similarly affected in future. Concerning negotiations in the Tamaki Makaurau, the Tribunal recommended that:

- The settlement with Ngati Whatua should be “put on hold, until such time as the other tangata whenua groups in Tamaki Makaurau have negotiated with the Crown
an agreement in principle, or a point has been reached where it is evident that … no agreement in principle is possible” (Ibid., 107-108);

- The Crown should support the other groups in Tamaki Makaurau so that they can enter into negotiations with the Crown as soon as possible, which should involve the Crown agreeing to the organization of claims regardless of their size (as opposed to its large natural grouping policy), providing information and financial support to enable the groups to enter into negotiations, and making the Tamaki Makaurau groups top priority in negotiations over other groups whose entry into settlement negotiation had been planned (Ibid., 108); and

- The Crown and Maori groups should engage in research concerning customary interests in the area in a comprehensive way, which would allow for appropriate allocation of redress (Ibid., 108).

**Recommendations aimed at preventing others being similarly affected**

The Tribunal’s broader recommendations can be summarized as follows:

*The Crown needs to meaningfully engage with all groups in a region*

Before entering into negotiations with any group in an area, the Crown should first hold meetings with all groups in the region both separately and together, to discuss ancestral connections between people, possible political groupings of people, and develop a plan for achieving settlements with those with which the Crown will not be immediately negotiating (Ibid., 109). The Crown should identify early all groups that may be affected by a settlement, and engage in a program of face-to-face communication with these groups throughout the negotiations. Communication should not be by letters alone. Crown actors should focus on
building relationships with all the groups in a region well before it begins to allocate specific redress in settlements (Ibid., 109). When circumstances dictate, the Crown should provide funding to all groups in a region to engage in a meaningful process of reconciliation, which will sometimes require historical research on key issues. If it is necessary for the Crown to negotiate with only one group in a region at a time, the Crown must also properly manage the political implications of such an approach so that other groups’ status (*mana*) in the region is not diminished in the eyes of local authorities and businesses (Ibid., 109).

*The Crown should be clear about how historical information will be used, and encourage the sharing of information*

The Crown needs to be forthcoming about the role of information in treaty settlement negotiations, and operate with an ethic of transparency. The Crown should make clear the processes by which information will be used and, unless absolutely necessary, avoid situations in which historical reports are owned by any particular party. If materials are relied upon in settlement negotiations, they should be available to all (Ibid., 109).

*The crown should make its process for addressing overlap disputes explicit and clear*

The Crown should make clear its policy concerning how it deals with overlap disputes. The following questions should be answered:

- What information is used to determine the content of treaty settlements?

- Does the Crown evaluate and compare the strength of each group’s claims, and, if so, how?

- How, and using what criteria, does the Crown make decisions concerning how redress will be allocated among groups? (Ibid., 110-111)
The Crown must understand the customary interests of all groups in a region, and the relationships among them

The Crown is obligated to understand the customary interests of all of the groups in a region. In order to do this, Crown officials should engage with Maori sources of knowledge, both written and oral, and seek external advice on customary interests when needed. The knowledge required is local and specific, not general, and will require Crown officials to recognize that there are often “layers of interests, rather than ‘predominance’ and ranking” (Ibid., 109).

The Crown must not take a “hands off” approach to overlap disputes

The Crown has a duty to actively protect the interests of all groups in region, and therefore must effectively manage its relationships with all groups. The Crown cannot do this by taking a “hands off” approach which assumes that Maori groups will be able to resolve their competing claims among themselves. The Crown, at a minimum, must be prepared to assist the settling group to manage its relations with its neighbours and relations. At all times, the Crown must ensure that its relationships with all groups are not jeopardized, and, to the greatest extent possible, that settlements do not result in damage to intra- and inter-tribal relations. The Crown is obligated to understand the nature of the relationships within and among the groups, and needs to take active measures, including those described above, to protect these relationships (Ibid., 110).

The focus should be on relationships

The Tribunal’s recommendations are best understood in the context of the Tribunal’s overarching contention that the treaty settlements should be, at their core, about repairing and enhancing relationships (Ibid., 17-18). The Tamaki Makaurau tribunal’s
primary concern was that treaty settlements were doing more harm than good (Ibid., 1). In
the Tribunal’s view, “treaty settlement is quintessentially about restoring damaged
relationships” (Ibid., 17-18). Because they work at the center of the treaty relationship,
Crown officials working in the treaty sector are obliged to understand, respect, and uphold
Maori values and institutions, including those related to chieftainship and relatedness (Ibid.,
17). The goal must be to build and enhance relationships.

As was discussed in Chapter 3, it is often assumed that overlap disputes can be
resolved through facilitated discussions and mediation. Concerning the situation in the
Tamaki Makaurau, the Tribunal concluded that while the draft settlement with Ngati Whatua
remained on the table, such approaches had little prospect of success, and indeed might even
cause further damage to relationships (Ibid., 106). In the Tribunal’s view, until the Ngati
Whatua Agreement-In-Principle was “taken off the table” there would be

… no incentive for Ngati Whatua to participate in the kind of frank and open
exchange on these issues that would enable them to be worked through to a
conclusion that all could live with … [T]he other tangata whenua groups will want
their competing histories honoured, and the settlement re-crafted to reflect their
realities … These two sets of objectives are too far apart to be capable of resolution
through [meetings]. It is simply too late in the process for there to be any reasonable
expectation that Tamaki Makaurau Maori themselves could sort out settlement-
related [redress]…” The first step, unfortunately, is that this draft settlement really
must be stopped in its tracks (106-107).

To stop the Ngati Whatua’s settlement “in its tracks” would not, in the Tribunal’s
view, mean that it would have no future. Rather, the Tribunal recommended that the draft
settlement be held in abeyance while other groups were brought up to speed and all of their
settlements negotiated concurrently (Ibid., 107). One of the challenges in such situations is
that different groups are often at different states of readiness or willingness to negotiate
(Anderson interview 2013; Dawson interview 2013; James interview 2014). The solution to the overlap disputes in the Tamaki Makaurau was for the Crown to engage with all the groups in the region at the same time. The Crown responded by putting some groups on hold while it worked to bring the others into negotiations.

**Conclusion: The Value of Independent Oversight**

While the tribunal has subsequently conducted urgent inquiries related to contestation concerning group composition and representation, the Tamaki Makaurau inquiry was the last to focus specifically on geographic “cross claims”. This is not to say that the overlap issue has disappeared. Numerous applications for these kinds of urgent inquires have subsequently been submitted to the Tribunal. However, the Tribunal has used its discretion to decline to hear these cases, likely in deference to its earlier findings (Rigby interview 2013; Durie interview 2014; Fisher interview 2014). It is therefore difficult to know with certainty the extent to which the Tribunal’s recommendations concerning overlap disputes have been heeded by the Crown. Nonetheless, according to the Crown actors and others I interviewed, the Crown’s practice concerning overlap disputes substantively changed as a result of the Tamaki Makaurau inquiry.

For instance, where appropriate, the Crown now seeks to engage in parallel, concurrent negotiations with different Indigenous groups, involving “checking in with each other at important points, as a way of demonstrating to all the groups involved that they are all tracking along, that they are all being treated consistently” (Linkhorn interview 2013; also Anderson interview 2013; James interview 2014). This is not to suggest that such an approach is easy. According to James, the “only perfect solution to that would be to deal

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113 E.g. *The East Coast Settlement Report* (Waitangi Tribunal 2010).
with everyone all at once, [but] that is never going to happen” (interview 2014). Finessing the timing of negotiations of different groups – holding some back while working to speed up others – is a delicate balance. To delay one group’s settlement indefinitely in order for other groups to “catch up” in the negotiation process may itself be a breach of treaty principles.

Concerning the Tamaki Makaurau situation specifically, however, the benefits of tribunal involvement are clear. Eight Maori groups eventually achieved treaty settlements in the Tamaki Makaurau area, all at around the same time. According to the Crown actors I interviewed, this was accomplished by: 1) the Crown acknowledging that it is squarely implicated in the issue of overlap disputes, and thus cannot simply leave it for Maori groups to sort out among themselves; 2) the Crown meaningfully engaging with, and building relationships with all Maori groups in the region; and 3) the Crown strategically using its resources to support all groups in the region to prepare for and engage in negotiations of their own (Anderson interview 2013; Linkhorn interview 2013; James interview 2014).

As it turns out, the overlap disputes in the Tamaki Makaurau area were not as intractable as some had anticipated. The specific disagreements concerning redress were only symptomatic of an underlying problem: the Maori groups of the Tamaki Makaurau were clamoring for the ear of the Crown, a seat at the table, and treaty settlements of their own. Once this was recognized, and the interests of the other groups acknowledged and respected, it became possible to reach settlements with all groups in the region. While it took multiple inquiries and repeated admonitions by the Tribunal, indications are that the Crown’s approach to overlap disputes changed considerably as a result of Tribunal oversight. Almost all of the people I interviewed spoke of the Tamaki Makaurau inquiry, and almost all indicated that it prompted important changes in the Crown’s approach to overlap disputes.
I argue that BC would be well-served by commission of inquiry-style institution to support the effective and lawful management of overlap disputes in BC. We in BC have much to learn from the hard-won lessons of Waitangi Tribunal in this regard, particularly those learned through the Tamaki Makaurau experience. I return to this argument in Chapter 9.
CHAPTER 8: OVERLAP DISPUTES IN AUSTRALIA

In 1992, Australia’s High Court in *Mabo v. Queensland* (“Mabo”) acknowledged a form of Native Title that recognizes Indigenous peoples’ right to use lands in accordance with their traditional laws and customs. The *Mabo* decision was the impetus for the *Native Title Act 1993*, which established a national legislative framework for determining where Native Title exists and the content of Native Title rights and interests. During its relatively brief lifetime, the Native Title framework has been extensively criticized as a catalyst for disputes within and among Indigenous groups concerning group membership, representation, and extent of territorial rights (e.g. Bauman 2006; Behrendt and Kelly 2008; Burnside 2012; Bauman et al. 2015). The purpose of this chapter is to explore how overlap disputes have been managed in Australia, and whether principles and processes employed in Australia have utility for managing overlap disputes in BC.

The chapter is presented in three major sections. The first is on the Native Title framework generally, and particularly aspects of the framework critical to understanding the contexts in which overlap disputes arise, the nature of these disputes, and how they are problematic. The second section concerns how overlaps disputes have been managed, with particular focus on the roles of three institutions: Native Title Representative Bodies (hereafter “Rep Bodies”), the National Native Title Tribunal (hereafter “the Tribunal”), and

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114 In this chapter I use the term “Indigenous people” to refer to Aboriginal and Torres Strait Islander people of Australia, who are descended from people who existed in Australia and surrounding islands prior to European colonization. Indigenous people comprise roughly three percent Australia’s total population (Australian Bureau of Statistics 2013).

115 See Russell (2005) for a thoughtful discussion of the political and legal context in which the *Native Title Act 1993* arose.

116 I use the term “Native Title framework” to refer to the processes established by the *Native Title Act 1993* and related Native Title jurisprudence.

117 For critiques of the Native Title framework generally, see, e.g., Behrendt 2003; Ritter 2009; Strelein 2009.
the Australian Federal Court (hereafter “the Federal Court”).\footnote{I use the term “Rep Body” as it is commonly used in Australia, and includes both Native Title Representative Bodies and Native Title Service Providers. By “the Federal Court” I mean the Federal Court of Australia, which has jurisdiction in matters related to Native Title, subject to appeal to the High Court of Australia (hereafter “the High Court”).} In the third section I turn to an initiative called the Right People for Country Program, a State-sponsored partnership between Indigenous groups, a Rep Body, and the Victorian Government. Much can be learned from the experiences of these institutions – both good and bad. As will be shown, approaches to the management of overlap disputes employed by Rep Bodies, the Tribunal, and the Federal Court have some advantages as well as significant challenges. As a relatively new initiative, the Right People for Country Program has had the benefit of lessons hard-won through the experiences of earlier approaches. In Chapter 9 I argue that some of the principles and approaches to the management of overlap disputes employed in Australia have significant utility for the management of overlap disputes in BC.

**The Native Title Framework**

This chapter is not intended to provide a comprehensive explanation or critique of the Native Title framework, which has been done elsewhere (e.g. Russell 2005; Ritter 2009; Strelein 2009). Yet three points concerning the Native Title and Indigenous land rights in Australia need to be made at the outset. First, there is a wide gulf between Native Title law as codified by the *Native Title Act 1993 (hereafter “the NTA”)* and interpreted by Australian courts, and how the term “Native Title” accords with Indigenous understandings of their relationship with land, waters, and each other. As stated by Mick Dodson, former Chair of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS):
… let us not pretend that the [Mabo] decision by the High Court recognised land rights as we understand them, as we understand our responsibilities for country[119] and connections with each other. The High Court attempted to accommodate Indigenous law and custom with the colonial common law, but was only able to understand our law and custom from within the framework of the colonial legal and political systems (2010, 14).120

Native Title within Australia’s legal system thus comprises what Indigenous scholar and activist Noel Pearson (1997) calls “the recognition space”: “the space between the two systems, where there is recognition … [of Indigenous rights] in particular circumstances” (119). Lisa Strelein (2009), Director of the Native Title Research Unit at AIATSIS, argues that this recognition space was forged out of a “discriminatory compromise” embedded in judicial interpretations of the NTA (35). In this view,

[to place] … compromised jurisprudence at the center of the inquiry into whether native title exists ensure[s] that … the rights and interests of Indigenous peoples [are] also compromised. Recognition and protection of native title … will be afforded by the Australian law on its own terms on the basis of convenience (Strelein 2009, 141).

For Indigenous groups seeking recognition of Native Title, Australian law imposes an onerous burden to demonstrate continuous, uninterrupted adherence to customary law and connection to particular land, even when such adherence and connection may have been interrupted as a result of state interventions.121 Moreover, Native title is extinguished to the

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119 Australians often use the term “country” to describe physical and metaphysical connections between people and places. In my short time in “the country” (a term which is vastly different from “country”), I came to understand the term “country” to include all manner of phenomena associated with particular places, such as creation spirits, dreaming paths, stories, knowledge, ceremony, rights, and obligations. I am especially grateful to anthropologist Peter Sutton (interview 2014) for explaining some of the nuances of the term to me (see, e.g., Sutton 2003).

120 In this chapter I use the term “Native Title” to describe Indigenous rights recognized by the NTA, while also recognizing that this definition falls well short of more nuanced understandings of Indigenous peoples’ connection with land, country, and each other.

121 See, e.g., Members of the Yorta Yorta Aboriginal Community v. Victoria 2002 (HCA, hereafter “Yorta Yorta”), paras. 86-90. In Yorta Yorta, the High Court determined that to satisfy the requirements in Section 225 of the NTA,
extent that it is incompatible with “valid” government acts, such as conferral of leasehold or freehold land title. Even where Native Title is recognized, Native Title rights exist only to the extent that they are compatible with the interests of other land users who have been granted land tenure prior to the High Court’s recognition of Native Title.¹²² Not all Indigenous groups are able to achieve legal recognition of Native Title rights and interests. The standard of proof is exacting and onerous. The NTA’s requirement for uninterrupted adherence to traditional law and custom means that Indigenous groups that have been most impacted by colonisation are least likely to have Native Title recognized, an unfairness that is acknowledged in the NTA’s preamble.¹²³ The “recognition space” described by Pearson (above) is increasingly recognized as being capable of recognizing the Native Title rights of only some Indigenous people, and then only in very specific circumstances (Strelein 2009; Ritter 2009).

Second, despite the complexity of the 600-plus page NTA, its purpose is clear. The NTA was intended to provide an administrative structure to address the large number of Native Title claims expected in the wake of the Mabo decision. It constrains Australian courts to a role of statutory interpretation in the realm of Aboriginal rights, and provides a mechanism to “validate” Indigenous dispossession of land, particularly dispossession occurring after the passage of the Racial Discrimination Act 1975 (NTA, ss. 13-22). Without such “validation,” government actions occurring after 1975 that extinguish or encroach on

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¹²² Wik Peoples v. Queensland ("Pastoral Leases case") 1996 (HCA).

¹²³ The preamble to the NTA recognizes “that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.” The “special fund” was never established.
Native Title in contravention of the *Racial Discrimination Act* are vulnerable to Indigenous claims for compensation (*NTA*, ss. 13-23). Despite the contention that the *NTA* would “rectify the consequences of past injustices” (*NTA*, preamble), the Native Title framework has largely failed to deliver on the expectations of Indigenous peoples prompted by the *Mabo* decision (Russell 2005; Strelein 2009; Ritter 2009). At its core, the *NTA* is intended to facilitate land management, as anthropologist and Native Title scholar Cameo Daly explains:

> [Native Title is] about providing certainty in land management. We should not be naïve about the degree to which it materially changes Aboriginal people’s lives in the short term. It’s a leverage point at best, with other people who have interests in the land (interview 2013).

A third point needs to be made at the outset of this chapter. In addition to the *NTA*, Australia comprises a patchwork of Indigenous land rights regimes recognized by State and Territorial legislation. While land rights and Native Title both relate to the recognition of Indigenous rights to land, they derive from dissimilar imperatives, and are often based on different evidentiary criteria. In various State and Territorial jurisdictions, land rights statutes were enacted in response to broad political movements, and often recognize the rights of Indigenous people whose families may have immigrated to an area after the assertion of colonial sovereignty (Kelly and Behrendt 2007; Behrendt and Kelly 2008). The impetus for the *NTA*, on the other hand, was and is to recognize a form of Native Title enunciated in the *Mabo* case and subsequent Native Title jurisprudence. Applications for Native Title made on the basis of occupation of particular areas will fail unless that occupation is grounded in traditional law and custom, which courts have determined are those that existed at the time when the British Crown asserted sovereignty over the area in question. Native Title rights of Indigenous people whose families immigrated to an area after the assertion of British
sovereignty, even if their families have been connected to the area for generations, are not recognized by the NTA.

The Native Title framework thus invokes a distinction between “traditional people” and “historical people” – a bifurcation of those whose rights derive from traditional law and custom and those whose family connections to particular places do not predate the assertion of British sovereignty (Kelly and Behrendt 2007; Behrendt and Kelly 2008). Disjunctures between federal and State legislative frameworks are a systemic cause of overlap disputes, and often prompt difficult questions concerning who “the right people” are for particular areas (Bauman and Williams 2005; Behrendt and Kelly 2008; Burnside 2012). In this chapter I use the phrase “right people for country” as it is used in literature and by almost all of the 21 people I formally interviewed in Australia. I also recognize that the phrase “right people for country” – as it is commonly used in Australia – is more legal than it is ethical. The NTA and Native Title jurisprudence dictates which Indigenous people are recognized as “the right people” according to a statutory and judicial construction of Indigenous authenticity.

According to Native Title law, the “right people” are those who can prove their genealogical decent to the “right” ancestors, and continuous observance of traditional law and connection to the “right” country. The Native Title framework thus often requires that deeply personal questions concerning Indigenous authenticity be aired in adversarial contexts, where an Indigenous person’s identity is sometimes questioned not only by the state but by other Indigenous people. In my view, this aspect of the Native Title regime, by producing the psychological, social, and economic ingredients of discord within and among Indigenous communities, is decidedly immoral.

As in BC and New Zealand, overlap disputes can damage relationships among
individuals, families, and groups (Bauman 2006; Behrendt and Kelly 2008; Gooda 2011; Burnside 2012; Bauman et al. 2015). As Bauman and others (2015) note, the Native Title framework often exposes “deep-seated personal, family and community self-identification issues in multiple layered contexts, all overlain with the demands and sometimes fleeting opportunities of native title” (78). Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda uses the term “lateral violence” to describe the emotional, social, and sometimes physical manifestations of such disputes. As Gooda explains,

Native title can be a catalyst for lateral violence because the native title process reinforces our oppression and dispossession of our lands, and raises questions about our identity – issues that are already sensitive for us given our harsh history of colonialism. Lateral violence resulting from our engagement in native title is having a devastating impact on our families and communities and we need to work out ways to address this (2011, 115).

Social discord caused to Indigenous communities by the process of claiming and proving Native Title has deeply felt costs in human terms. “Positive” Native Title outcomes may be achieved at the expense of personal and group relationships. Even when two groups may seek to address an overlap dispute by negotiating an informal “shared country” agreement, if either wishes to have their Native Title recognized, the Federal Court would need to be satisfied that this arrangement has a basis in traditional (i.e. pre-sovereignty) law and custom, rather than reflecting a contemporary political compromise. As Burnside (2012) notes, the Native Title framework sets up a situations in which “claimants may well be required to engage in adversarial behaviour and act in a manner contrary to the interests of other claim groups: this is the way the Australian legal system works” (5).

A Complex Legislative Regime: The Players, the Institutions, and the Process
The *NTA* provides four avenues for recognition of Native Title rights and interests: 1) compensation for “invalid” acts of government that contravene the *Racial Discrimination Act 1975* (*NTA* ss. 13-22); 2) future act agreements that recognize rights of Indigenous groups to be consulted and, in some cases, participate in decisions concerning proposed development (*NTA*, s. 24A); 3) Native Title determinations, which are judicial findings concerning whether Native Title exists and, if so, their content (*NTA*, s. 87); and 4) Indigenous land Use Agreements (hereafter “ILUAs”) that explicate how Native Title rights will be exercised and the Indigenous corporate bodies that are authorized to represent the holders of Native Title (*NTA*, s. 24B). Native Title “settlements” often involve more than one of these mechanisms.

For instance, a positive Native Title determination is a judicial finding that specifies the content and location of Native Title rights and interests. ILUAs explicate the governance structure of Indigenous corporate entities that hold and manage rights on behalf of their members (*NTA*, s. 24B), how Native Title rights will be exercised (*NTA*, 24C), and how, and under what circumstances, public government and land developers will consult and negotiate with the rights-holding collectives concerning proposed land development (called “future acts”) (*NTA*, s. 24F ff.). A “negative determination” is a judicial finding that Native Title does not exist, either because of lack of evidence establishing uninterrupted adherence to traditional law and custom, or because Native Title has been extinguished by “valid” acts of the Crown.

**Registration of claims and the “right to negotiate”**

Native Title applications – commonly called “Native Title claims” – are lodged with the Native Claims Registrar and assessed according to a “registration test”. Applications
include, among other things, a map and a description of the claimed area, a *prima facie* description of the factual basis of the claim, and a description of the membership of the group on whose behalf the claim is lodged (*NTA*, ss. 190A-190C). If a claim passes the registration test, it is registered in a national registry. Registration of claims confers to claimants certain procedural rights, including a “right to negotiate” (*NTA*, s. 25) in relation to a set of defined “future acts”, such as proposed mining and hydrocarbon development projects (*NTA*, s. 24F ff.). The right to negotiate recognizes the right of Indigenous groups to negotiate with land developers concerning activities proposed to take place on the land while claims progress through the Native Title system.

Benefits deriving from these procedural rights can in some contexts be more attractive to Indigenous claimants than the prospect of a successful Native Title determination (e.g. Altman 2012). Moreover, a commonly held opinion of people I interviewed is that the promise of benefits deriving from the right to negotiate can disincentivize Indigenous groups to address overlap disputes. Anthropologist and Native Title scholar David Trigger explains:

> In some cases, [claimant groups] enjoy the right to negotiate more so than after an actual [Native Title] determination, depending on whether the determination is successful and what rights might be found to exist. If you have a group that has achieved a right to negotiate … and they are getting substantial funds from agreements with proponents, particularly mining and gas, there is no incentive to … progress [their] Native Title claim, and to join together with their [Indigenous] neighbours to work out disputes (interview 2014).

For some purposes, groups with registered claims are treated by Native Title law as though their claims have already been proven. Echoing a sentiment expressed by many of the people I interviewed, anthropologist and Native Title scholar David Martin suggests that
the Native Title framework encourages groups to “get in first and lodge [their] claim in as expansive a form as possible, [and that is] part of the reason why you’ve got this massive number of wildly overlapping claims” (interview 2013). The right to negotiate with project developers thus often prompts overlap disputes well before claims are determined and ILUAs negotiated (Altman 1997, 2012; Altman and Martin 2009).

The way claims progress through the Native Title system has changed over time. One of these changes concerns the criteria against which the Native Title Registrar assesses applications. Initially, in the mid-1990s, the evidentiary threshold for having a claim registered was much lower than it is now. As Native Title lawyer and Indigenous advocate Tim Woolley explains,

[i]nitially the process was almost like filling out a form. There were some basic criteria but it was reasonably easy to tick the boxes. There was very little factual evidence, even on a *prima facie* basis. And there was a huge rash of overlapping claims, [particularly where …] there is something to fight for in terms of money (interview 2013).

Many of the hundreds of Native Title claims registered in the mid-1990s overlapped spatially, and did not clearly define which Indigenous people were represented in which claims (Davies 2003; Burnside 2012). In response to the High Court’s *Wik* decision, the *NTA* underwent a significant amendment in 1998, part of which intended to clarify issues of group membership and overlapping territorial claims. The 1998 amendment tightened the test for registration (*NTA*, ss 190A-190C), which prompted the Federal Court to require that all preexisting claims be reassessed according to the new registration test criteria. The statutory bodies responsible for organizing and supporting claims – Native Title Representative Bodies (hereafter “Rep Bodies”) – were required to examine each claim in
their respective regions, and to resubmit claims to the satisfaction of the Federal Court.

Kevin Smith, Chief Executive Officer of the Queensland South Native Title Services (a Rep Body), explains the challenge of re-registration:

The Federal Court did a lot of the cleaning. Some [claims] got combined. Some were simply kicked out of the system. [The Federal Court] said if the form that has been filed in court does not actually disclose an action of Native Title, then it will have to be dismissed. That is how bad some of these claims were. You couldn't actually see what was being claimed (interview 2014).

The reassessment process significantly reduced the number of registered claims that overlapped spatially (Davies 2003; Burnside 2012), partly because the new registration test required that group membership be explicitly defined (NTA, s. 190B). Nonetheless, many overlapping claims remain on the registry, and additional claims may be added “on top of” registered claims provided that they demonstrate a society that is distinct from that of a previously registered claim (NTA, ss 190A-190C).

If a claim fails to pass the registration test, the claimant group has three options: 1) abandon their claim entirely; 2) attempt to join a group with a claim already registered; or 3) become a respondent party to a registered claim, which means that they become, in mediation and/or at trial (explained below), an adversary of the group with the registered claim (Daly interview 2013; Trigger interview 2014). Trigger suggests that “increasingly, you have adjacent Aboriginal groups who are becoming respondent parties” (interview 2014).

The Federal Court and the National Native Title Tribunal: An evolving relationship

The process by which claims advance through the Native Title system has also changed over time. Initially, in 1994, all claims were made to the National Native Title Tribunal, with the expectation that all claims would be mediated under its supervision. The
intent was for claimant groups, public governments, and third parties with interests in the
land to reach agreements on the existence of rights, the content of rights, and how rights and
interests would be exercised. The NTA’s focus on mediation reflects the intent for claims to
proceed to trial only as a last resort. By the mid-2000s, however, the Commonwealth
Government and the Federal Court had become increasingly skeptical of the Tribunal’s
ability to facilitate agreements, some of which had been under mediation for a decade. The
NTA was amended to remove the requirement for the Federal Court to automatically refer
claims to the Tribunal for mediation, and the court began to impose timelines on the
completion of mediation – either agreement was reached by a specified date or the matter
would proceed to a trial. In 2012 the mediation function effectively shifted from the
Tribunal to the Federal Court, which was not so much a legislative change as it was a
significant reduction in the Tribunal’s funding.\footnote{The changes were given statutory force by the Tribunals Legislation Amendment (Administration) Act 2013, that
codified and facilitated the transfer of much of the Tribunal’s fiscal appropriation and some its functions to the
Federal Court. Under these changes, the Federal Court is now responsible for the mediation of Native Title claims
and ILUAs. All of the Tribunal’s other statutory functions remained. For instance, the Tribunal continues to
conduct mediation when requested by the Federal Court, and continues to perform its arbitral function related to
future acts (NTA, s. 24).}

Tribunal and Federal Court approaches to overlap disputes are covered later in this
chapter. For now it suffices to make three points concerning the Native Title framework
generally. First, the process of establishing Native Title recognition is onerous, adversarial,
and often litigious. The existence and content of Native Title is ultimately determined by the
Federal Court, even when claimants and respondents agree on the evidentiary basis of claims
and the existence and content of Native Title rights and interests. Native Title
determinations are either contested (the matter goes to trial) or are by consent of the parties
(a consent determination). Even when agreements are reached, the Federal Court must be satisfied that agreements are consistent with the evidentiary criteria established in the NTA and related Native Title jurisprudence. Second, as the public’s fear of Native Title has generally waned, State governments have become increasingly willing to negotiate consent determinations. And third, since the mid-2000s the Federal Court has become more engaged in the management of claims – and overlap disputes – with the Tribunal now exercising far less influence over the process than it had previously. There was near-consensus among the people I interviewed that increasing control of the process by the Federal Court has increased the rate at which Native Title is recognized.

Overlap disputes create uncertainty in land management, increased costs for governments, and delays as land developers try to identify “the right people” with whom they are legally obligated to negotiate. The NTA seeks to provide clarity and predictability in land management by stipulating that only one determination of Native Title can be made in respect of a given area of land or waters (NTA, s. 68). Overlap disputes can preclude settlement under the NTA for a number of reasons, not least because State Governments will not generally engage in substantive negotiation until overlap disputes are resolved.

Tribunal President Raelene Webb explains:

I think I’m safe in saying that there is no State now in Australia that prefers litigation rather than a consent determination. The problem is that where you do have those overlapping claims there is no possibility of a consent determination until the groups come to some accommodation. [Overlapping claims] are the most prominent barrier

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125 For instance, former Tribunal President Graham Neate estimates that 85 percent of determinations are now by consent, whereas in the 1990’s the majority of claims were litigated (interview 2014).

126 I am particularly grateful to Graham Neate (interview 2014), Tribunal President Raelene Webb (interview 2014), and an anonymous Federal Court Judge (interview 2014) for sharing their perspectives on the evolving relationship between the Tribunal and the Federal Court.
to recognition of Native Title in Australia at present. Most of the issues that are now coming before the Federal Courts are overlaps … and the consequence are actually quite dire (interview 2014).

While some of the people I interviewed suggested that State Governments intentionally set up intra-Indigenous conflict to undermine claims, most expressed the opinion that State Governments have an obligation to ensure that Native Title determinations recognize groups that satisfy the legislative criteria. As Smith notes,

[the State has to be a responsible agent in this. The Crown has a responsibility to make sure that it is [dealing with] the right people for right country. There is an obligation on the State to be involved. I don't really have too many problems with the state saying, “We’re not going to consent to a determination unless the overlapping issues are sorted out.” I think it actually does require the State to say, “If they [Indigenous groups] can’t convince us about these issues, how are they going to convince the world at large about these issues?

Overlap disputes preclude the possibility of a consent determination. If the claim proceeds to litigation, moreover, the Federal Court may conclude that an overlap dispute indicates that two or more groups no longer adhere to traditional law and custom, and thus neither Indigenous group holds Native Title in the disputed area.\(^{127}\)

Managing Overlap Disputes: Representative Bodies, the Tribunal, and the Federal Court

Overlap disputes and Rep Bodies

Although some Native Title claimant groups may retain their own legal representation, most are represented by a Rep Body, which are bodies established by the

\(^{127}\) See, e.g., Wyman on behalf of the Bidjara People v State of Queensland 2013 (FCA). It should also be noted that the federal court may also find that there is a basis in traditional law and custom for two or more groups to hold Native Title in the same area, in which case two or more groups would be included in the determination (see, e.g., James on behalf of the Martu People v Western Australia 2003 (FCA); see also NTA, ss. 67-68).
to assist Indigenous groups to advance their claims. Rep Bodies provide a set of functions and services to Indigenous groups in their respective regions, including dispute resolution functions intended to promote agreements among its constituent Indigenous groups, and management of funding to support progressing claims (NTA, ss. 203-203BK).

Rep Bodies have a statutory obligation to “make all reasonable efforts to achieve agreements” among claimants groups in their respective regions, and to “minimize the number of applications covering the land and waters” (NTA, ss. 203BC, 203BE). Rep Bodies must also attempt to “identify persons who may hold native title” (NTA, s. 203BJ), as well as “promote satisfactory representation … of Native Title holders and persons who may hold native title” within their regions (NTA, s. 203BA). Simply put, Rep Bodies try to establish in evidence which people have rights where, and thus how people who hold Native Title rights should be grouped for claims purposes (Smith interview 2014; Wishart interview 2014). In some cases, Rep Bodies have conducted research on a regional basis, rather than on a claim-by-claim basis, and then held large regional “land summit” meetings to try to organize claimant groups in a manner that aligns with the evidence. As former President of the National Native Title Tribunal (hereafter, “the Tribunal”) Graham Neate explains,

> In an ideal world that is how you would do it: see what the regional research tells us about who is where, and then compile claims out of that, and then hopefully avoid all of these overlaps and all these disputes. We don’t live in an ideal world (interview 2014).

Many overlapping claims remain on the national registry. Rep Bodies thus often have the difficult task of trying to reorganize claimant groups in a manner that aligns with research, which often means that some claims need to be combined, boundaries adjusted, and claims without a clear basis in evidence withdrawn (Daly interview 2013; Smith interview...
Because of resource constraints, Rep Bodies also need to prioritize which claims will be supported, often on the basis of which claims appear most likely to result in successful outcomes (Daly interview 2013; Smith interview 2014).

Rep Bodies have a statutory mandate to advocate for the interests of all persons who hold or who may hold Native Title rights in their defined region. Rep Bodies are also providers of research and legal services intended to benefit particular claimant groups, which is sometimes seen as a conflict of interest. For instance, a Rep Body may compile research that sets out an expert opinion about the extent of a claimant group’s asserted territory, yet the research may not be consistent with the group’s beliefs concerning which people have traditional rights where, which can aggravate tensions between and among groups and individuals, and between groups and a Rep Body (Bauman interview 2014; Daly interview 2014; Trigger interview 2014). In such an event, the claimant group may retain their own legal representation and conduct its own research without the involvement of the Rep Body.

It is not uncommon for claimant groups to become disillusioned with their Rep Body, and to then pursue their claim in a manner that undermines the claims of groups also represented by the Rep Body (Daly interview 2013; Trigger interview 2014). As noted by anthropologist and Native Title scholar Mary Edmunds, the “way in which the claims process has been established encourages an adversarial approach by rival claimant groups, each of whom is free to engage its own lawyer or other advisers” (1995, 5). According to mediator and anthropologist Toni Bauman,

… the problem from a process point of view is that the [Rep Bodies] are often located in the dispute one way or another. In my view they are not the most appropriate people to be dealing with this stuff. They need to be at arm’s length because they are part of the dynamics. The second thing is that they don’t have the
funding to deal with this stuff. And the third thing is [that] they are supposed to represent all Native Title [holders] as well as all those who might be Native Title holders, but there is a conflict in that (interview 2014).

A common criticism of Rep Bodies is that they tend to act in the interests of particular claimant groups, which may be contrary to the interests of others (Edmonds 1995; Burnside 2012; McCaul interview 2013; Trigger interview 2014).\(^{128}\) Cowie puts it bluntly: “up until 2010\(^{129}\) I found it quite outrageous that [a Rep Body] would essentially pick its client and was then using its barristers in an adversarial way to shut their neighbours out” (interview 2014). Echoing Bauman, Manager of the Right People for Country Program (discussed below) Sally Smith argues that resource constraints limit the ability of Rep Bodies to effectively manage overlap disputes:

The issue for the [Rep Bodies] is that, in the past, [overlap disputes] were always left to the last minute. [Rep Bodies] normally have one or two priority claims at any one time that take the majority of their resources. What inevitably happens is that their neighbours are not resourced, so, when it comes time to engage with their neighbours, it becomes really difficult, or, in fact, the Rep Body is engaged in the dispute because they are seen to be acting for one party and not the other. Then it becomes really difficult for the [Rep Body] to mediate or broker any sort of agreement (interview 2014).

Almost all of the people I interviewed indicated that Rep Bodies are often unable to effectively manage overlap disputes for two reasons: 1) conflict of interest in their advocacy role for both individual claimant groups and all claimants, that may be competing for the same land; and 2) lack of resources, which means that some groups may be privileged to the detriment of others.

\(^{128}\) See Ritter (2009, Chapter 3) for a thorough discussion of the contradictory mandates of Rep Bodies.

\(^{129}\) Prior to 2010, Native Title claimants were unable to access legal aid to support Native Title claims, and thus were required to seek support from a Rep Body or to provide their own funding to support their claim.
Overlap disputes and the Tribunal

The Tribunal has the statutory jurisdiction to mediate disputes related to Native Title claims, including overlap disputes, when requested by the Federal Court (NTA, s. 86B). In response to concerns over the rate at which mediation was progressing, in the mid-2000s the Federal Court began to exercise more control of the claims process by requiring matters to proceed to trial if mediation was unsuccessful within a specified period (Daly interview 2013; McCaul interview 2013; Neate interview 2014). People I interviewed were generally consistent in their explanations of why the Tribunal was perceived to be ineffective in the management of overlap disputes, and I return to these reasons below. Before doing so, it is useful to explore how the Tribunal has attempted to address overlap disputes, as well as barriers it encountered while attempting to do so.

Research briefs

One of the ways the Tribunal supports mediation of overlap disputes is by providing ethno-historical research. Neate, speaking in the past tense, explains the Tribunal’s research process and its benefit while under his leadership:

We had a research unit who would prepare what were colloquially known as research briefs: … carefully collated, publicly available, prior research for a region or group. But [we] would not write a commentary about it, but simply say “here is the material”. And those research briefs were quite helpful because people would say “oh, that explains why [such and such] … and now we can put the family tree together … and maybe our country doesn’t go that far, or maybe it goes a lot further than we thought (interview 2014).

Most research related to proving Native Title is compiled on behalf of individual claimant groups, often with the support of Rep Bodies. Research is often summarized and presented to the Federal Court as “connection reports”, which are anthropologists’ reports
based on historic documentary sources and oral history (Daly interview 2013; McCaul interview 2013). In the context of overlap disputes, two or more reports may be based on different interpretations of the documentary record and can draw from different sources of oral history, and thus reach different conclusions concerning which groups have Native Title rights where (Behrendt interview 2014; Neate interview 2014; Woolley interview 2014). One of the advantages of the Tribunal’s research briefs is that they were/are compiled by an independent and impartial body with no vested interest in supporting any particular party to a dispute.

The Tribunal’s review and inquiry functions

When requested by the Federal Court, the Tribunal also has the statutory jurisdiction to conduct reviews into whether claimant groups in mediation hold Native Title rights and interests (NTA, s. 136). The review process is voluntary, without prejudice to the parties involved, and recommendary (Ibid., s. 136). Reports generated by Tribunal reviews are provided to mediators and the parties involved in mediation, and are only provided to the Federal Court with permission of the parties involved (Ibid., s. 136). The review function is intended to assist mediation by elucidating specific areas of disagreement in order to, as Webb explains, “try to break through that particular issue” (interview 2014). As of 2014, the review function had not been used by the Tribunal (Webb interview 2014).

The Tribunal also has the jurisdiction to conduct inquiries into any matter relevant to the determination of Native Title, including overlap disputes (NTA s. 136). Inquiries may relate to more than one claim, which is to say that an inquiry may concern an overlap dispute in which the disputing groups are not respondents in the other’s proceedings. As with its powers of review, the Tribunal’s inquiry process may only be used with the consent of the
disputing parties. The main difference between the Tribunal’s review and inquiry functions is that in an inquiry the Tribunal has the jurisdiction to make legal findings of fact, subject to review of the Federal Court (Ibid., s. 169), and inquiry reports must be provided to the Federal Court (Ibid., s. 164). As with most commissions of inquiry, the Tribunal is not bound by legal forms or rules of evidence (Ibid., s. 109), may summon witnesses and documents, and has the authority to take evidence under oath (Ibid., s. 156).

As of 2014, the Tribunal’s inquiry jurisdiction had only been used once. Webb describes some benefits of the inquiry process:

[The] inquiry process is a lot more informal [than conventional courts]. For example, when I conducted this inquiry I went out to the area, I went out with the people, [and] they talked about it. We came back, went to the hearing room, [and] put it all down in a transcript. As an inquiry, it has to have its structures, but it is a lot more informal and you actually get more information. In court, one side will tell you one thing and the other side will tell you another, but [courts] don’t have that investigative function. [The inquiry] report goes to the Federal Court who may adopt those findings. So even though [the findings] are not binding, the Federal Court may make them binding by adopting them (interview 2014).

Webb is convinced that the Tribunal’s review and inquiry functions are “extremely good tools to try to break through impasses”, not least because the Tribunal is “a body that is seen as objective”:

The Tribunal has no vested interest either way, and that’s the real advantage of it. It can have that position of a totally neutral third-party researcher, reviewer, or inquirer. In fact we’ve had a number of requests for the Tribunal now from [Rep Bodies] and others to actually look at an issue and to basically provide a report on that issue, as an objective third party. … I’m doing a number of mediations that are referred to me by the Federal Court and every single one of them is an overlap dispute (interview 2014).

However, it is impossible to ignore the Tribunal’s fiscal reality: its fiscal allocation in
2016 was a third of what it was in 2011 (NNTT 2012; Federal Court 2016), which has resulted in a significant reduction in Tribunal staff and the number of Tribunal Members authorized to conduct review and inquiries (reduced from fifteen in 2011 to three in 2016). A Rep Body may request that the Tribunal conduct a review or inquiry, yet in such an event the Rep Body would be required to pay for the service (NTA, s. 203BK). The Tribunal’s review and inquiry function is thus at the discretion of the Federal Court, or dependent upon a Rep Body’s ability to pay.

It would be unfair to place responsibility for the lack of agreements produced in the first fifteen years of the NTA on the Tribunal exclusively. The Tribunal has been required to work with an exacting and difficult legislative regime that includes onerous evidentiary criteria that must be met in order for Native Title to be recognized. Even the most common criticism of the Tribunal – that its meditation processes take an excessive amount of time – was not entirely due to Tribunal policies and approaches. Until recently, State Governments – the principle respondent in claims – were generally unwilling to work towards consent determinations, preferring instead for claims to be litigated. There is no doubt that the rate at which successful determinations were made began to increase dramatically in the late-2000s, which is around the time when the Federal Court began to impose deadlines on mediation and employ other case management strategies discussed below. Whether the increased rate of settlement was a direct result of increased court supervision or because of other variables is impossible to say with certainty. However, there was near-consensus among people I interviewed that one of the shortcomings of the Tribunal’s mediation process was and is that it does not have the legislative authority to impose deadlines.

Webb contends that the changes made to the Tribunal’s role over the past decade,
and particularly in 2012, are not as dramatic as some people assume (interview 2014). The statutory powers of the Tribunal have not substantively changed since its inception; it still has the jurisdiction to mediate and to conduct reviews and inquiries, and does so when requested by the Federal Court. Webb indicates that she is “pushing for” the use of the Tribunal’s review and inquiry functions, and contends that “there is a great deal that we can do with the Federal Court and the Tribunal working together” (interview 2014). In the meantime, however, the vast majority of claims, including those subject to overlap disputes, are no longer referred to the Tribunal, but rather are directly supervised by the Federal Court.

Overlap disputes and the Federal Court

The NTA initially prescribed a process by which all Native Title claims had to be referred to the Tribunal for mediation. In the mid-2000s the Federal Court began to take a more assertive role in the management of claims. As a Federal Court judge explains,

… what really happened from about 2006 … was the judges said, “well, we are getting reports from the Tribunal saying ‘We are mediating, give us another six months. We are mediating, give us another six months’ … In fact, they were trying to bring people together to try and sort themselves out without any positive intervention. So the judges who were responsible for these cases said “you’re taking too long, so we are going to start intervening.” So we started to do what we called case management, which was mediation with a bit more head thumping, if you like … under the threat of a [court] hearing (anonymous interview 2014).

Many of the people I interviewed indicated that the threat of a trial provides a powerful incentive to address overlap disputes. First, the imperative to prepare evidence for trial compels the parties to disputes to come to grips with the evidentiary basis of their claims. A concern for claimants is that their evidence will be challenged in court by another
claimant with an overlapping claim, which, as noted earlier, can result in the Federal Court ruling that neither party has proven Native Title. Second, the threat of a trial incentivizes the resolution of overlap disputes because, as McCaul explains, “nobody really wants to have their matter heard [by the court], because it is not a very friendly process and a very expensive process for everybody” (interview 2013).

A Federal Court judge outlines three ways overlap disputes have been addressed under the supervision of the Federal Court:

The first is to ... use a registrar mediator or an external mediator to go and talk [with] the people who are involved in the overlap, and see if they can sort it out. Commonly they will sort it out. [The claimants] will say, “as between ourselves, where you want something on our side of the line, we will recognize, as a matter of agreement, that you have these rights.” And that is recognized under an ILUA. A second device is a mediation in an area where there’s a whole lot of overlapping claims ... put all the people together ... with a whole team of anthropologists and a whole team of lawyers ... and people agree to either to abandon their claims or do an ILUA [to address] the overlaps. A lot of the claims are individual families so it’s ... a matter of defining and redefining who the right people for the country are. The third is ... you put all of the apical ancestors in[to the same claim] (anonymous interview 2014).

The quote above outlines a set of strategies echoed by most of the people I interviewed. Intra-Indigenous agreements concerning “shared country” can be given legal effect by ILUAs, that allow Indigenous groups to formalize relationships and communicate to the broader world which people have Native Title rights and interests where, and which Indigenous corporate bodies speak on behalf of rights-holding collectives (NTA, s. 24). ILUAs are registered in a national registry, which provides a mechanism for governments and land developers to ascertain the nature of Native Title rights and interests, and which Indigenous corporate bodies need to be consulted concerning proposed activities on the land.
Under the *NTA*, the Federal Court has the latitude to identify and attempt to address particular aspects of claims, such as an overlap dispute, without all aspects of the claim proceeding to trial (*NTA*, s. 86A, 88). For instance, in some cases a judge may appoint a mediator to attempt to address the specific question of which people should be included in a claim. If the mediator is unable to broker an agreement, the judge, “rather than hear the whole case”, may “put in place a system for the anthropologists to get together … and sort it out” (anonymous interview 2014). The colloquial term often used by people I interviewed to describe such processes is “hot tubs”, which are in fact expert conferences conducted under section 88 of the *NTA*.

As was noted earlier, the adversarial and sometimes litigious Native Title framework can tend to produce conflicting evidence, which is partly a result of each claimant group retaining their own experts and advocates. McCaul, who has been involved in “hot tubs” as an anthropologist, explains:

> Every party has their anthropologist. Good anthropologists will produce the information that is there and that is it, but you will always get people who barrack, for sure. Hot tubs involve putting a bunch of anthros together with some court registrars and they will keep you in the room until you come up with some sort of resolution. The Federal Court now very much tries to push you toward some kind of agreement (interview 2013).

Woolley adds that the Federal Court will sometimes retain an independent expert to evaluate evidence put forward by claimant groups and their respective anthropologists. Woolly provides an example that was part of a mediation the Federal Court conducted:

> It was part of a complicated situation where there were three overlaps, and we were able to negotiate with one of the other groups. This was a classic example [where] someone who was erudite and well considered … was able to analyze the reports of two anthropologists in relation to both groups, and sort the wheat from the chaff.
And the respective groups on both sides saw the merit of acknowledging what he was saying.

But interestingly the third group was not prepared to accept it. They had their own anthropologist who was rather opinionated and so research wasn’t the key to unlocking that one. The key there was rediscovering their links. We had a mediation with lawyers and everyone had their hired guns, and at some stage one of the Aboriginal leaders said “this is all bullshit. We’re all a part of the same group.” And others said “Yaya, okay, lawyers out!” And we all went out of the room and they resolved it. This was after more than five years of going at it. People just finally saw common sense (interview 2014).

Woolley’s point concerning Indigenous groups “rediscovering their links” was echoed by many of the people I interviewed. Research can demonstrate the links between people as much as it can establish boundaries between them. Sharing of information can lead to recognition of the relatedness of people, and thus facilitate combining the claims of disputing claimant groups into one larger claim. There was also near-consensus among people I interviewed that the kinds of court interventions discussed above – directly appointing mediators, employing expert conferences, imposing deadlines, and ultimately forcing matters to trial if necessary – has dramatically increased the rate at which overlap disputes are being addressed and claims settled. However, there were also a number of concerns with the Federal Court taking what some consider to be a heavy-handed approach.

Kevin Smith agrees that “there has been a level of efficacy in [the Federal Court’s] strategy, because there are outcomes,” yet his concern is that outcomes derived from court-driven processes may not be durable:

What we have seen is litigation becoming a first resort instead of a last resort, and we are not having regard to other modalities of ADR [Alternative Dispute Resolution]. You can have hierarchies of ADR. Unfortunately, all of those ADR mechanisms haven't really had the opportunity to bear down. [The Federal Court is now] basically
saying, “well, we don't believe in that. Let's just get an outcome. It's going to be faster if we just put everyone to proof,” and whoever wins at the end of it is the winner.

These bare determinations don't really take into account how those rights and interests are going to be applied on the ground. If those things are not dealt with up front, there can be problems with implementation, [which] could actually cause litigation further down the track (interview 2014).

McCaul, for instance, argues that that the practice of aggregating multiple claims into one larger claim may not be a durable strategy for addressing overlap disputes in some situations:

There was a claim where that tactic was used, with the State Government having quite an active role … in suggesting that these overlapping claims could be resolved by aggregating the claims, because the people were all related. And that hasn't worked very well. There has been a lot of fighting. It is a very volatile claim. There is no overlap strictly speaking, but underneath it there is a continuous risk that it will fall apart (interview 2013).

The concern of some, then, is that rushed strategies, or those mainly employed for the sake of avoiding a trial, will prompt what are commonly called “second generation issues”: disputes that arise after determinations are made. In Smith’s view, overlap disputes “need a space to breathe”, or will “just create another raft of litigation.” In Smith’s opinion, … the Tribunal should be playing a greater role in overlapping disputes. The Federal Court has got the necessary rigour but, where you have overlapping claims, there needs to be a parallel process where people can exit the litigation side. These disputes are really people issues, [and] courts aren't interested in people issues. I think overlaps should be kept out of the Federal Court, so that people can unpack those underlying issues that cause lateral violence, and the Federal Court needs to countenance this, and be patient. There has to be a political solution (interview 2014).

Legal scholar and Indigenous activist Larissa Behrendt, who has written extensively
on the issue, suggests that addressing overlap disputes requires that “both the human [and] historical aspects” be “unpacked”, which is “impossible for a court”:

The Federal Court would never look at those human interactions and the long-running feuds. Opening it up to different process where the parties can be empowered to tell their own stories and find their common ground would be really useful, but you are never going to get that in an adversarial setting.

[People need to] feel like they have got their point across, but critically more important is making them feel like they are invested in the outcome, because they have worked towards achieving it. You’re not going to solve an overlapping claim unless people feel like they are invested and represented in the outcome.

Being able to tell multiple stories in different ways is very important. To be able to give evidence of connection [to country] through song or a painting means that you are opening up lots of different ways for people to express themselves. In traditional culture dispute resolution is a very lengthy process because everyone got to tell their story … even if it is an emotional story.

How do you reach that point? I don’t think you get there through the Federal Courts, and I don’t think you get there by having experts to argue the matter. You get there by having people themselves to work it out and to give an answer (interview 2014).

Like Smith and others I interviewed, Behrendt is of the opinion that the Tribunal and the Federal Court generally employ conventional Alternative Dispute Resolution techniques (see Chapter 3), and that the model should have been (and should be) “pushed further to really encompass dispute resolution processes that went beyond Western-style mediation” (interview 2014). In Behrendt’s view, “the tribunal had an important purpose in trying to keep claims in a context where they could be negotiated and sorted out without having to be adjudicated, [but] it could have been done in a much more radical way” (interview 2014).

Rep Body lawyer Tim Wishart agrees:

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I think our courts have got to lose the notion of formal, white fella-based mediation where people are rushed and stampeded, and look for much more culturally appropriate ways of dealing with these sorts of disputes. If a more appropriately designed process is put into place, and people are given time and space to resolve the dispute, there is likely to be a more sustainable outcome (interview 2014).

The arguments for and against court intervention in overlap disputes are far from settled, as are questions concerning the rate at which the Federal Court should be forcing such matters to trial. Moreover, to suggest that this debate is simply between those who are for and against court intervention in overlap disputes would be an oversimplification. Regardless of where one stands on “the mediation versus adjudication” question, the reality is that even politically derived consent determinations must be consistent with the evidentiary basis of claims. Politically driven processes and outcomes must be supported by evidence, and the Federal Court ultimately decides whether the standard of proof has been met.

The tension between legal, evidence driven processes and political efforts to reach settlements is especially difficult in areas where the colonial footprint is heaviest. It is particularly difficult for Indigenous groups to establish in evidence continuous connection to land and custom where state interventions have profoundly undermined Indigenous societies. Almost all of the State of Victoria has been taken up by settler society, and thus it has one of the highest levels of extinguishment of Native Title (RPFCP 2011; Bauman et al. 2015). Field work for this inquiry involved two visits to Australia. Many of the people I spoke with during my first visit suggested that I investigate the settlement framework of the State of Victoria, and particularly a State-wide initiative specifically intended to address

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131 See, e.g., the Yorta Yorta case mentioned earlier.
overlap disputes – the Right People for Country Program. I interviewed four people directly associated with the initiative in 2014. The next section describes my findings.

**The Right People for Country Program**

In 2008, the Steering Committee for the Development of a Victorian Native Title Settlement Framework was established to “develop jointly a draft Victorian Native Title Settlement Framework” (hereafter, “the Framework Committee”) (DOJ et al. 2008). According to the Framework Committee, “Native title as it was applied in Victoria was proving too cumbersome, complex, costly and litigious and was delivering only ad hoc and limited outcomes” (Ibid., 19). Dean Cowie, Manager of the Victorian Department of Justice’s Native Title Unit, describes the motivation of the Victorian Government for supporting an alternative to the federal Native Title framework:

> We counted up the money that was spent on lawyers, researchers, and salaried government officers who were part of the system to respond to Native Title claims. We figured out that we were spending about 80 percent of the money on the transaction costs as opposed to about 20 percent on money used for actual benefits [going to claimant groups]. So you might end up winning in court ... but ... at the end of that, as a government, you still have a significant group of the population who are deeply unhappy and still identify strongly with their country, and are going to be part of life forevermore. So the fact that technically no legal Native Title exists anymore is kind of irrelevant when you look at how a government responds to a particular group of its citizens (interview 2014).

A primary goal of the Indigenous representatives on the Framework Committee was

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132 The Framework Committee was chaired by Native Title scholar and Indigenous activist Professor Michael Dodson, four representatives of Traditional owner groups, one representative from the Representative Body for Victoria, and four senior State Government officers. The Commonwealth Government was not represented on the Framework Committee but attended all meetings and provided advice. The Framework Committee was mandated to “[t]o oversight and guide the development of a Victorian Native Title Settlement Framework (‘the Victorian Framework’) … by consensus” (DOJ et al. 2008, 72).
to create opportunities for “a greater range and level of outcomes in the State’s approach to land settlements than has been achieved in the past in Victoria…” (DOJ et al. 2008, 10). A chief goal of the Victorian Government was to achieve “finality and certainty through the resolution of claims,” including the “finalization of claims through the binding mechanism of a registered Indigenous Land Use Agreement” (Ibid., 11).

The Framework Committee’s report identified “intra- and inter-Indigenous disputes over group composition and boundaries” as a significant barrier that “stand[s] in the way of the resolution of native title” (Ibid., 17). The Framework Committee also found that such disputes were a barrier to Indigenous groups being recognized as Registered Aboriginal Parties under the Victorian Aboriginal Heritage Act, which provides for Indigenous group involvement in the management of Aboriginal cultural heritage. The Victorian Government thus has strong reconciliatory and economic imperatives to ensure that it deals with the appropriate Indigenous group/s concerning specific land, as Cowie explains:

We don’t want to be dealing with these [overlap] issues when assets are at stake, or at the eleventh hour when we are reaching an agreement. That’s too late. We want to deal with them at the foundation … and make sure that we’re talking to the right people. We want to be able to make an agreement with them because there is a host of future activities that they have to be involved in legally, under the Native Title Act. Unless you have an agreement, you’ve got complications about how you negotiate consent with that group in the future if there is a mine or another major public works that needs to happen on that land (interview 2014).

To address these concerns, the Framework Committee proposed “a non-litigious process, supported by adequate research, whereby the aim would be to seek agreements [concerning overlap disputes] based on the knowledge and consent of all parties” (DOJ et al. 2008, 17). The Framework Committee argued that the Victorian Government “has a role to play in supporting structured and concerted efforts to resolve [overlap] disputes,” but that
such efforts should be “Indigenous led [...] and] based on the principle that recognition by other Aboriginal people is an integral element of establishing Traditional Ownership” (Ibid., 17).

In 2009, the Victorian Government adopted the Framework Committee’s recommendations as its preferred approach to settling Indigenous claims (RPFCP 2011; Bauman et al. 2015). In 2010, the Victorian parliament passed the *Traditional Owner Settlement Act*, which established an out-of-court, agreement-making process intended to address Native Title and land rights claims. Settlements reached under the legislation typically involve the return of some land to Indigenous groups, joint management of parks and reserves, funding arrangements, and consultation protocol concerning future use of agreed upon areas (Cowie interview 2014; Lenffer interview 2014; Bauman et al. 2015). The *Traditional Owner Settlement Act* is said to provide an alternative to the Native Title framework (RPFCP 2011; Smith 2013; Bauman et al. 2015). Yet agreements are given legal effect under the *NTA* by their inclusion in registered ILUAs, which prohibit all holders of Native Title in agreement areas from making Native Title or compensation claims in the future (RPFCP 2011).

In 2009, in response to the Framework Committee’s recommendation concerning overlap disputes, the Right People For Country Project Steering Committee (hereafter the RPFCP Committee) was established to “provide support for resolving intra and inter-Indigenous disputes to assist Traditional Owner groups reach agreements regarding boundary, group composition and other key issues” (RPFCP 2011, 55). According to its terms of reference, the RPFCP Committee’s “role is to develop a non-litigious process, supported by adequate research, which aims to achieve agreement based on the knowledge
and consent of all parties” (Ibid.) The intent is that it would be “an Indigenous-led process based on the principle that recognition by other Aboriginal people is an integral element of establishing traditional ownership and be consistent with the principles of empowering the community in decision making and self determination” (Ibid.).

Aligning overlap dispute management with the legislative framework

The Victorian Government’s settlement framework explicitly accounts for the need to align Indigenous agreement-making concerning overlap disputes with Indigenous-State initiatives. Sally Smith, the Manager of the Right People for Country Program (hereafter “the RPFCP”), explains the imperative for a new approach to the management of overlap disputes in Victoria:

Nothing else has worked. It was really the first time that Traditional Owners and the State Government had sat down together to look at these disputes. In the past, Traditional Owners have said, “This is our business. We're not prepared to talk about it with the State Government.” But there was recognition that the government had a role to provide support to Traditional Owners, but also to clarify its own processes so that agreements that Traditional Owners might make are actually respected (interview 2014).

Agreement-making supported by the RPFCP is driven and shaped by broader Indigenous-State processes and legislation. The Victorian Government’s approach is not just to financially support management of overlap disputes, but to play an active role in providing the imperative, means, and a framework for doing so. As Sally Smith notes

133 The RPFCP Committee has been chaired by a Traditional Owner since its formation, and in addition to the Chair is comprised of two representatives of the Victorian Aboriginal Heritage Council, two representative of the Victorian Traditional Owner Land Justice Group, two senior State Government officers, and a representative of the Rep body for Victoria. “Decision making by the Committee is by consensus” (RPFCP 2011, 55).

134 The name “Right People for Country Project” was changed to the “Right People for Country Program” in 2015, indicating an intention to continue the initiative.
(above), a goal of the RPFCP is to facilitate agreements which are effective, which is to say that they must meet evidentiary requirements in order to achieve legislative effect. As with Native Title determinations under the *NTA*, under the Victorian legislative framework, group composition and territorial definition must have an evidentiary basis in traditional law and custom.

These requirements – standards of evidentiary rigour and specificity – are documented in the Victorian Government’s *Threshold Guidelines* (DOJ 2013), which arose out of the recommendations of the Framework Committee discussed above (DOJ et al. 2008). The Framework Committee recommended that the Victorian Government develop a “collaborative, non-adversarial, transparent and consistent approach” to establishing two key thresholds as a prerequisite to entering into settlement negotiations: 1) the claimant group must demonstrate that it represents the “right people for country”; and 2) the claimant group must have the “negotiation capacity” to enter into meaningful negotiations (Ibid., 81). The *Threshold Guidelines* were developed concurrently with the establishment of RPFCP, the two processes influencing each other (Cowie interview 2014; Lenffer interview 2014; Bauman et al. 2015).

In order for an Indigenous group to enter into negotiations, the group must submit a “threshold statement” to the Victorian Government that details, among other things, the criteria by which the group is defined, and the evidentiary basis of the group’s territorial claim (DOJ 2013). Once submitted, the Victorian Department of Justice evaluates the evidentiary rigour and completeness of the threshold statement, including aspects related to overlap disputes (Ibid.). Anoushka Lenffer, a Policy Officer with the Victorian Department
of Justice,\textsuperscript{135} and Cowie,\textsuperscript{136} describe the process by which Indigenous claims are evaluated by the Victorian Government:

In a threshold statement the group has to put forward a description of who they are and the country for which they say they are the Traditional Owners, but they also have to provide a basis for that, and that comes from research – historical and anthropological research. They are threshold guidelines because we didn’t want to set it up as a test as such. It is much more of an iterative process of discussions about the issues (Lenffer interview 2014; original emphasis).

The idea is that the threshold evaluation process be an iterative process to try to identify what [evidence] is weak or not sufficient, and for people to go away and find that [information] and to bring it back. So it is not a pass or fail thing, it is a matter of “look, this bit is weak, this bit needs some attention, you need to talk to these people, you need to cover this base (Cowie interview 2014).

Once we have evaluated the [threshold] statement we then test those issues of right people for country with the wider community. We ask people outside the group, “would the Government be sitting down with the right people for the country? Does it involve all the right people? I think it is also very important to be seeking the views of the neighbours because it gets away from the very circular notion of the groups defining themselves [in isolation of other groups] (Lenffer interview 2014).

The Victorian Government’s Threshold Guidelines stipulate that the evaluation is not a legal test (DOJ 2013, 32). However, the criteria against which threshold statements are evaluated overlaps considerably with the evidentiary criteria set out in the NTA (s. 223). An important distinction between the Victorian process and the Native Title framework is that the Victorian process explicitly acknowledges situations in which research may be inconclusive concerning group composition and/or extent of a group’s customary territorial interests (DOJ 2013, 43). In the Victorian context, if research is inconclusive, or contested,

\textsuperscript{135} Lenffer was a principle author of the Victorian Threshold Guidelines, and is also a member of the RPFCP Committee.

\textsuperscript{136} Lenffer and Cowie were interviewed together.
this is seen as an opportunity for political negotiation between and among Indigenous groups. The Victorian threshold process is nonetheless unmistakably research-based: political agreement-making concerning group composition and extent of territory must conform to the evidentiary parameters set out in the *Threshold Guidelines* (DOJ 2013, 37-43). The Victorian Government requires a “robust basis or rationale for the traditional owner group and their traditional and cultural association to particular country. This basis draws, albeit not exclusively, on the research findings” (Ibid., 13).

As Lenffer and Cowie indicate (above), another key distinction between the Victorian settlement process and the Native Title framework is reflected in the Victorian Government’s commitment to work collaboratively with Indigenous groups to achieve settlements. This commitment is evident is the Victorian Government’s proactive approach to supporting Indigenous groups to make decisions concerning overlap disputes, as evinced by its endorsement of core principles identified by the RPFCP Committee. In 2011 the Victorian Government committed base funding to the project, and specifically earmarked funding to conduct three overlap dispute pilot projects over 2011 and 2012.

**RPFCP pilot projects**

The RPFCP was initiated by seeking expressions of interest from Indigenous groups, from which three pilot projects were selected by the RPFCP Committee. The pilots encompassed both group composition and extent of country issues, and involved groups at different stages of negotiation readiness. As Sally Smith explains, the RPFCP chose to approach disputes concerning group composition and boundaries differently, while also recognizing that the two issues are intimately related:

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137 Core principles identified by the RPFCP Committee are summarized in Appendix C.
I suppose the reason why we talk about these [group composition and extent of country] issues separately is that the approach needed is quite different… Disputes within a group are [often] about who should be in the group and how are they going to work together. So, that's not to say that some of those issues don't arise in boundary matters as well, but, generally, they can be managed within the group. With these boundary matters, this is generally where groups have already sorted out those [group composition] issues (interview 2014).

**Group composition and representation pilots**

The two group composition pilots involved questions concerning group representation and membership. In one case, two corporate entities claimed to be the appropriate representative of more or less the same constituency, both vying unsuccessfully for formal recognition by the Victorian Government. The other group composition pilot concerned whether or not particular families should be included in a group (Sally Smith interview 2014; Baumann et al. 2015). Negotiations between one group and the Victorian Government had stalled because of ambiguity concerning group composition. Two other groups were unable to enter into negotiations with the State because of contestation concerning which organizational entity should represent the group (Moxham 2012).

A key support provided by the RPFCP in the group composition pilots was the engagement of independent co-facilitators chosen by the Traditional Owner groups from a list compiled by the RPFCP. The RPFCP also coordinated meetings, logistics, and mapping, as well as legal advice and research provided by the Rep Body for Victoria (Sally Smith interview 2014; Bauman et al. 2015). Sally Smith describes the approach of the RPFCP:

There has been a tendency to address group composition issues by calling a really big meeting, inviting everybody possible, [and …] expecting it will be resolved in one or two days by applying a majority vote of whoever turns up to the meeting. Really, this makes things worse, in my opinion. So, we have an approach of having small meetings with different family groups, of ensuring everybody has got the
information, of gaining consent and being very purposeful about how we bring people together. When we do bring people together, [we facilitate conversations] about how they will make decisions, rather than just applying the majority vote (interview 2014).

Following this approach, facilitators convened a series of family and small group meetings to discuss approaches to decision-making. Only after relationships had warmed, and groups/families were comfortable with an agreed-upon approach to decision-making, was detailed genealogical research considered. As of 2015, an agreement had not yet been reached in the case of the representation dispute. Concerning the group composition dispute, an agreement was reached to include all the Traditional Owners for the proposed settlement area (Bauman et al. 2015).

The boundary pilot

The “boundary pilot” involved overlap disputes among three Indigenous groups. One group was already engaged in negotiation with the Victorian Government under the Traditional Owners Settlement Act 2010 and was receiving research and legal support from the Rep Body. Each of the three groups had already been appointed as a Registered Aboriginal Party under the Victorian Aboriginal Heritage Act 2006, but only for undisputed areas of their asserted territories (Bauman et al. 2015; Moxham 2012). The group already in negotiations with the Victorian Government needed to reach boundary agreements with their Indigenous neighbours if any of the contested area was to be included in their settlement (Moxham 2012; Bauman et al. 2015).

In the boundary pilot, the RPFCP provided project planning, coordination, and four days of negotiation skills training to one group to develop its capacity to negotiate. The RPFCP also provided funding to cover “cultural services fees” for Indigenous
representatives to jointly review research and maps, “walk country”, and document agreements (Bauman et al. 2015; Moxham 2012). As Sally Smith explains,

… walking country doesn't mean literally walking country. It's a cultural term which means, for Traditional Owners, that they appoint a number of negotiation representatives who review the research, get out all the maps, look at where their boundary might be, where the issues are, plan for where they are going to go out and visit country, and who needs to go. They go out on country. They visit key sites along the boundary. They map their boundary. They also document … stories and cultural heritage sites (interview 2014).

Rodney Carter, a Traditional Owner who was involved in the boundary pilot, describes “walking country” as a process of “following old ways, but using modern tools”:

Maps were spread out as broad as the rooms we met in, laid flat for our bird’s eye view of the world, to talk about and share what we already know of the lands and waters and the special places that it held. We captured much of the journey electronically as data – you cannot see it, feel it or taste it, but the data provides a means to be applied to the decision-making processes. It is used in the maps, it captures our voice, it captures our places and animals (quoted in Bauman et al. 2015, 83).

The boundary pilot resulted in two boundary agreements that where critical to reaching a settlement in 2013 under the Traditional Owner Settlement Act 2010 (Cowie interview 2014; Lenfer interview 2014). The boundary agreements also resulted in the recognition of the three groups under the Aboriginal Heritage Act 2006 for their respective, agreed upon areas (Bauman et al. 2015).

Independent evaluation of the pilots

The RPFCP commissioned an independent economic cost-benefit analysis of the pilots (Daly and Barrett 2012). The analysis identified costs related to employing facilitators, providing training, walking country, meetings, and payments to Traditional Owners for their
time and expenses. The cost-benefit analysis found that government savings were realized through reduced legal and administrative costs, reduced costs associated with land dealings, greater efficiencies for government in its heritage management responsibilities, and enhanced capacity to reach and manage settlements under the *Tradition Owner Settlement Act 2010*. The analysis indicated that every dollar spent by the Victorian Government on the RPFCP returned savings of $3.80 (Daly and Barrett 2012). As Cowie notes (above), an earlier analysis found that by 2008 the Victorian Government had spent in excess of 40 million dollars responding to Native Title claims covering only fifteen percent of crown land in Victoria (DOJ 2008). Of this $40 million, eighty percent had been spent on what are generally referred to as “transaction costs” (legal, technical and administrative costs,) while just twenty percent had been invested in settlement benefits for Traditional Owners (Ibid.).

The RPFCP also commissioned an independent qualitative evaluation of its approach to the pilots (Moxham 2012). The evaluation found that RPFCP pilots “created new pathways for dispute resolution and agreement-making that were otherwise not available,” strengthened Traditional Owner relationships, and increased Traditional Owner capacity to make agreements (Moxham 2012, 6). The evaluation also found that the RPFCP played an important role in coordinating the efforts of Victorian Government ministries and Native Title Services Victoria in ways that supported Traditional Owners making their own agreements. The evaluation noted that the RPFCP “negotiated and brokered space and support” within government processes for Traditional Owners to make agreements, that “enabled Traditional Owners to take the lead in making their own agreements” (Ibid., 6).

The evaluation identified a set of “critical success factors” that provided a foundation on which the pilot projects were built, most of which overlap with the core principles
identified by the RPFCP Committee mentioned earlier:

- The pilots were Traditional Owner-led, and involved Traditional Owners working with the RPFCP to design the overlap agreement-making process, identifying the support they needed, and selecting the appropriate facilitators;

- The RPFCP offered flexible and tailored support to Traditional Owners, which included, as required, facilitation, coordination of stakeholder services, and support for specific initiatives such as small family meetings and walking country;

- The pilots focused on strengthening Traditional Owner capacity, and involved the RPFCP providing negotiation skills training and support for strengthening of cultural knowledge through sharing of research and walking country;

- The RPFCP coordinated a collaborative partnership of stakeholders – including Traditional Owners, Native Title Services Victoria (a Rep Body), and various government ministries – which leveraged existing expertise and resources;

- Traditional Owner leadership of the RPFCP Steering Committee was vital in building legitimacy and trust of the initiative, which was essential to Traditional Owners’ willingness to enter into overlap dispute agreement-making in the first place.

These “critical success factors” (Moxham 2012) are reframed as key lessons in the next section.

**Key lessons derived from the RPFCP**

*Indigenous agency and leadership*

Sally Smith identifies “Indigenous-led agreement-making” as the RPFCP’s “core
principle”, which “is applied at every stage of agreement-making” (2013, 3). For instance, Indigenous group participation in the RPFCP is initiated by the submission of an expression of interest by representatives of Traditional Owner groups. These groups identify, in collaboration with the RPFCP, the types of support they would like to receive. When needed, the groups attempt to agree on specific facilitators. Indigenous groups work towards their own agreements, suited to their own needs, but which also aligned with the legislative framework of the Victorian Government (Smith 2013; Bauman et al. 2015). Bauman (interview 2014) and other key individuals involved in the RPFCP contend that Indigenous leadership on the RPFCP Steering Committee is critical to the RPFCP’s credibility in the eyes of the Traditional Owner community (Bauman et al. 2015; Lenffer interview 2014; Sally Smith interview 2014).

Agreement-making in such bi-cultural contexts requires trust. To enter the RPFCP arena Indigenous groups must trust that the process will be fair: that groups better resourced with lawyers and researchers will not for this reason be privileged over others. The decision to provide financial and in-kind support to the project also requires the Victorian Government to trust that group representatives are sincerely committed to agreement-making, properly authorized to make decisions on behalf of their constituencies, and that agreements will be respected. The independent evaluation found that the leadership provided by Traditional Owners on the RPFCP Committee was an important aspect of achieving trust and understanding among Indigenous groups and other partners, and thus cultivated an environment where leaders of Indigenous groups were willing to voluntarily engage in the process (Moxham 2012). Essential to building this trust was effective communication of the roles of the RPFCP and its partners, the legislative framework, and
providing adequate time and resources (Moxham 2012).

That Indigenous leadership and agency is a critical aspect of processes aimed at addressing overlap disputes in an entirely uncontroversial finding. In this context, however, one aspect of the RPFCP stands out from dispute management processes discussed in this and earlier chapters. At its core, the RPFCP is a collaborative partnership between Traditional Owner groups and a public government.

A collaborative partnership

The RPFCP’s role is complex. It requires coordination of a diverse group of partners which often have disparate goals, spheres of influence, and priorities. It involves coordinating information sharing and services among groups and partners that may have a history of disagreement or animosity (Moxham 2012; Bauman et al. 2015). Part of the role of the RPFCP is to coordinate information sharing and the contributions of these diverse actors, and to ensure that the Victorian Government plays a constructive role. As Sally Smith explains,

> [o]ften government gets in the way, or stakeholders get in the way and make disputes worse. A big part of my role is coordinating all the stakeholders so that we're not making the matter worse, and that we are being really clear about [the] requirements under our legislative framework. Being really clear about those things upfront is absolutely critical (interview 2014).

The role of the RPFCP, then, is not only to provide financial resources critical to Indigenous group agreement-making. It coordinates interactions and information sharing between and among Indigenous groups, government ministries, and a Rep Body. As Sally Smith indicates, public governments can get in the way of agreement-making and can sometimes exacerbate disputes. As a government initiative, the RPFCP is intentionally
housed within the Victorian Department of the Premier and Cabinet in order to maintain independence from other partners within government, particularly the Department of Justice which ultimately decides with which Indigenous groups the Victorian Government will negotiate. Maintaining independence from other government ministries enhances its ability to address a core principle identified by the RPFCP Committee: to address institutional, policy, and other systemic barriers to agreement-making (RPFCP 2011; Moxham 2012; Sally Smith interview 2014).

The RPFCP is Indigenous-led in that participating Indigenous groups choose and control the process by which agreement-making occurs, yet the Victorian Government also plays a significant role in making clear its interests in the process, by financially investing in Indigenous agreement-making, and by providing, through the office of the RPFCP Manager and staff, project planning, monitoring, and coordination of the contributions of partners. A significant lesson derived from the RPFCP is that such a partnership is indeed possible and can achieve clarity of Indigenous jurisdiction, and that financially supporting such an initiative can be a sound economic investment.

The benefits and limitation of ethno-historical research

Research can focus on establishing the interests of a particular group. As a result, groups well supported with resources for research may appear to have predominant interests in an area principally because the research thus far completed has focused primarily on their claim. A benefit of the RPFCP is that it attempts to level the playing field between Indigenous groups by “provid[ing] more support to the group with the lower level of capacity, and negotiating longer time frames to allow them to catch up” (Sally Smith interview 2014). Even when the disputing groups are equally resourced, however, research
can be inconclusive or contradictory. As Sally Smith notes,

… because of the history of colonization [in Victoria], often the research is patchy and conflicting. It's not determinative. It's not going to provide the answer. So, it’s really on that basis that the State is then saying, “reach an agreement that is not in conflict with what the research says and we will respect that.” The fact that there is not a lot of research in some areas makes things more difficult, but agreement-making is the opportunity to develop a contemporary solution (interview 2014).

The Victorian Government’s Threshold Guidelines also acknowledge that research can be inconclusive and/or contradictory in some situations (DOJ 2013). Bauman and others (2015) contend that the RPFCP “can assist Traditional Owners to identify how to engage with and share research findings in their decision-making … [so that r]esearch thus becomes an information tool that informs negotiations, rather than being the predeterminant of a particular outcome” (93). A benefit of the RPFCP, then, is that it creates space for dialogue about the evidentiary basis of claims, which allows Indigenous groups to imagine and define their connection with land in ways not imposed by the prescriptive regime of the NTA. As one Traditional Owner involved in a RPFCP pilot notes, “reviewing the historical research was useful because we could see it was up to us as Traditional Owners to work collectively to come up with an agreement” (quoted in Bauman et al. 2015, 93). A key lesson derived from the RPFCP is that it is possible to effectively manage overlap disputes within a process that is neither entirely evidence-based nor entirely political.

Capacity and readiness

The Victorian Government attempts to support Traditional Owners to address key organizational issues early in the negotiations process. Cowie, for instance, echoes the point noted earlier concerning the circular notion of groups defining themselves in isolation from other groups (interview 2014). Claims defined without regard to the relationships between
and among groups are particularly vulnerable to overlap disputes. As Cowie suggests, claims can be made on the basis of a group’s “own self-belief about who they are and where their country is, but … the next step is to ask ‘is there anyone else who objects to the [claim]’” (interview 2014). In Cowie’s view, such an approach “doesn’t suit situations where the neighbouring groups might be at different stages of capacity or development” (interview 2014). A challenge is that groups without clearly defined membership and territorial interests may object to the settlements of neighbouring groups not because of disagreement per se, but because of ambiguity and uncertainty. The Victorian Government recognizes that to accomplish the goal of reaching settlements with all Traditional Owner groups, questions concerning membership and territorial interests must be sorted. To do so, Traditional Owners must have the capacity to make durable decisions on behalf of defined groups.

The independent evaluation of the RPFCP pilots identified four “core capabilities” critical to effective Traditional Owner agreement-making in this regard: 1) strategic negotiation skills; 2) group decision-making capacity; 3) ability to manage internal disputes and difference; and 4) organization capacity to manage logistics and external experts (Moxham 2012, 6-7). The evaluation noted that skills and confidence in agreement-making varied significantly among claimant groups prior to the pilots. Where decision-making capacity was low, agreement-making was slowed or stalled. Where decision-making capacity was a barrier to agreement-making, in some instances the RPFCP took measures to build skills and capacity (Sally Smith interview 2014; Bauman et al. 2015). That decision-making capacity is a prerequisite to durable agreements is an uncontroversial finding. A significant lesson to be learned from the RPFCP in this regard is that a public government can effectively support the development of capacity in the Indigenous groups with which it
wishes to settle. Governments have a profound interest in doing so, particularly where disputing groups are at different levels of capacity and readiness to negotiate.

**Timelines, milestones, and incentives: Early support yields dividends**

All agreement-making processes are subject to constraints of time and resources. Time and resources required are difficult to predict, and vary according to readiness and decision-making capacity, complexity of the dispute, and the intransigence of those involved (Moxham 2012; Bauman et al. 2015). Where positions are particularly polarized, greater investment of time and resources is needed in order to achieve durable outcomes. Disputes tend to become more intractable if left until one group is more advanced in negotiations with the state than others. Hastily conceived agreements driven by externally imposed deadlines are less likely to be durable in the long run (Bauman interview 2014; Kevin Smith interview 2014; Sally Smith interview 2014; McCaul interview 2013; Moxham 2012). The Victorian settlement framework, and particularly the State’s *Threshold Guidelines*, aim to ensure that overlap disputes are not left to the last minute. Traditional Owner groups are required to describe, in their threshold statements, their efforts to reach agreements with neighbours prior to start of substantive negotiations under the Traditional Owner *Settlement Act 2010* (DOJ 2013; Cowie interview 2014; Lenffer interview 2014).

There will always be a tension between establishing deadlines for agreement-making and allowing sufficient time to build durable agreements. The imperative for Traditional Owners to reach agreements in order to achieve settlements within the broader Victorian settlement framework provides an incentive for agreement-making, but it can, if not carefully managed, limit time for capacity strengthening. The evaluation of the pilots found that such tensions can be mitigated by supporting agreement-making and capacity strengthening early
in the settlement process. As the evaluation noted, “earlier support … will provide opportunity for deeper and longer term capacity strengthening” (Moxham 2012, 9).

The Victorian Government will not settle agreements concerning land that is subject to overlap disputes. Settlements are geographically exclusive and must not overlap. Thus, the Victorian settlement framework itself provides an incentive for agreement-making concerning overlap disputes. The RPFCP negotiates milestones with traditional owners and other partners, and making progress towards these milestones is a requirement of continued support from the RPFCP (Sally Smith interview 2014). Concerning timelines and incentives, two key lessons are evident. First, allowing sufficient time to plan and negotiate the agreement-making process itself, including establishing deadlines, is critical to achieving positive outcomes. Second, the goal of effective management of overlap disputes is not just to “get a deal”. In the Victorian context, a goal of overlap dispute management is for intra-Indigenous territorial agreements to achieve meaningful effect within broader Indigenous-Crown initiatives. Within the Victorian framework, intra-Indigenous agreements concerning Indigenous jurisdiction are given legislative effect by their recognition under the Aboriginal Heritage Act and by their registration as ILUAs under the NTA.

Relationships, relationship documents, and boundaries

Agreements derived from the pilots have provided a basis for recognition under the Cultural Heritage Act 2006 and for negotiations under the Traditional Owner Settlement Act 2010. These agreements were subsequently given legal effect by their inclusion in ILUAs. The

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138 It should also be noted that it may be possible for multiple Traditional Owner groups to form a single corporate body to negotiate an agreement with the State concerning an area traditionally shared among the Traditional Owner groups. In such an event, the State would consider the corporate body the authorized-decision maker with which it has an obligation to negotiate (Lenffer interview 2014).
ILUAs specify an explicit, linear boundary between settlement areas of each Traditional Owner group. This provides the clarity of Indigenous jurisdiction sought by the Victorian Government and by Indigenous groups themselves. Agreements derived from the pilots thus address the immediate question of how groups are constituted for decision-making purposes, and which groups are authorized to make decisions concerning specific areas.

Traditional Owners also recorded agreements in ways that served other purposes, such as documenting understandings concerning reciprocal cultural rights and intra-Indigenous consultation protocols, as well as documenting traditional knowledge through mapping of named places and stories (Sally Smith interview 2014; Bauman et al 2015). As Sally Smith notes, “[o]ne of the key things [Traditional Owners] said from the outset was that [overlap] agreements are relationship documents” (interview 2014). As Carter explains, agreements “set out the basis on which Traditional Owners will conduct relationships with each other into the future, [they] define us in the cultural landscape, and connect us with our neighbours (quoted in Bauman et al. 2015, 89).

Conceiving of Traditional Owner overlap agreements as “relationship documents” is a significant shift from approaches discussed in earlier chapters. Another paradigm shift involved reconceiving the meaning of boundaries. Just as agreements were framed as relationship documents, boundaries were reconceived as markers of those relationships, as Sally Smith explains:

What the Traditional Owners said, in those boundary matters, was that this isn't a boundary in the normal sense. It's not a line that divides us. It's a line that brings us together. From engagement early on, then through the pilot, people were saying, "[t]his is actually about our relationship. We would have had relationships pre-colonization. This whole process of walking country is about revisiting country together, and rebuilding a relationship as neighbours (interview 2014).
It would be difficult to overstate the significance of the shift from understanding boundaries as phenomena which separates people to understanding boundaries, and agreement-making generally, as something that strengthens relationships. This is perhaps particularly true in Australia where the federal Native Title framework is often adversarial, with different groups each having their own lawyers and researchers competing for recognition of the Crown. In the context of federal Native Title claims, the focus has often been on establishing boundaries in order to progress a claim through the Native Title system, which, as was discussed earlier, sometimes results in matters being adjudicated by the Federal Court. The concern noted by Sally Smith, above, was echoed by many of the people I interviewed: agreements hastily conceived for the sole purpose of progressing federal Native Title claims often exacerbate overlap disputes in the long run (McCaul interview 2013; Bauman interview 2014; Kevin Smith interview 2014; Sally Smith interview 2014; Wishart interview 2014).

A significant lesson derived from this aspect of the RPFCP is that a requirement for explicit boundaries delineating Indigenous jurisdiction does not preclude agreement-making in the context of overlap disputes. Indigenous groups can reach “internal agreements” concerning matters such as reciprocal cultural rights, consultation protocols, and sharing of benefits derived from areas in which two or more groups have shared interests. Cowie and Lenffer explain the Victorian Government’s position on the issue of geographic exclusivity of settlements:

… it’s up to [Traditional Owners] to organize those kinds of things, which is fine so long as they don’t impinge upon the interface that the wider world has with a group for a given area, because we want to set up a process where … we know which group we need to talk with (Lenffer interview 2014).
We don’t mind what they do internally, whether they have to talk to four different family groups before they make decisions, or whether they need to talk to their neighbours. But there is one [corporate] decision-maker [for each area], and that was important to get the support of government and to get the support of industry for what we were doing (Cowie interview 2014).

As a new initiative, it is difficult to know how the RPFCP will fare when it comes up against more difficult disputes, or how durable the agreements derived from the RPFCP will be. It would be naïve to assume that Traditional Owner agreements derived from the RPFCP would be immune to the kinds of “second generation issues” discussed earlier in this chapter. At this time, however, it is entirely uncontroversial to say that the RPFCP creates space for Traditional Owner agreement-making that explicitly aligns with the Victorian settlement framework, and so far has an excellent record of producing beneficial outcomes in a complex and costly policy area for the Victorian Government. To summarize, the RPFCP has created this space by employing a set of critical elements:

- Building partnerships within government, between government and indigenous groups, and between and among Indigenous groups;
- Recognizing and creating space for Indigenous leadership and agency in the process;
- Effective project planning, management, and coordination of information sharing and contributions of stakeholders;
- Supporting the development of Indigenous group decision-making capacity;
- Providing skilled and independent facilitators;
- Using ethno-historical research to support decision-making, rather than undermine it;
- Focusing on ongoing relationships;
Employing innovative techniques such as walking county and small family meetings;

Allowing sufficient time and resources for agreement-making; and

Aligning process outcomes with broader Indigenous-state initiatives whereby intra-Indigenous territorial agreements achieve meaningful effect by their recognition under the *Aboriginal Heritage Act* and by their registration as ILUAs under the *NTA*.

**Conclusion: Key Lessons**

This chapter has sought to explicate how overlap disputes have been managed in Australia, with a view to identifying strategies with utility for managing overlap disputes in BC. The Native Title framework was discussed, with focus on the roles of Rep Bodies, the Tribunal, and the Federal Court, each of which has employed different approaches to the management of overlap disputes with varied success. Rep Bodies have a statutory dispute resolution function, yet have proven largely ineffective in addressing overlap disputes. A key reason for this is that Rep Bodies have a number of roles that can come in conflict: they have a legislative mandate to advance the interests of all potential Native Title holders in their defined areas, yet at the same time are effectively required to focus their support on only a few Indigenous groups at one time. The result of this situation has been that Rep Bodies are sometimes seen as being too invested in the success of particular groups to play the role of neutral and objective facilitator of intra-Indigenous dispute resolution.

The Tribunal has and continues to have a dispute resolution function, yet according to many of the people I interviewed the Tribunal has not had a good record of producing agreements. A key reason for this has been that the Tribunal does not have the statutory jurisdiction to set meaningful deadlines. The result of this situation has been that claims, and
overlap disputes specifically, often become stuck in unproductive meditation for years. This is not to say that the Tribunal was or remains ineffective. Many disputes, including overlap disputes, were resolved under the management of the Tribunal, but it was a very slow process until the Federal Court started imposing greater control. Interestingly, the Tribunal’s powers of inquiry were not used until after the change in 2012, which, as was discussed, may indicate that the practices of the Tribunal have changed over the past few years and will likely continue to evolve.

The approach of the Federal Court to overlap disputes was also discussed, with particular focus on case management strategies such as directly appointing mediators, expert conferences (“hot tubs”), and scheduling trials to provide an incentive for disputing groups to seriously engage in mediation and the evidentiary basis of claims. Also discussed were some of the reasons the Federal Court’s more assertive approach may in fact be “papering over” underlying issues, and thus may not adequately address the need for Native Title outcomes to be acceptable and “owned” by the people impacted most by settlements. The danger with imposed or rushed dispute resolution is that it risks leaving unaddressed the underlying sources of disputes, which undermines the ability of people to effectively manage the land together.

And finally, the RPFCP was discussed. As a relatively new initiative, the RPFCP has had the benefit of lessons learned through the experiences of Rep Bodies, the Tribunal, and the Federal Court. Foremost among these is that public governments can play a proactive and constructive role in the management of overlap disputes. The Victorian Government has done this by providing a powerful incentive for Indigenous groups to address overlap disputes, and by establishing and supporting a collaborative framework that aligns with
broader Indigenous-state imperatives: to reach intra-Indigenous agreements concerning overlapping claims which are consistent with evidentiary standards, and provide clarity of Indigenous jurisdiction by having these agreements registered in the national ILUA registry.

In the next chapter I argue that BC would be well served by employing a commission of inquiry-style institution with jurisdiction to employ a number of the strategies discussed in this chapter, including, among other things, the mediation, review, and inquiry functions of Australia’s National Native Title Tribunal, strategies employed by the Federal Court such as expert conferences and the imposition of deadlines, as well as many of the strategies and principles employed by the RPFCP. I argue that the Crown and First Nations in BC should work collaboratively to establish a legislative framework to achieve clarity of Indigenous jurisdiction on a province-wide basis, and that this framework should involve a registry of territorial determinations, either by agreement or by recommendation of an Indigenous Territories Tribunal.
CHAPTER 9: A GEOGRAPHY OF RECONCILIATION

Effective and lawful management of overlap disputes in BC is not a simple matter of resolving contested boundary locations. These are complex disputes involving the characterization of Aboriginal rights and rights holders, Indigenous sociospatial identity, and ambiguity concerning the criteria by which territorial claims and settlements should be defined. At stake here are not only boundary locations but contestation over the meanings of boundaries and the forces implicated in their production. Accounting for such issues – the underlying sources of overlap disputes – is fundamental to designing a process for their effective and lawful management. In earlier chapters I identified seven propositions concerning overlap disputes in BC. I argued that:

1. *Ad hoc* approaches to overlap disputes currently employed in BC will not produce the clarity of indigenous jurisdiction needed for effective Indigenous-Crown relations;
2. Barriers to effective dispute management must be addressed;
3. Law should comprise a basis for common understanding and legitimacy in the sociospatial definition of territorial claims and settlements;
4. The process should accommodate nuanced Indigenous territorialities while also supporting effective Indigenous-Crown relations;
5. The process should create space for people to tell their stories, have complicated conversations about history and law, and become fully invested in territorial agreements;
6. The Crown is directly implicated in overlap disputes and should partner with First Nations to implement an effective and lawful framework for their management; and
The process needs to support Indigenous agency, and enable objective and well-informed Crown decisions in the absence of intra-Indigenous territorial agreements. This inquiry is the first to thoroughly research the experiences of BC, New Zealand, and Australia with the aim of developing knowledge in these seven areas.

The purpose of this chapter is fourfold: 1) to bring forward and crystalize key arguments developed in earlier chapters; 2) to identify and explicate processes and principles employed in New Zealand and Australia that have utility for BC; 3) to compare project findings with literature on overlap disputes; and 4) to address the central question with which this inquiry is concerned: What is the best way to achieve and sustain clarity of Indigenous jurisdiction on a province-wide basis? The chapter is presented in four major sections. Analysis and findings are presented in the first section, organized according to the seven propositions listed above. Based on these findings, in the second section I lay out a framework for achieving and sustaining clarity of Indigenous jurisdiction on a province-wide basis. The third section compares and contrasts this study’s findings with literature critiqued in Chapter 3. In the final concluding section I underscore the imperative for First Nations and the Crown to partner in the development of a legislative framework for achieving clarity of Indigenous territorial jurisdiction on a province-wide basis. I argue that this framework should enable an Indigenous Territories Tribunal to support First Nations and the Crown to develop an exhaustive map of Indigenous territorial jurisdiction in BC – a geography of reconciliation.

Analysis and Findings

1. Ad hoc approaches currently employed in BC will not produce the clarity of indigenous jurisdiction needed for effective Indigenous-Crown relations
Overlap disputes are a significant barrier to effective and lawful Indigenous-Crown relations in BC: they delay if not preclude lawful settlements, delay and sometimes prevent land and resource development, and have significant lost opportunity costs for both First Nations and the Crown. Overlap disputes also raise legal uncertainty over whether the Crown is negotiating with the correct rights-holding Indigenous collective/s concerning specific territory. A risk for the Crown is that settlement benefits are being conferred to First Nations in geographic areas for which they may not have exclusive or legitimate claim, to the detriment of other First Nations that do. A risk for Indigenous people is that a First Nations polity might sanction the diminishment or effective extinguishment of Aboriginal rights, through settlement, where it does not have the authority, or exclusive authority, to do so. Settling agreements amidst jurisdictional uncertainty poses a significant liability risk for both First Nations and the Crown. Moreover, disputes and ambiguity concerning Indigenous territorial jurisdiction stand in the way of First Nations having an effective role in decision-making concerning land (see Chapter 1).

There are hundreds of overlapping claims to collectively-held Aboriginal rights in BC, yet few intra-Indigenous agreements concerning territorial jurisdiction have been settled. Of these, few are aimed at supporting Indigenous-Crown relations, and fewer still explicitly account for the need for territorial agreements to be consistent with both Indigenous and state legal systems. Political agreements that contravene the inter-societal law of Aboriginal rights are not legally durable. Effective management of overlap disputes requires a framework that incentivizes First Nations to reach territorial agreements, fosters understanding of geopolitical history and law, and produces outcomes that are accepted as legitimate even when some people may not like the result. In the absence of such a
framework, *ad hoc* attempts to mediate overlap disputes will have limited success. A systemic solution is needed (see Chapter 5).

2. **Barriers to effective dispute management must be addressed**

Three significant and related barriers stand in the way of effective and lawful management of overlap disputes in BC: 1) a dysfunctional narrative that has been used to justify not addressing the issue; 2) systemic disincentives to address disputes; and 3) postponing dealing with the issue until settlement negotiations are well advanced.

**A dysfunctional narrative**

Three arguments in particular contribute to a profoundly dysfunctional narrative concerning overlap disputes in BC: 1) non-derogation clauses in modern treaties provide a remedy for First Nations with Aboriginal and historic treaty rights impacted by treaty settlements; 2) First Nations do not have a veto over the settlements of other First Nations with the Crown; and 3) First Nations are to resolve overlap disputes among themselves, and therefore, the Crown’s only obligation to First Nations with overlapping claims is to fulfill its minimum legal duty to consult and accommodate. These arguments are a woefully inadequate response to the issue because they do little to advance the imperative of Indigenous-Crown reconciliation, and may indeed have the opposite effect. Courts have now made it abundantly clear that the Crown can longer use non-derogation provisions in treaties to justify delaying engaging with the issue until agreements are close to being settled (see Chapter 5). The argument that a First Nation does not have a veto over another’s agreement with the Crown mischaracterizes the issue. A First Nation does not have a veto over another First Nation’s settlement, but their Aboriginal or historic treaty rights may. Legally defined Aboriginal rights are paramount to politically-derived settlements.
Systemic disincentives

The now twenty-five year old recommendation of the BC Claims Task Force (1991) concerning overlapping claims – that First Nations are to resolve overlap among themselves – was predicated on the BC Treaty Commission (BCTC) and the Crown actually requiring its implementation. The Task Force recommended that a process for addressing disputes be in place before treaties are settled, and suggested that in some instances it may be necessary to exclude contested land from settlements until territorial agreements are reached. By supporting the advancement of treaties without a process for the management of overlap disputes in place, the BCTC and the Crown have created a significant disincentive for some First Nations to meaningfully engage with the issue. If a treaty settlement is inevitable regardless of the outcome of efforts to address disputes, such efforts may be perfunctory or disingenuous. First Nations close to treaty settlement have a disincentive to seriously engage in a dispute management process because to do so may require that their proposed settlement be modified, potentially causing the settling First Nation to give up gains hard-won at the treaty table. First Nations that are not as advanced in negotiations, or have opted not to engage in negotiations at all, have little to gain by engaging in a dispute management process because the likelihood of these groups settling a treaty in the foreseeable future is very low. Unless and until systemic disincentives are replaced by meaningful incentives, many First Nations are unlikely to resolve overlap disputes among themselves. A mechanism for addressing disincentives is discussed later in this chapter.

Delayed engagement with the issue makes it almost impossible to effectively manage overlap disputes

The experiences of BC, New Zealand, and Australia concerning overlap disputes are analogous. A challenge common to all three is that efforts to address overlap disputes have
often been initiated only after negotiations with one Indigenous group are well advanced. In
BC, as in New Zealand and Australia, settlements allocate finite land and resource rights that
are either exclusive or non-exclusive to the settling Indigenous group. Groups that settle
agreements early can be privileged to the detriment of groups that come later to their
settlement simply because once exclusive rights are conferred to one group they are no
longer available as part of future settlements. Moreover, recognition of non-exclusive rights
of one group makes it difficult if not impossible to later recognize the exclusive rights of
another in the same area. By focusing on only one or two claims at a time in a region, the
Crown in effect can reward groups that settle earlier than others, and thereby invites
competition among Indigenous groups. Depending on one’s perspective, the Crown can be
seen as an instigator of such disputes or just caught in the middle. Either way, by negotiating
with only one or two groups in a region at once, the Crown is in effect “picking winners”.

In BC, the practice has been to delay attempts to address overlap disputes until late
in the negotiation process, often after Agreements-In-Principle or treaties have been settled
(see Chapter 5). In Australia, generally, efforts to address disputes have been initiated only
after major land development projects have been proposed, or when one claimant group’s
claim is close to finalized and the threat of Federal Court intervention brings attention to the
issue (see Chapter 8). Until 2007, common practice in New Zealand was also to delay
engagement with overlap disputes until settlements were close to finalized. BC, New
Zealand, and Australia have all experienced difficulties with delaying engagement with the
issue until final stages of negotiations. In this regard, BC should draw lessons from the
settlement framework of the Australian State of Victoria and the Waitangi Tribunal’s Tamaki
Makaurau inquiry.
In 2007 the Waitangi Tribunal completely rejected the Crown’s argument that attempts to address overlap disputes should be delayed until Agreements-In-Principle are settled. The Tribunal found that the Crown in New Zealand has an obligation under the Treaty of Waitangi not only to cultivate its relationships with all Indigenous groups equally, but to actively protect relationships between and among Indigenous groups, which includes not setting up processes that undermine these relationships (see Chapter 7). While the Crown’s duty under the Treaty of Waitangi and the Crown’s duty in BC are of course grounded in different sources, it is certainly arguable that the same principle applies to the Crown in BC because of its duty to act honourably and as a responsible fiduciary. To attempt to address overlap disputes only after agreements are close to settled makes it almost impossible for the Crown to establish relationships of trust with First Nations with overlapping claims, and excludes the possibility of running parallel processes in which Indigenous-Crown relationships are built with all First Nations. Once there is a settlement on the table, non-settling First Nations are essentially put in a position of having to react and object to it, particularly if the Crown is only interested in discussing the proposed settlement of one First Nation and not the settlement goals of others. Such an approach means that the Crown inevitably ends up defending a predetermined position, rather than collaboratively seeking to craft a solution that addresses the rights, interests, and settlement goals of all First Nations in a region concurrently.

In New Zealand, the Waitangi Tribunal’s Tamaki Makaurau inquiry recommended that the Crown meaningfully engage with all Indigenous groups concurrently on a regional basis, and attempt to address overlap disputes early in the process. As a result, the Crown in New Zealand shifted its practice. This is not to suggest that such an approach is easy.
Balancing the timing of negotiations of different groups – holding some back while working to speed up others – is difficult and not always possible. The key to success in Tamaki Makaurau experience involved the Crown taking an existing settlement offer off the table, strategically refocusing energy and resources, and incentivizing and engaging with all groups in the area concurrently. Basically, the approach was to take a few steps back in the negotiation process and complete the measures that should have been done earlier: a) research and get to know the people, the history, and the cultural landscape of the region; b) share information; and c) design settlements with all groups transparently and with a view to protecting and enhancing relationships.

The principles enunciated by the Waitangi Tribunal in this regard are transferable to BC. Negotiating with all First Nations in a region concurrently would significantly reduce complications associated with overlap disputes. Even where some First Nations have chosen not to engage in the BC treaty process, the same principles should apply: a) the BC process should involve historical inquiry on a regional basis (discussed below), and thereby be informed by a deep understanding of the relationships between and among First Nations; b) information concerning character and strength of claims, proposed settlements, and the goals of all parties should be transparently shared and discussed with all parties; and c) settlements should be designed with a view to supporting effective relations not only between the Crown and First Nations, but also between and among First Nations.

BC also has something to learn from the Australian State of Victoria in this regard. As a fairly new initiative, the Victorian settlement framework has had the benefit of lessons derived from the experiences of the Federal Court, the National Native Title Tribunal, and the federal Native Title framework generally. One of these lesson concerns the problems
created when Indigenous groups and their territories are defined without reference to the claims of other groups. The Victorian framework recognizes both the importance of establishing common criteria against which to assess claims (discussed below), and the need to account for the opinions of neighbouring Indigenous groups concerning the sociospatial dimensions of claims. Under Victorian legislation and policy, claims are assessed with reference to neighbouring claims, and not in isolation from each other. Where overlaps exist, Indigenous groups are incentivized and supported to reach agreements concerning Indigenous territorial jurisdiction within a framework managed by the Right People for Country Program (RPFCP). BC should employ a settlement framework that adopts these two lessons: 1) claims, and character and strength-of-claims, should be assessed with reference to the claims of other First Nations; and 2) overlap disputes should be addressed on a regional basis early in the negotiations process, as a condition of advancement in the settlement process (discussed below).

3. Law should comprise a basis for common understanding and legitimacy in the sociospatial definition of claims and settlements

The idea that Indigenous-Crown negotiation in BC could be an entirely political process seemed plausible two decades ago. However, the law of Aboriginal rights has developed and in doing so has put political processes of negotiation on a collision course with legally defined Aboriginal rights. The collision is unavoidable in the context of overlap disputes, which are at their core a product of ambiguity concerning the criteria by which First Nations and their territories should be defined. Not to base territorial claims and settlements on legal criteria is to accept that geopolitical history does not matter, that political “might makes right”, and that the law of Aboriginal rights can be overridden by
politically-derived agreements. The Crown has a duty to ensure that settlements are lawful. To settle agreements that conflict with either Indigenous law or state law undermines the imperatives of efficacy, lawfulness, and jurisdictional clarity (see Chapter 6). Moreover, overlap disputes are often a product of ambiguity concerning the criteria by which Indigenous collectives and their territorial claims should be defined. Without clear and commonly accepted criteria, a First Nation may object to other First Nations’ settlements not because of disagreement *per se* but because of ambiguity and uncertainty.

I argue that the sociospatial dimensions of claims and settlements should crystalize at the nexus of Indigenous and state legal systems, which can and must develop to encompass present-day values and ambitions of Indigenous peoples and of society as a whole. To rely upon European-derived legal concepts alone does not further the imperative of Indigenous-Crown reconciliation, particularly where the content of Aboriginal rights is contested, or where there are contradictions and ambiguities within state law. Similarly, the application of Indigenous legal systems to present-day conflicts can be challenging because of disjunctures between historical antecedents and present-day values and ambitions (see Chapters 3 and 6). Legal pluralism – that is, concurrent acknowledgement of separate legal systems – is not enough. Achieving clarity of Indigenous jurisdiction requires the articulation, harmonization, and application of both legal systems together: in other words, legal hybridity.

There is space within Canadian law for this to occur. Indeed, Canadian law acknowledges the need to account for “the Aboriginal perspective” which imposes a duty to learn about and account for Indigenous law within Canadian law and policy (see Chapters 3 and 6). Erosion of Indigenous legal systems does not preclude Indigenous people from bringing forward and articulating aspects of Indigenous law that help us understand
Indigenous peoples’ relationships with land and with each other. Indigenous laws have a historical basis but are not for this reason frozen in the past. All law evolves. The legitimacy of all legal systems should be judged according to their consistency with present-day values and imperatives of the communities governed by their terms, and not solely for their fidelity to the perceived past (see, especially, Borrows 2010).

Effectively using law in the context of overlap disputes means bringing forward aspects of law that have utility for working through present-day conflicts. To effectively use law also means disposing of aspects of law that conflict with present-day values and imperatives, and this applies equally to both Indigenous and state legal systems. Applying law to overlap disputes requires a process that makes these legal systems, and necessary changes within these legal systems, cognizable within processes of Indigenous-Crown negotiation, and within and among Indigenous communities themselves. Achieving clarity of Indigenous jurisdiction on a provide-wide basis requires a process that creates time and space for articulating, harmonizing, and applying hybrid law.

The Australian case demonstrates that strict adherence to a legal regime that freezes Indigenous law in the past can have devastating consequences for Indigenous communities. In Australia, such an approach has resulted in Native Title benefiting only some Indigenous people and only in limited circumstances. As was discussed in Chapter 6 with regard to a dispute within the Gitxsan Nation, application of Indigenous law in BC can also disenfranchise a considerable portion of a present-day Indigenous community. Fundamentalist interpretations and application of either Indigenous or state law can cause lateral violence, particularly when such processes require that deeply personal questions concerning Indigenous authenticity be aired in adversarial contexts. Law should be
interpreted and developed in ways that are functional and meaningful for present-day communities. Neither Indigenous nor state law alone provide a legitimate basis for determining which Indigenous collectives have rights where. Legal hybridity is required, and both Indigenous and state legal systems must develop in order for this to happen.\textsuperscript{139}

At the outset of this inquiry I set out to identify processes that effectively employ both Indigenous and state legal systems in the management of overlap disputes. Of the processes examined, only the Victorian settlement framework comes close to encompassing all of the elements required for achieving clarity of Indigenous jurisdiction on a province-wide basis in BC. Concerning the role of law in the management of overlap disputes, a significant finding of this inquiry is derived from the Victorian experience. As an alternative to the federal Native Title framework, the Victorian framework recognizes that sparse or inconclusive evidence does not preclude politically-derived agreements. Victorian evidentiary guidelines do not comprise a legal test, but rather serve as a starting point for discussions concerning the legal basis of claims. Where evidence is sparse or contradictory, this is treated as an opportunity for political and legal dialogue.

The RPFCP creates the space, resources, and information needed to support this dialogue. Political dialogue fills the legal vacuum. While not overtly portrayed as such, the intra-Indigenous territorial agreements negotiated with the support of the RPFCP reflect the development and articulation of present-day hybrid law. The content of these territorial agreements reflects the development and expression of legal hybridity, which is then codified

\textsuperscript{139} This finding echoes one of the “calls to action” to the National Truth and Reconciliation Commission on Indian Residential Schools (TRCIRS). The TRCIRS calls on First Nations and the Crown to “[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements” (TRCIRS 2015, Call to Action #45).
by their registration as part of Indigenous Land Use Agreements (ILUAs) under the *Native Title Act* (see Chapter 8). BC should strive for a similar result, one where agreements concerning Indigenous territorial jurisdiction are based on the substantive articulation and development of hybrid law. Methods for doing so are described below.

4. **Process outcomes should accommodate nuanced Indigenous territorialities while also supporting effective Indigenous-Crown relations**

   In BC, First Nations’ statements of “traditional territory” have been institutionalized within processes of Indigenous-Crown consultation, revenue sharing, and treaty negotiation. Through institutionalization these territories display the reifying, displacing, and depersonalizing tendencies typical of conventional, modernist territorial inscriptions (described in Chapter 4). In some instances the institutionalization of these territories has depersonalized relations to such an extent that overlapping claims are now often assumed to be conflicts over the location of territorial boundaries rather than an indication of how people are connected through their relationships with land and each other. In the context of overlap disputes in BC, territorial boundaries are often the primary object of attention, rather than the forces implicated in their production. The place-clearing, erasing effects of these territories are keenly felt by First Nations with claims that overlap with finalized, or soon to be finalized, Indigenous-Crown settlements. The idea that territory is a container of enforceable political power maintains a tenacious grip on the geographical imaginaries at work in processes of Indigenous-Crown negotiation in BC (see Chapter 4).

   In some instances, overlapping claims are a product of disjunctures between Indigenous territorialities and conventional notions of exclusive territorial jurisdiction. In some cases, Indigenous land use and allocation was (prior to colonial contact) and
sometimes still is governed by nuanced Indigenous legal systems not well represented by conventional territorial boundaries. Indigenous land rights and responsibilities often applied to specific places and resources at specific times of year, with diplomatic protocol (i.e., law) regulating reciprocal rights of neighbouring collectives (see Chapter 4). Rights and responsibilities were and often are vested in individuals and extended families on a functional rather than a strictly geographical basis. Thus the territorial dimensions of Indigenous collectives were and often are determined by group constituency, with territoriality produced by these rights and responsibilities rather than territory defining the constituency of the collective.

Some overlapping claims are thus not overlap disputes at all, but rather are an opportunity for the articulation of this kind of complexity in ways cognizable to processes of Indigenous-Crown and intra-Indigenous negotiation. A relational understanding of territory provides a useful conceptual framework for understanding and accounting for these Indigenous territorialities. It provides a way of understanding Indigenous territorialities as networks of semiotic and material flows, and thus admits the possibility of understanding intra-Indigenous territorial agreements as relationship agreements that regulate flows of people and materiality. This is not to say that conventional understandings of territory can be easily dismissed, nor should they be entirely. The territorial claims of First Nations are a critically important challenge to exclusive state authority over land. However, achieving and sustaining clarity of Indigenous jurisdiction in BC also requires enacting territory in relational terms (see Chapter 4).

The application of Indigenous legal systems is critical to this endeavour. Indigenous territoriality is an expression of Indigenous law. The effective management of overlap
disputes requires that conventional understandings of territory and fundamentalist interpretations of law be reimagined. Placing people and their relationships at the conceptual core of territory and law is critical. There is room within state law to accommodate the complexity of Indigenous territorialities. Aboriginal rights, including the right of Aboriginal title, do not need to be exclusive to one First Nation, as is often incorrectly assumed. Overlapping claims do not preclude the existence of Aboriginal title provided that there is a basis in Indigenous law for shared exclusivity – for joint title (see Chapter 6). Specific Aboriginal rights, such as rights to gather and hunt, may be geographically exclusive to one First Nation or governed by nuanced Indigenous legal protocol concerning which people and groups have rights and obligations to what, where, and when. Indeed, there is more than ample room within state law for the articulation of this kind of nuance; there is a duty to learn about and accommodate it (see Chapters 3 and 6).

Indigenous territoriality needs to be articulated and enacted in ways that make Indigenous territorial relations visible to our hybrid legal system. By making Indigenous law and state law cognizable to each other – through the development of lawful intra-Indigenous territorial agreements – we would contribute to the development of the inter-societal law of Canada, and achieve a sum greater than its parts. Achieving clarity of Indigenous jurisdiction in some instances thus requires that territory be imagined and enacted in ways that accommodate nuanced articulations of First Nations territoriality. In some instances this requires formalizing Indigenous co-jurisdiction in order to reflect the reality that more than one First Nation has rights and interests in the same geographic area. The goal of overlap dispute management should be clarity of First Nation territorial jurisdiction, not necessarily exclusivity of First Nation jurisdiction. Concerning methods to achieve this clarity, a
significant finding of this inquiry is informed by experiences of the Native Title framework of Australia and the RPFCP.

BC should employ an Indigenous Land Use Agreement (ILUA)-like mechanism for achieving and communicating clarity of Indigenous jurisdiction. The boundaries of these intra-Indigenous territorial agreements – hereafter called Indigenous Jurisdiction Agreements – should signify which First Nation/s the Crown is to negotiate with concerning land contained by the boundary, but should not necessarily signify the geographic extent of First Nations’ rights and responsibilities. Explicitly bounded territory delineating Indigenous jurisdiction does not preclude the recognition of nuanced Indigenous territorial relations. Where appropriate, reciprocity and sharing across jurisdictional boundaries should be articulated within Indigenous Jurisdiction Agreements. The registration of Indigenous Jurisdiction Agreement in a province-wide registry (discussed below), when combined with the other recommendations of this inquiry, would achieve an exhaustive, province-wide map of non-overlapping territories that communicates which First Nation polities the Crown should negotiate with and concerning what territory.

5. The process should create space for people to tell their stories, and have complicated conversations about history and law, in order for people to become fully invested in territorial agreements

Indigenous Jurisdiction Agreements should be relationship agreements that sustainably support mutually beneficial relationships over time. The experience of the RPFCP evinces the argument that consensual outcomes are far more likely, and more likely to be sustainable, if people feel that they are invested and represented in agreements because they have worked towards achieving them (see Chapter 8). Unless and until the process accounts for peoples’ lived experiences of overlap disputes, misgivings will remain and
fester, and damaged relationships will become ever more difficult to repair. In order for people to feel invested in agreements, the process needs to empower people to tell their stories about their relationships with land and each other. An effective and lawful strategy for achieving clarity of Indigenous jurisdiction requires time and space for people to have complicated conversations concerning geopolitical history, law, and present-day imperatives (see Chapters 3-8).

The New Zealand and Victorian cases evince at least three potential benefits of such inquiries. First, empowering people to tell their stories can lead to discovery and acknowledgment of the relatedness of people, which shifts understanding of overlapping claims from contestation over boundaries to one that understands the issue as an opportunity to cultivate functional relationships. Second, by creating time and space for the telling of history, the process educates people, which not only can lead to greater understanding, it may well strengthen Indigenous identity and cohesion, as has been the case with Waitangi Tribunal inquiries and processes managed by the RPFCP. These cases evince the idea that Indigenous groups that go through a process that closely examines history and law – that creates space for the telling and hearing of peoples’ stories – are less likely to suffer from internal discord. And third, such inquiries produce a record of history told by Indigenous people themselves. Indigenous leaders are under tremendous pressure not to make mistakes that might compromise the interests of their constituencies. Leaders seen as too willing to compromise negotiating positions are vulnerable to intense criticism. The New Zealand and Victorian cases evince the argument that researching and recording the history of a region in dispute, even if that history is contested, can provide Indigenous leaders a way to explain to their constituencies why compromise may be warranted (see Chapters 7 and 8).
In this regard, a significant finding of this inquiry is drawn from the experience of the Waitangi Tribunal. Waitangi Tribunal inquiries create space for Maori to tell their history, and, at least to some extent, to tell their history in their own way. Hearings of the Tribunal are almost always conducted in Indigenous facilities and in Maori (language) where appropriate. In addition to reports based upon the documentary record, the Tribunal considers evidence in any form it deems useful, such as personal stories, oral history handed down through generations, and ceremonial songs. Culturally- and legally-attuned practices, outcomes, and membership of the Tribunal have cultivated its legitimacy in the eyes of Maori. Tribunal credibility in the view of the Crown and public is built upon the evidentiary integrity of its processes, reports written in accessible language, and the political cache of Tribunal members and presiding officers (see Chapter 7). Achieving clarity of Indigenous jurisdiction in BC also requires a process that closely examines history and law, creates space for people to tell their stories about their relationship with land and each other, and empowers people to create their own solutions. BC should draw from the experiences of the Waitangi Tribunal to implement a commission of inquiry-style institution – an Indigenous Territories Tribunal – that empowers people to do so (discussed below).

6. The Crown is directly implicated in overlap disputes and should partner with First Nations to define and support an effective and lawful framework for their management

Disputes among and within Indigenous polities are correctly considered “First Nations business”. However, a corollary to this is that the Crown is also often implicated in these disputes. The Crown is required to make decisions concerning which Indigenous collectives have rights where, and thus which First Nations polities it should negotiate with concerning specific territory. Canadian courts have now made it abundantly clear that the
Crown can no longer rely upon First Nations to resolve overlap disputes among themselves, if it ever really could (see Chapter 5). Achieving clarity of Indigenous jurisdiction requires that the Crown proactively engage with the issue.

In this regard, two significant findings are derived from this inquiry, both based on the Australian experience and particularly the experience of the RPFCP. First, while some aspects of the Native Title Act and related jurisprudence are problematic, ILUAs, by making explicit which Indigenous polities the Crown is to negotiate with and where, have proven to be an effective mechanism for achieving clarity of Indigenous jurisdiction. Second, the RPFCP evinces the argument that the Crown can and should play a constructive role in the management of overlap disputes. In the Australian State of Victoria, the Crown not only invests financially in the management of overlap disputes, it has partnered with Traditional Owner groups to provide the incentive, means, and a structured framework for doing so. The experience of the RPFCP supports the argument that Crown funding for overlap dispute management – when aligned with a well-structured and incentivized framework – can be a sound economic investment with significant economic returns for both Indigenous peoples and the Crown. The Victorian case evinces the argument that the economic interests of BC would be well-served by implementing a legislative framework that includes sufficient funding to achieve and sustain clarity of Indigenous jurisdiction on a province-wide basis.

7. The process needs to recognize and account for Indigenous agency in supporting objective and well-informed Crown decisions in the absence of intra-Indigenous territorial agreements

Effective Indigenous-Crown relations requires clarity of Indigenous jurisdiction, but how is this to be defined, and to what extent do First Nations have agency in defining the polities and territorial jurisdictions that form the sociospatial basis of negotiations and settlements? Two significant differences among the BC, New Zealand, and Australian cases are: 1) the degree to which Indigenous peoples have agency in defining the sociospatial dimensions of claims and settlements; and 2) the degree to which Indigenous groups and the Crown are incentivized (or disincentivized) to address overlap disputes.

For instance, the settlement process in New Zealand has struggled to find the right balance between the Crown’s strong preference to negotiate and settle with “large natural groupings” of Indigenous claimants and a tendency for smaller Maori groups to seek their own settlements or for larger groups to split apart (see Chapter 7). Early settlements were with large groups. Over time, and partly because of recommendations of the Waitangi Tribunal, some settlements have been with smaller groups. The Crown in New Zealand has learned that in some situations cultural and historic specificity outweighs economic efficiency, which has resulted in a more flexible application of its large natural groupings policy. Maori have agency in defining the sociospatial dimensions of claims and settlements through the process of submitting their claims. Nonetheless, the Crown ultimately decides which claims it accepts for negotiation and has declined to accept some claims because, in the Crown’s view, they did not constitute a large natural grouping. Concerning incentives to address overlap disputes in New Zealand, hard-won lessons have led to an approach that attempts to bring all groups in a region into negotiations with the Crown at the same time. Engaging with all groups in a region simultaneously opens up the possibility of allocating settlement benefits among Indigenous groups equitably and transparently, rather than on a
first-come-first-served basis. The Crown is incentivized to ensure overlap disputes are addressed by its obligation to adhere to the principles of the Treaty of Waitangi, and by the oversight of the Waitangi Tribunal.

Indigenous Australians have little agency in defining the sociospatial dimensions of Native Title claims and determinations. Instead, Indigenous groups in Australia are compelled to try to conform their Native Title claims to strict judicial interpretations of traditional law and custom, and “traditional” in this context means judicial interpretations of Indigenous law as it was prior to the assertion of British sovereignty (see Chapter 8). Native Title claims are accepted and registered only if they meet a registration test, and the registration test has become more onerous over time. The Federal Court ultimately determines if the sociospatial dimensions of Native Title claims are consistent with its interpretation of the Native Title Act. Thus, comparatively, Indigenous people in Australia have very little agency in defining the sociospatial dimensions of Native Title claims and settlements.

Incentives (and disincentives) to address overlap disputes within Australia’s Native Title framework are bizarrely paradoxical. Because registration of a claim confers a right to negotiate with land developers, once a group has its claim registered, and especially where neighbouring groups have not had their claims registered, the group with a registered claim is in a privileged position, and thus has a profound disincentive to address overlap disputes (see Chapter 8). Because the Native Title Act allows no more than one Native Title determination in any given area (unless there is a basis in traditional law for jointly held title), and because State Governments generally will not consent to a determination in areas subject to overlapping claims, any claimant group that wishes to advance its Native Title
claim has an incentive to address overlap disputes. The ability of the National Native Title Tribunal to successfully mediate overlap disputes has been limited by these paradoxical disincentives/incentives, and particularly because it has no authority to impose deadlines on mediation. The Federal Court, increasingly since the late-2000’s, has used its ability to schedule claims for trial to create a powerful incentive to address overlap disputes, and the consensual settlement of Native Title claims generally. By scheduling a trial, the court is basically saying to disputing parties that either they address the dispute or the matter will be litigated and the court will decide which group, if any, has proven Native Title.

The Victorian settlement framework provides an alternative to the Australia-wide Native Title framework. Here, the State still decides which claimant groups it will negotiate with and whether the sociospatial dimensions of claims are consistent with its evidentiary criteria (detailed in its Threshold Guidelines, discussed in Chapter 8). Nonetheless, a significant difference between the Native Title framework and the Victorian framework is that the Victorian Threshold Guidelines admit an opportunity for agreement-making where evidence supporting claims is sparse or contradictory. This space – at the nexus of law and politics – admits a considerable degree of Indigenous agency in defining the sociospatial dimensions of claims and settlements. The Victorian framework incentivizes Indigenous groups to address overlap disputes by requiring that overlap disputes be addressed prior to settlement.

Ostensibly, the current settlement framework in BC provides for a high degree of Indigenous agency in defining the sociospatial dimensions of claims and settlements. First Nations are self-defined, and their assertions of “traditional territory” are accepted by the BC Treaty Commission and the Crown with little scrutiny or reference to defined criteria. However, Indigenous agency in the sociospatial definition of claims and settlements in BC is
not all that it may seem. By prioritizing which claims it will negotiate and by focusing on only a few claims at a time – essentially, picking winners – the Crown in BC privileges the agency of some First Nations to the detriment of others. First Nations in BC have a high degree of agency in making claims, but unless they are at the top of the Crown’s list of priorities, First Nations may have little agency in defining the sociospatial definition of settlements. The Crown in BC recognizes its interest in achieving clarity of Indigenous jurisdiction but is stuck between the imperative of First Nations self-determination and its duty to act in accordance with the emerging law of Aboriginal rights. BC has been stuck in this position for well over a decade because we have created no better option.

The Crown must and will continue to make decisions concerning how settlement benefits are allocated among First Nations. Yet even a well-designed agreement-seeking process will likely not produce consensual intra-Indigenous territorial agreements in all cases, at least not in the short term. The process thus needs to manage overlap disputes in the absence of intra-Indigenous agreements. The process needs to be seen as legitimate, even if some parties to overlap disputes, including the Crown, may not be entirely satisfied with the result. The Crown’s current approach of basing decisions on its own assessments of the character and strength-of-claims is problematic for three reasons: 1) most First Nations have little or no agency in the process of determining how settlement benefits are allocated among First Nations, or the criteria used to make such decisions; 2) information on which such assessments should be based (e.g. Indigenous law) is often not available to the Crown; and 3) the Crown is seen by many as too invested in settling with particular First Nations to be objective (see Chapter 5). Three related findings of this inquiry concern the need to enable Indigenous agency in the process while also supporting objective and well-informed Crown
decisions in the absence of intra-Indigenous agreements.

First, the Victorian settlement framework provides a useful example of how legal criteria can set a minimum standard for defining the sociospatial dimensions of claims and settlements. BC should adapt this approach to enable greater Indigenous agency in the process. Instead of the Crown taking the lead, the criteria for defining the sociospatial dimensions of claims and settlements should be developed by First Nations within a framework of regional inquiries conducted by an independent Indigenous Territories Tribunal. The Tribunal should propose an initial set of criteria for defining claims – based on the law of Aboriginal rights – as a starting point for discussion. The Tribunal should support Indigenous communities in their efforts to substantively articulate Indigenous law concerning allocation of land rights and responsibilities within each region. Where appropriate, and based on both state and Indigenous legal systems, Indigenous Jurisdiction Agreements should express nuanced reciprocal rights and responsibilities of neighbouring First Nations both within and across jurisdictional boundaries.

In other words, where agreeable between or among neighbouring First Nations, Indigenous Jurisdiction Agreements should signify which Indigenous polity the Crown should negotiate with concerning land contained within the boundary, while also specifying, where agreeable, protocol for how and under what circumstances neighbouring First Nations will access resources within the area. In some areas, assets and land may need to be held and managed by more than one First Nation. In such cases, where agreeable among neighbouring First Nations, Indigenous Jurisdiction Agreements should identify a single

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140 See, e.g., Chapter 6 for a discussion of ambiguity concerning the threshold dates for Aboriginal rights, and common misconceptions concerning Aboriginal rights and exclusivity. Such issues – in effect, legal vacuums – should be identified as opportunities for the articulation of region-specific hybrid law.
Indigenous corporate body, such as a legal trust, with which the Crown would interact concerning the specified area (see, e.g., Overstall 2004; Reynolds 2009). The Crown and First Nation in BC, together, should implement a statutory regime for the development and registration of Indigenous Jurisdiction Agreements and, where necessary, Contested Recommendations (both are discussed below).

Second, objective and well-informed assessments of the character and strength-of-claims are critical to determining which Indigenous polities the Crown should negotiate with concerning specific territory. The Crown in BC is not seen as sufficiently objective to fairly determine allocation of treaty and other benefits among First Nations, especially in the context of overlap disputes and treaty settlements (see Chapter 5). Overlap disputes in BC are precisely the kinds of “complex [and] difficult cases” the Supreme Court of Canada had in mind when it suggested that a “tribunal” of “impartial decision-makers” may be better suited to conduct character and strength-of-claim assessments than the Crown (Haida Nation 2004, paras. 37, 44). The Crown and First Nations in BC should empower an Indigenous Territories Tribunal to assess character and strength of claims on a regional basis. The Tribunal should be Indigenous-led and reflect a high degree of Indigenous agency, yet be

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141 Within the law of equity, a trust arises when an interest (e.g. property) is transferred to a trustee, who is obliged to hold and manage the interest for the benefit of others, called beneficiaries (Penner 2016). If a legal trust were used to address an overlap dispute, the trust would be created by transferring an interest (e.g. Aboriginal rights in the specified area) to the trust, defining the trust’s terms, and appointing trustees (Overstall 2004; Reynolds 2009). Using a legal trust would enable multiple First Nations to collectively assume, through the trust, responsibility for managing land, assets, and other rights for the benefit of present and future generations. In the context of the framework proposed in this dissertation, the appointment of trustees, governance structure, and decision-making authority of the trust would be determined by agreement of the First Nations involved, according to the rules of trusts, with the advice and support of the Indigenous Territories Tribunal. Where agreeable to the First Nations involved, trust property may include interests such as consultation rights, consent mechanisms, co-management regimes, and transfer payments. Treaty and other settlement benefits, such a real property in highly populated areas (e.g. Vancouver), may be managed by a trust, for example by investing or distributing rental income to beneficiaries.
sufficiently neutral to any given dispute to be accepted as objective and legitimate (discussed below).

And third, in instances where First Nations are unable to reach consensual Indigenous Jurisdiction Agreements, Regional Tribunal Panels (discussed below) should make recommendations concerning Indigenous territorial jurisdiction based on its assessment of character and strength-of-claims on a region basis. The Regional Panels should set deadlines that allow First Nations adequate time to consider its recommendations and make counter-proposals aimed at reaching consensual agreements. If agreements are still not possible, as a last resort the Regional Panel’s recommendations concerning Indigenous territorial jurisdiction should be registered in the provincial registry as Contested Recommendations. The Indigenous Territories Tribunal should set deadlines for the registration of Contested Recommendations to incentivize First Nations to address overlap disputes. In areas subject to overlap disputes, the Crown should account for registered Indigenous Jurisdiction Agreements, Contested Recommendations, and character and strength-of-claim assessments when making decisions concerning the allocation of treaty and other settlement benefits among First Nations. Treaty Agreements-In-Principle should not be settled unless and until Tribunal inquiries have been completed and its assessments, Contested Recommendations, or Indigenous Jurisdiction Agreements have been registered.

To summarize, an Indigenous Territories Tribunal should oversee a series of regional inquires conducted by Regional Tribunal Panels. The Indigenous Territories Tribunal should be governed by a Board of Directors comprised of representatives from the three pan-BC First Nations organizations and the Crown. High level decisions of the Tribunal, such as the prioritization of regional inquiries and the appointment of Regional Tribunal Panel Chairs
should be made by a Tribunal Board of Directors. The Tribunal should have four branches:  
1) Panel Chairs, comprised of people with expertise in dispute resolution, Indigenous and state law, and Indigenous-Crown relations; 2) a research branch, made up of disciplinary specialists including anthropologists, historians, and legal scholars; 3) inquiry facilitation, comprised of facilitators who would engage with First Nations communities to support their participation in inquiries; and 4) a registrar, who would receive, manage, and make accessible the findings, recommendations, and Indigenous Jurisdiction Agreements made and/or facilitated by the Regional Tribunal Panels. The Regional Tribunal Panels should be comprised of a Chair appointed by the Tribunal and Panels members appointed by First Nations communities with interest in each region (discussed below).

Regional inquiries should involve seven stages:

1. Tribunal inquiry facilitators should engage with First Nations communities on a regional basis, identify issues in dispute (if any), and identify community nominees to become members of Regional Tribunal Panels.

2. A Regional Tribunal Panel should be formed for each region, comprised of a Chair appointed by the Tribunal Board of Directors, and one or more members nominated by each First Nation with interests in the region. In cases where First Nations have complex and overlapping governance structures (e.g. where the nominees of traditional governance structures differ from nominees of other present-day Indigenous polities), the Tribunal may accept more than one nominee from each First Nation, while also ensuring an equal number of nominees from each First Nation with interests in the region.

3. The Chair of each Regional Tribunal Panel, with the support of Tribunal staff,
should complete a preliminary assessment of the character and strength-of-claims for each inquiry region based upon information that is publically available, provided by the First Nations of the region, and the Crown (information sharing is discussed below). Panel Chairs should make preliminary reports available to all parties involved in each regional inquiry, and should include a regional character and strength-of-claims assessment and preliminary recommendations concerning the criteria that might be used to determine the sociospatial dimensions of claims and settlements (i.e., criteria for determining which First Nations have rights where, and how they might overlap).

4. Regional Tribunal Panels should conduct hearings in each First Nation community in the region. The intent of the hearings should be to empower people to: a) share information; b) tell their stories about their relationships with land and each other; c) discuss the Tribunal’s preliminary assessment of character and strength of claims; d) discuss the Tribunal’s preliminary recommendations concerning the criteria that might be used to determine the sociospatial dimensions of claims and settlements; and e) discuss options and preferences for different model of dispute resolution such as mediation, arbitration, or other process (e.g. traditional protocol). Participants (that is, people testifying before the Tribunal) should be nominated by First Nations with interests in the region, with the Panel ensuring an equal number of participants from each community. Here again, in instances where First Nations communities have complex and overlapping governance structures, the Tribunal should ensure that nominees of different types of governance structures have an opportunity to participate. Regional Tribunal Panels, at their discretion, should also hear testimony
(e.g. presentations) from expert witnesses, legal counsel, and the Crown. Where appropriate, and at the discretion of the Panel, procedures of the hearings should be culturally-attuned, which is to say that in some situations it may be appropriate for the community in which the hearings are held to determine hearing procedures, such as those attuned to indigenous protocols concerning, for example, the order in which people speak and topics of discussion. In some instances, the Tribunal should conduct multiple hearings in a community, particularly if there is contestation within the community concerning which people should speak and according to what protocol. Wherever possible, all hearings should be attended by participants from all communities in the region.

5. Based on information gathered during community hearings and the preliminary report, the Chair of the Panel should prepare an interim report that includes an updated assessment of the character and strength-of-claims in the region, recommendations concerning the criteria to be used to define the sociospatial dimensions of claims and settlements, and recommendations concerning methods of dispute resolution, such as facilitation, mediation, or other processes. The Panel should seek to develop consensus among Panel members on the content of the interim report, and if consensus is not achieved the interim report should describe the nature of the disagreements among Panel members.

6. Where First Nations agree on methods of dispute resolution, Regional Tribunal Panels should facilitate the negotiation of Indigenous Jurisdiction Agreements between and among First Nations using the methods agreed upon. Where First Nations are unable to agree upon a process for negotiating Indigenous Jurisdiction
Agreements, or are unable to reach Agreements, the Chair of the Panel should prepare a final report that makes a Contested Recommendation concerning Indigenous jurisdiction and allocation of settlement benefits among First Nations in the region. The Panel should seek to develop consensus among Panel members on the content of the final report. If consensus is not achieved, the final report should describe the nature of the disagreements among Panel members.

7. The Indigenous Territories Tribunal should register Regional Panel findings, including refined assessments of character and strength-of-claims, Indigenous Jurisdiction Agreement/s, and/or Contested Recommendations in the provincial registry.

The Crown should take into account the recommendations and findings of Regional Tribunal Panels when making decisions concerning the allocation of treaty and other settlement benefits among First Nations in each region. The BCTC should take into account the findings and recommendations of Panels when determining if a First Nation should advance to the next stage of treaty negotiation within the six stages of the BC treaty process. Treaty Agreements-In-Principle should not be settled unless and until regional inquiries have been completed and findings, Agreements, and/or recommendations have been registered. This framework would provide the incentive and the means to achieve clarity of Indigenous jurisdiction on a province-wide basis.

**Recommendations**

To summarize, seven major recommendations are derived from this inquiry:

1. First Nations and the Crown in BC should implement a legislative framework that
empowers an Indigenous Territories Tribunal to fulfill the following functions:

- Employ a process of regional inquiry involving research, community engagement, information gathering including community hearings, culturally-attuned dispute resolution methods tailored to each overlap dispute, and reporting;
- Interpret and substantively articulate the law of Aboriginal rights on a regional basis, and make legally-informed recommendations concerning the negotiation of Indigenous Jurisdiction Agreements;
- Empower Indigenous communities to substantively articulate Indigenous land law, and make this law cognizable for the benefit of Indigenous communities themselves, the development of Indigenous Jurisdiction Agreements, and the development of the law of Aboriginal rights;
- Complete character and strength-of-claims assessments on a regional basis, and make recommendations concerning Indigenous territorial jurisdiction and the allocation of treaty and other settlement benefits among First Nations;
- Establish and manage a province-wide registry of two types of determinations: 1) Indigenous Jurisdiction Agreements based on agreements between and among First Nations; and 2) where First Nations are unable to agree, Contested Recommendations based on Regional Tribunal Panel findings and recommendations concerning First Nations jurisdiction or shared jurisdiction. These agreements and recommendations should indicate which First Nation polity the Crown should negotiate with concerning the specified territory, but these boundaries should not necessarily indicate the
extent of each First Nations’ rights and interests; and

- Over time, at the request of any First Nation, re-examine and possibly modify Indigenous Jurisdiction Agreements and Contested Recommendations as new information becomes available or new agreements are made;

2. The Tribunal and Regional Tribunal Panels should operate with an ethic of transparency and information sharing. Hearings, assessments, reports, recommendations, and information gathered by the Tribunal should be accessible to any party involved in an inquiry, including the Crown, unless there are compelling and substantial reasons for information to be held confidential;

3. The Crown should make available to the Tribunal all legal opinions, strength-of-claims assessments, and any other information that may support the Tribunal achieving its goals, unless there are compelling and substantial reasons for information to be held confidential;\textsuperscript{142}

4. The BCTC should take into account the findings and recommendations of Regional Tribunal Panels when determining if a treaty table should advance to the next stage of negotiation within the six stages of the BC treaty process;

5. The Crown should take into account Regional Tribunal Panel assessments and recommendations, Indigenous Jurisdiction Agreements, or Contested Recommendations, when making decisions concerning allocation of treaty and other

\textsuperscript{142} This recommendation is consistent with one of the “Calls to Action” of the National Truth and Reconciliation Commission on Indian Residential Schools (TRCIRS): “We call upon the Government of Canada, as an obligation of its fiduciary responsibility, to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope extent of Aboriginal and Treaty rights” (TRCIRS 2015, Calls to Action #51).
benefits among First Nations;

6. To mitigate problems associated with overlap disputes, the Crown should prioritize negotiation of claims on a regional basis; and

7. Treaty Agreements-In-Principle should not be settled unless and until Regional Tribunal Panel findings and recommendations, Indigenous Jurisdiction Agreements, or Contested Recommendations have been registered in a province-wide registry.

**Comparison of the Proposed Indigenous Territories Tribunal with Other Proposals**

The framework described above draws upon lessons learned from each of the three cases with which this inquiry is concerned, from the available literature, and from other overlap dispute management processes that have been proposed but not implemented. It constitutes an overarching framework under which specific dispute resolution methods would be tailored to each dispute. Under this model, methods of dispute management would be locally developed and culturally-attuned, and would include both Indigenous dispute management methods and methods associated with conventional alternative dispute resolution. The framework adapts aspects of the legislative approach of the Australian State of Victoria, particularly the method of using evidentiary criteria for defining claims as a point of departure for politically derived agreements, and communicating territorial agreements by their registration as ILUAs under the *Native Title Act*. The proposed Indigenous Territories Tribunal would also employ many of the techniques proven by the Waitangi Tribunal, such as information gathering and sharing, culturally-attuned community hearings, a regional approach to inquiries, and providing reports and recommendations aimed at supporting
Indigenous-Crown negotiation.

The recommended framework also adapts aspects of other overlap dispute management processes that have been proposed but not implemented, including the Union of BC Indian Chiefs’ (2008) proposal for an Indigenous Title Council, Napoleon’s (2007a) proposal for an Indigenous Legal Lodge, and Vivian’s (2009) proposal for an Australian Indigenous Dispute Resolution Tribunal. All three of these proposals emphasize the importance of applying Indigenous law in the management of overlap disputes, yet only Napoleon’s (2007a) proposal posits a method for supporting Indigenous communities to develop and apply Indigenous law – a way to bring forward and apply useful aspects of Indigenous law in a manner consistent with present-day values and imperatives. The Tribunals proposed by the UBCIC (2008) and Vivian (2009) both contend that the dispute management process should inform the development of state law, yet only Vivian’s proposal explicitly accounts for the role of state law in the management of overlap disputes. The Indigenous Territories Tribunal would encompass all of the elements of these three proposals, and more. The most significant difference between these proposals and the recommended Indigenous Territories Tribunal is its explicit purpose: to support effective and lawful Indigenous-Crown reconciliation by achieving and sustaining clarity of Indigenous jurisdiction on a province-wide basis.

Comparison of the Proposed Framework with Existing Literature

In Chapter 3 I identified five questions with which the literature has not thoroughly engaged or has overlooked entirely. The following compares and contrasts the findings of this study with the literature in these five knowledge areas.
1. Which type of overlap dispute management process is best, and who decides?

Literature on overlap disputes in BC, and on dispute resolution management processes in Indigenous contexts generally, reflects near-consensus that the best type of process for managing disputes is the process selected or developed by the disputing First Nations themselves. This inquiry echoes the literature on this point: First Nations should choose the specific mechanisms – e.g. facilitation, mediation, or Indigenous methods – best suited to the local context of each dispute. However, literature on the BC case is entirely silent on what should be done when First Nations are unable to reach agreement on how the dispute management process should be structured. This study is the first to argue that case-by-case mechanisms should fit within an overarching legislative framework that includes, at a minimum, regional inquiries involving information gathering and sharing, community hearings, reporting, and the production of either Indigenous Jurisdiction Agreements or Contested Recommendations covering each region. In other words, this study explicates a process that accounts for situations where disputing First Nations are unable to agree on how they might agree.

2. Are boundaries, as conventionally understood, an appropriate way to communicate Indigenous rights and territorialities, and, if not, are there better ways to communicate First Nations’ rights and territorialities within Indigenous-Crown negotiations?

Literature suggests that disjunctures between Indigenous and state territorialities are a cause of overlapping claims and a challenge to effective and lawful Indigenous-Crown relations (see Chapters 1, 3, and 4). This study posits a conceptual framework for understanding Indigenous and state territorialities in the context of overlap disputes, and is the first to explicate a strategy that simultaneously accommodates both. A novel aspect of
this study is the argument that the boundaries of non-overlapping Indigenous Jurisdiction Agreements need not signify the extent of First Nations’ rights and interests, but rather should indicate which First Nation/s the Crown should negotiate with concerning the specified territory. Where appropriate, Indigenous Jurisdiction Agreements should include detailed information on reciprocal rights and responsibilities of neighbouring First Nations that transcend coterminous boundaries. This study is the first to argue that such agreements should be registered in a province-wide registry that supports effective and lawful Indigenous-Crown reconciliation.

3. How are criteria, information, and evidence to be defined and used, and who decides?

Literature on dispute management in Indigenous contexts reflects near-consensus that the criteria and information to be used in decision-making should reflect the values and priorities of the First Nations involved (see Chapter 3). Yet the literature rarely acknowledges the diversity of opinion and values within and among Indigenous communities, or explains how disputes should be managed when disputing First Nations have fundamentally different understandings of which criteria should be privileged and how. Like the BC treaty process itself, for the most part, the role of criteria, information, and evidence is rarely discussed in the literature on overlap disputes in BC. Except for Napoleon’s (2007a) proposal for an Indigenous Legal Lodge, the literature on BC is almost entirely silent on the imperative for territorial agreements to be consistent with both Indigenous and state legal systems, and even Napoleon’s proposal only implicitly refers to the role of state law in the management of overlap disputes.

An extraordinary body of scholarship illustrates the need to substantively articulate
and accommodate Indigenous law within the law of Aboriginal rights (see Chapter 3). I take this argument a step further to assert that both Indigenous law and the law of Aboriginal rights should be substantively articulated, harmonized where required, and expressed through Indigenous Jurisdiction Agreements. I argue that hybrid law should comprise a basis of common understanding and legitimacy in the management of overlap disputes, and that ambiguities and disjunctures within and between legal systems are opportunities to negotiate outcomes that make hybrid law cognizable through the registration of Indigenous Jurisdiction Agreements in a province-wide registry.

4. Who are the appropriate decision-makers, participants, and third parties; and who decides?

Literature on overlap disputes and dispute resolution processes more generally reflects near-consensus that questions concerning who should be involved in dispute management processes are best answered by the First Nations involved. There is also substantive agreement in the literature that this argument applies as much to the selection of third party interlocutors as it does the selection of community participants and decision makers. Yet the literature on overlap disputes in BC says little about the difficulties associated with such choices, such as whether interlocutors – such as facilitators and mediators – should be independent of the communities in dispute, or who should be selected when disputing parties do not agree on who has the authority to speak or decide. This study explicates a strategy that facilitates Indigenous agency in the selection of third party interlocutors while also accounting for situations where First Nations are unable to agree.
5. How are overlap disputes to be managed in the absence of intra-Indigenous territorial agreements?

Literature on the BC case rarely acknowledges that in the absence of a framework that incentivizes and provides appropriate mechanisms and support, most First Nations will likely continue to be unable to address overlap disputes among themselves. Much like the BC treaty processes itself, the expectation seems to be that continuing with the same approach will produce a different result. Moreover, literature on the BC case rarely recognizes the Crown’s interest in achieving clarity of Indigenous jurisdiction. This study squarely implicates the Crown in the issue, demonstrates that the Crown has an interest in helping define how overlap disputes should be managed, and suggests that proactive Crown engagement in the issue would yield significant benefits for society as a whole.

To summarize, this inquiry is the first to:

- Identify and analyze systemic barriers to the effective and lawful management of overlap disputes, and propose strategies to address them;
- Recognize disjunctures between Indigenous and state territoriality, posit a conceptual framework for understanding the nature of the challenge, and explicate a strategy for accommodating both territorialities;
- Explicitly identify hybrid law as basis for common understanding and legitimacy in the management of overlap disputes, and propose a strategy for its development and expression in a province-wide registry of Indigenous Jurisdiction Agreements and Contested Recommendations;
- Recognize the benefit of Indigenous people sharing information and perspectives on overlap disputes – empowering people to tell their stories – and explicate a strategy
for empowering them to do so; and

- Recognize the imperative for the Crown to make objective and well-informed decisions concerning the allocation of treaty and other benefits in the absence of intra-Indigenous territorial agreements, and propose a strategy for it to do so.

This study contributes knowledge in each of these critical areas, and combines these considerations into a comprehensive framework explicitly intended to support Indigenous-Crown reconciliation in BC.

**Conclusion: A Geography of Reconciliation**

Canadian courts have consistently held that the Constitution requires the recognition and reconciliation of the rights of Aboriginal peoples and the interests of society as a whole. Overlap disputes are challenging because answers are found in the difficult space that is between the constitutional principles of recognition and reconciliation – in an implicit third principle – relationship. These relationships are not only between and among First Nations, but are between First Nations and society as a whole, as represented by the Crown. If settling treaties and other agreements does more harm than good to these relationships then the cost of settlements is too high. For the Crown to set up processes that invite Indigenous infighting, and then do little to support effective and lawful dispute management, is neither honourable nor consistent with the Crown’s duty to act in the best interest of Indigenous people. BC has a decades-long history of postponing dealing with the overlap issue because it raises a difficult question at the heart of the Indigenous-Crown relations. Based on what criteria should First Nations and their territorial rights be defined? The idea that the basis of claims and settlements could be politically-defined seemed plausible 25 years ago, yet the law
has developed and in doing so has put political negotiations on a collision course with legally-defined Aboriginal rights. BC has been stuck between legal and political imperatives for decades because we have created no better solution. This dissertation proposes a way forward.

Clarity of Indigenous territorial jurisdiction is essential to Indigenous-Crown reconciliation. The development and application of hybrid law is critical to achieving this goal. Hybrid law should comprise a basis of common understanding and legitimacy in defining the sociospatial dimensions of claims and settlements. The objective should not only be to recognize disparate, parallel legal systems and territorialities, but to achieve a sum greater than its parts. The goal should be to achieve and sustain legal and geographical hybridity, and in so doing achieve and sustain effective and lawful Indigenous-Crown relations in the interest of all British Columbians. Reconciliation requires effective and ongoing dialogue, and dialogue is ineffective in the midst of contestation over which Indigenous polities have the authority to negotiate with the Crown concerning specific territory. First Nations and the Crown in BC should establish a legislative framework that empowers an Indigenous Territories Tribunal to support First Nations and the Crown to achieve and sustain a geography of reconciliation – together.
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APPENDICES

Appendix A: Participant Biographies

**Jon Altman** is a Research Fellow with the Native Title Research Unit at the Australian Institute of Aboriginal and Torres Strait Islander Studies. Altman has a disciplinary background in economics and anthropology, and was the Foundation Director of the Centre for Aboriginal Economic Policy Research April 1990 to April 2010. He held an ARC Australian Professorial Fellowship between 2008 and 2013, focusing his research efforts on Hybrid Economic Futures for Remote Indigenous Australia.

**Lillian Anderson** (Te Rarawa and Ngā Puhi) held positions as Deputy Director and Chief Advisor with the Office of Treaty Settlements, New Zealand, since the early 2000s until 2015. Anderson has decades of experience improving outcomes for Māori, particularly in Treaty settlement negotiations, including playing a key role in the negotiation of the Ngāi Tūhoe settlement. Anderson is currently Deputy Chief Executive Policy Partnership at Te Puni Kōkiri, which works within government and communities to support Māori collective success.

**Toni Bauman** is an Australian anthropologist, mediator, facilitator, and trainer who has over 30 years’ experience in Indigenous matters including land and native title claims, consensus building, agreement-making, decision-making, and dispute management processes. Bauman was the chief investigator for the Indigenous Facilitation and Mediation Project at AIATSIS (see, e.g., Bauman 2006).

**Larissa Behrendt** is Eualeyai/Kamillaroi and Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. Behrendt has published numerous books on Indigenous legal issues and written on human rights, property law, indigenous rights, Aboriginal women’s issues, and indigenous dispute resolution (see, e.g., Behrendt and Kelly 2008).

**Shaun Berg** is an Australian lawyer with a broad range of experience in Native Title negotiation and litigation, such as with a High Court decision which resulted in the recognition of the native title right to fish in South Australia. Berg is the editor of *Coming to Terms: Aboriginal Title in South Australia* (2010), which examines the implications of the foundation documents of South Australia.

**Richard Boast** is a barrister and Professor of Law, Victoria University of Wellington, New Zealand. Boast has appeared before the Waitangi Tribunal on numerous occasions, both as counsel and as an expert witness, and has written a number of specialist reports for the...
Waitangi Tribunal on geothermal issues, foreshore and seabed claims, and the history of Maori land alienation.

Beverley Clifton Percival (Gitxsan name Gwaans, Wilps Hanamuuxw, Gal Tsup Gitsegukla), is Chief Negotiator for the Gitxsan Nation of Northern BC. Clifton Percival has taught at the Northwest Community College and University of Northern BC in the Faculties of Education, First Nations Studies, Sociology and Anthropology, and has held her grandmother's Gitxsan name, Gwaans, since 1998.

Andrew Chalk is an Australian lawyer with extensive experience representing indigenous groups in Native Title claims, such as the claims of the Lardil, Kaiadilt, Yangkaal and Gangalidda peoples in the Gulf of Carpentaria region, and has advised Aboriginal Land Councils and representative bodies throughout Australia.

Dean Cowie is Chief Negotiator and Manager for the Native Title Unit for the State of Victoria, Australia. Cowie led the development of Victoria’s Traditional Owner Settlement Act 2010, and managed negotiations with indigenous groups such as the Gunai Kurnai and Dja Dja Wurrung peoples. Cowie held the position of Negotiations Manager at the New Zealand Office of Treaty Settlements (OTS) from 2001 to 2007, worked at the Waitangi Tribunal’s research unit from 1994 to 2001.

Cameo Dalley is a Research Fellow at the Centre for Native Title Anthropology at the Australian National University. Dalley has worked in Aboriginal affairs for over ten years, including as an in-house anthropologist for the Queensland State Government, assessing native title connection materials, and as a consultant undertaking cultural heritage surveys throughout Queensland.

John Dawson is Professor of Law at the University of Otago, New Zealand, where he teaches public law, law and psychiatry, and the law relating to the Treaty of Waitangi. Dawson has published articles and book chapters on Maori representation issues and Waitangi Tribunal remedies reports, some of which related to overlap disputes.

Christopher Devlin practices Aboriginal law throughout Western Canada, as a litigator, negotiator and legal advisor. He is the past chairperson of the CBA’s National Aboriginal Law Section and currently serves on the CBA’s National Aboriginal Law s’s Law Reform Committee. Devlin represented the plaintiff’s in two of the legal challenges of 2007 in BC related to overlap disputes (discussed in Chapter 5).

Edward "Eddie" Taihakurei Durie is currently Chair of the New Zealand Māori Council, was the first Maori appointed as a Justice of the High Court of New Zealand, and is
regarded as the preeminent legal expert on the Treaty of Waitangi. He was the Chief Judge of the Māori Land Court from 1980–1998 and Chair of the Waitangi Tribunal from 1980–2004. In 1998 he was appointed to the High Court and retired in 2004, at which point he was the longest-serving member of the New Zealand judiciary. Durie is of Rangitāne, Ngāti Kauwhata and Ngāti Raukawa descent.

**Martin Fisher** is a lecturer at the Ngāi Tahu Research Centre at the University of Canterbury, New Zealand. Fisher has worked as a contract researcher with expertise in Maori claims, and as a Research Analyst/Inquiry Facilitator with the Waitangi Tribunal. Fisher’s doctoral research focused on the recent history of Waikato-Tainui and Ngai Tahu’s Treaty Settlement Negotiations with the New Zealand Government during the late 1980s and 1990s.

**Roy Francis** is Chief Treaty Negotiator for the Tla’amin, a BC First Nation that in 2014 achieved a modern treaty with the governments on BC and Canada. Prior to appointment as Chief Negotiator, Francis served as elected Chief of the Sliammon (Tla’amin) Indian Band.

**Donna Marie Tai Tokerau Durie-Hall** is Ngati Rangiteaorere from Mokoia Island, Lake Rotorua, New Zealand. She is the principal at her own law firm, Woodward Law Offices, Wellington. Durie-Hall is legal adviser to the New Zealand Maori Council, National Maori Congress, and Federation of Maori Authorities (Te Arawa). She is currently an expert adviser on indigenous issues to the World Conservation Union based in Geneva, Switzerland.

**Jeff Harris** is Manager Geospatial and Research Co-ordination at Queensland South Native Title Services (QSNTS), Australia. Prior to joining QSNTS, Harris worked as Senior Geospatial Specialist with the National Native Title Tribunal of Australia.

**Janine Hayward** researches and teaches various aspects of New Zealand politics at the University of Otago, New Zealand, including: Treaty of Waitangi politics, New Zealand’s constitution, electoral politics, environmental politics, and local government politics. Hayward also works on the comparative constitutional politics of commonwealth nations, and comparisons with Canada on Indigenous/State relations. Previously she worked as a report writer and researcher for the Waitangi Tribunal.

**Richard Hill** is Professor of New Zealand Studies at the Stout Research Centre for New Zealand Studies at Victoria University of Wellington, where he also directs the Treaty of Waitangi Research Unit. Hill was formerly Chief Historian and Negotiator for the New Zealand government, has worked for claimant tribes, and has been a Member of the Waitangi Tribunal.
Paul James was the Director of the New Zealand Office of Treaty Settlements from 2006-2011. Before that, James was General Manager, Public Law, and Policy Manager, Family Law. He has also worked in policy in the Treasury, Office of Treaty Settlements, and Te Puni Kōkiri. James has held the role of Deputy Chief Executive, Policy, Regulatory and Ethnic Affairs since 2011.

Carwyn Jones is of Ngāti Kahungunu and Te Aitanga-a-Māhaki descent. Before joining the Faculty of Law at Victoria University of Wellington in 2006, Jones worked in a number of different roles at the Waitangi Tribunal, the Māori Land Court, and the New Zealand Office of Treaty Settlements. Jones is the Co-Editor of the *Maori Law Review* and maintains a blog, *Ahi-kā-rua*, on legal issues affecting Māori and other indigenous peoples. His primary research interests relate to the Treaty of Waitangi and Indigenous legal traditions.

Robert Joseph (Ngati Ruukawa, Maniapoto, Towharetoa, Kahungunu, Rangitane, Ngai Tahu and Pakeha) is a Barrister and Solicitor of the Court of New Zealand and Senior Lecturer, Te Piringa- Faculty of Law, University of Waikato. Joseph’s research interests include Treaty processes, and post-settlement development, and Māori and Indigenous peoples' governance in settler nation-states.

Paul Kariya was Executive Director of the BC Treaty Commission from 1994 to 1998. Prior to his current position as Executive Director of the Clean Energy Association of British Columbia, Kariya served as Executive Director of the Pacific Salmon Foundation, Chief Executive Officer of Fisheries Renewal BC, and in various positions with the federal government, primarily in the departments of Fisheries and Oceans and Indian and Northern Affairs.

Tim Koepke was Chief Treaty Negotiator with the Government of Canada from 1987 until 2013, and was engaged in treaty negotiation in both Yukon and British Columbia. Koepke was involved in negotiations leading to the Umbrella Agreement (1993) and 11 Yukon Land Claim settlements (1995-2006), as well as the Tsawwassen First Nation settlement, which came into effect in 2009.

Richard Krehbiel is a lawyer and scholar with interest in environmental law, Aboriginal law, Aboriginal governance, and environmental assessment. His practice includes First Nation land management and environmental assessment, and provides technical assistance to First Nations related to the First Nation Land Management Initiative. Krehbiel has been involved in BC treaty negotiations since 1993, including over ten years with the Lheidli T’enneh Treaty Office.
Anoushka Lenffer is a Policy Officer with the Victorian Department of Justice, Australia, who was involved with the development of the Victorian Native Title Settlement Framework and Victoria’s *Traditional Owner Settlement Act 2010*. Lenffer is a member of the Right People for Country Program Committee, an initiative that supports Traditional Owner groups to reach agreements about boundary and group composition issues.

Craig Linkhorn is co-editor of the Maori Law Review and is responsible for a team of lawyers within the Attorney-General’s group at Crown Law, New Zealand. Linkhorn has also contributed to research on Indigenous peoples’ rights through a visiting fellowship at the Australian National University’s Centre for Aboriginal Economic Policy Research, and as a participant writer in the Post Treaty Settlement Project to stimulate debate about what will happen after historical Treaty of Waitangi claims are settled in New Zealand.

David Martin is an Australian anthropologist who has extensive field-based experience with Aboriginal groups in rural and remote areas, and has provided high level advice to Aboriginal organisations, government agencies, and the private sector on matters such as developing effective Aboriginal organisational structures, native title and land rights, and addressing alcohol issues. Martin works as a research fellow at the Centre for Aboriginal Economic Policy Research at the Australian National University, and as an independent consultant.

Kim McCaul is an Australian anthropologist with expertise in linguistics and mediation. McCaul has worked in urban and remote contexts on researching, presenting, analysing and assessing ethnographic and linguistic information for Native Title and heritage management processes. McCaul has conducted cross-cultural mediations, expert conferences and community meetings, and spent 10 years as an anthropologist working at the Native Title section of the South Australian Crown Solicitor’s Office.

Paul Meredith is Pou Hautu at the Māori Office/Toihuarewa, Victoria University in Wellington, New Zealand, and is of Ngāti Maniapoto and Pākehā descent. Meredith was previously a Research Fellow at Te Matahauariki Institute, University of Waikato, and has published in the areas of Maori customary law, identity, and history.

Brad Morse has served as legal advisor to many First Nations in Canada, including national and regional Aboriginal organizations in a broad range of constitutional, land claim, governance, economic and treaty issues. He was General Counsel to the Native Council of Canada from 1984-93, during which time he was directly involved in the First Ministers Constitutional Conference Process and subsequent constitutional proposals. Morse served as executive assistant to the Canadian Minister of Indian and Northern Affairs from late 1993 until early 1997, and was Chief Federal Negotiator on several land claims in Canada. Morse
served as Dean and Professor of Law at Te Piringa – Faculty of Law at the University of Waikato, New Zealand, until 2014, at which time he was appointed Dean of Law at Thomson Rivers University in BC.

Val Napoleon is the Law Foundation Professor of Aboriginal Justice and Governance at the Faculty of Law, University of Victoria. Napoleon is from north east British Columbia (Treaty 8) and a member of Saulteau First Nation. She is also an adopted member of the Gitanyow House of Luuxhon, Ganada (Frog) Clan. Napoleon worked as a community activist and consultant in northwestern BC for over 25 years, specializing in health, education, and justice issues. Her dissertation on Gitksan law and legal theory was awarded the UVIC Governor General’s Gold Medal for best dissertation in 2009. Napoleon’s current research focuses on Indigenous legal traditions, Indigenous legal theory, Indigenous feminism, citizenship, self-determination, and governance.

Graeme Neate was President of the National Native Title Tribunal in Australia from 1999 to 2013. Prior to joining the Tribunal, Neate was the Chairperson of the Aboriginal and Torres Strait Islander Lands Tribunal in Queensland and a member of the Land Court of Queensland. Neate is an accredited mediator under the Australian National Mediation Standards with over 30 years’ experience in various aspects of Indigenous land and cultural heritage matters.

Trevor Proverbs was Chief Negotiator, BC Ministry of Aboriginal Relations and Reconciliation, from the early 1990s until the early 2010s, and was involved with the negotiation of the Nisga’a, Lheidli T’enneh, and Sliammon treaties. Proverbs is currently Director, First Nations Engagement, with BC Hydro.

Barry Rigby is a Senior Historian and Research Analyst with the Waitangi Tribunal, and the principal author of many reports produced by the Tribunal. During 1995 Rigby was a Claude McCarthy Fellow at the Stout Research Centre at University of Victoria, Wellington, researching America’s establishment of a Pacific Island empire.

Jacinta Ruru, Ngati Raukawa ki Waikato, Ngai te Rangi, Ngati Maniapoto, was appointed to the Faculty of Law at Otago University, New Zealand, in 1999, where her research focuses on Indigenous peoples’ legal rights to own, manage and govern land and water. Ruru is a consultant editor to the Maori Law Review, and has led, or co-led, several national and international research projects on the common law doctrine of discovery, Indigenous rights to freshwater, and multidisciplinary understandings of landscapes.

Piri Sciascia is Deputy Vice-Chancellor (Māori) at Victoria University in Wellington, New Zealand, and has been involved in the promotion and conservation of Maori arts and culture
since the 1970s. Of Ngāti Kahungunu and Ngāi Tahu descent, Sciascia is regarded as an authority of whakapapa and tikanga Māori, and has been a prominent orator for his hapu and iwi for more than 35 years. Before joining the University, Sciascia was an adviser to the Chief Executive of Te Puni Kōkiri. He has also been Assistant Director-General of the Department of Conservation, and Assistant Director of the QEII Arts Council and Director of the Māori and South Pacific Arts Council.

Kevin Smith is the Chief Executive Officer of the Queensland South Native Title Services, which provides legal representation, facilitation and assistance to Aboriginal Peoples and Torres Strait Islanders in consultations, mediation, negotiations, agreement-making and court proceedings relating to their Native Title claim. Smith is a descendant of the Meriam Peoples of the Torres Strait with traditional connections to Ugar (Stephen Island) and Erub (Darnley Island). Smith has over 20 years’ experience in Indigenous affairs including senior positions with the National Secretariat of Torres Strait Islander Organisations, the Brisbane Aboriginal and Torres Strait Islander Legal Service, the National Native Title Council, and the National Native Title Tribunal.

Sally Smith is the Project Manager of the Right People for Country Program, Office of Aboriginal Affairs Victoria, Australia, an initiative that supports Traditional Owner groups to reach agreements about boundary and group composition issues. Prior to initiating the Right People for Country Project in 2009, Smith worked in community legal centres in advocacy and project management roles, and as a Native Title lawyer for native title representative bodies.

Joel Starlund, Sk'a'nam Tsa 'Win'Giit, is from Wilp Wii Litsxw, a member of the Gitanyow Nation of northern BC, and Executive Director of the Gitanyow Hereditary Chiefs, the body that represents the Gitanyow in negotiations with the Crown.

Neil Sterritt is a member of the Fireweed Clan of the Gitxsan Nation of BC, and was research director for the Gitxsan-Wetsuweten Tribal Council (1977 to 1981), president of the Tribal Council (1981-1987), and was one of the principal architects of the Delgamuu’kw v. British Columbia Aboriginal title court case, a decision widely regarded as a key turning point for Indigenous-Crown relations in Canada. In 2008 Sterritt was awarded an Honorary Doctor of Laws degree by the University of Toronto in recognition of his lifetime contributions to the understanding and expression of Aboriginal citizenship in Canada.

Peter Sutton is an Australian anthropologist and linguist who, over a period of 40 years, has significantly contributed to recording Australian Aboriginal languages and increasing understanding of contemporary Australian Aboriginal social structures and systems of land tenure. Sutton has assisted with over fifty Indigenous land claim cases and has published
prolifically in the fields of Aboriginal languages, land tenure, art, history and indigenous policy. Sutton is a Senior Research Fellow at the University of Adelaide and the South Australian Museum.

**Brian Thom** provides negotiation support to the Hul’q’umi’num’ treaty group of BC, and is an Associate Professor of Anthropology at the University of Victoria. Thom has extensive experience with the BC treaty process, and has published on issues related to Indigenous territory and regional approaches to Indigenous self-government.

**David Trigger** is the Head of Anthropology and Deputy Head of the School of Social Science at the University of Queensland, Australia, whose research focuses on the different meanings attributed to land and nature across diverse sectors of society and in different countries. Trigger has worked on Aboriginal land and negotiation matters for three decades, prepared reports supporting claims, and provided a wide range of advice on claims generally.

**Baden Vertongen** is a New Zealand lawyer specialising in Treaty of Waitangi settlement negotiations and post-settlement issues for Maori. Vertongen has represented clients in numerous Treaty settlement negotiations and in Waitangi Tribunal inquiries, at different times acting for groups either challenging settlements or seeking to defend settlements from legal challenge because of overlap disputes.

**Carrie Wainwright** was appointed in 2000 as kaiwhakawā of the Māori Land Court of New Zealand and served on the Waitangi Tribunal for ten years, including six years as Deputy Chair and one year as Acting Chair. Wainwright is currently Chair of the Immigration and Protection Tribunal, and was formerly a barrister specialising in judicial review and law relating to the Treaty of Waitangi.

**Peter Walters** is the Assistant Deputy Minister of Negotiations and Regional Operations Division, BC Ministry of Aboriginal Relations and Reconciliation, which is the division of the BC Government that implements the government’s program of negotiation and implementation of both non-treaty and treaty agreements with First Nations in BC. Previously, Walters served as Assistant Deputy Minister, BC Ministry of Forests, Lands and Natural Resource Operations, and Assistant Deputy Minister, BC Ministry of Tourism, Culture and the Arts.

**Raelene Webb** has been President of the National Native Title Tribunal of Australia since her appointment in April 2013. Formerly she was a practicing Native Title barrister, appearing for applicants, the Commonwealth, State and Territory Governments in many of the leading Native Title cases in Australia, including the Miriuwung Gajerrong case (*Ward v. Western Australia*) and the Torres Strait Sea Claim.
Gerald Wesley is the Chief Negotiator for the Tsimshian First Nations Treaty Society in BC, a society that currently represents five Tsimshian First Nations in treaty negotiations with the Crown: Kitumkalum, Kitselas, Metlakatla, Gitga’at, and Kitasoo. Previously, Wesley served in several Senior Management positions with First Nations, including Director Northwest Tribal Treaty Nations, Secretary-Treasurer of the Tsimshian Tribal Council, Executive Director/Band Manager for the Haisla Nation, and Executive Director for the Nuu-Chah-Nulth Tribal Council.

Joe Williams was Chief Judge of the Maori Land Court of New Zealand from 1999 to 2008, Deputy Chair of the Waitangi Tribunal from 1999 to 2004, and Chair of the Tribunal from 2004 to 2009. He currently serves as a High Court judge. Prior to joining the Land Court and Tribunal, Williams worked as a lawyer representing claimants at a number of Tribunal inquiries, and is regarded as a leading specialist in Maori legal issues. Williams’ tribal affiliations are Ngati Pukenga and Te Arawa (Waitaha, Tapuika).

Tim Wishart is Principal Legal Officer at Queensland South Native Title Services, Australia. Wishart has worked predominately in litigation and commercial law for 28 years, and on projects such as the Woorabinda Indigenous Land Use Agreement project.

Tim Wooley is an Australian lawyer specialising in native title since 1993. Wooley was involved with the Antakirinja Matu-Yankunytjatjara Native Title Claim in South Australia, which resulted in a consent determination recognising the Antakirinja Matu–Yankunytjatjara People’s non-exclusive Native Title rights and interest to that area.
Appendix B: Principles Identified by the Indigenous Mediation and Facilitation Project

- “Conflict is natural and can have positive outcomes when managed appropriately;
- Indigenous peoples have a right to;
  - manage their own decisions and disputes,
  - say no to any process or agreement, and
  - free, prior and informed consent to processes and outcome;
- Indigenous decision-making is complex and should not be rushed;
- Processes should do no harm to Indigenous participants;
- The specific type process of dispute resolution is determinative of the sustainability of outcomes;
- Processes require ‘arm’s length’ facilitation;
- ‘One size does not fit all’ – dispute resolution processes should:
  - reflect, support and be tailored to local needs and ideas of how authority should be organized and decisions should be made,
  - embody Indigenous values and laws,
  - build on and support local capacity; and,
- Some disputes may not be amenable to resolution and that there needs to be mechanisms to manage unresolved disputes”

(Bauman 2006, 28).
Appendix C: Principles Identified by the Right People for Country Working Group

1. The RPFCP should employ an indigenous-led approach, in which Traditional Owner groups design their own agreement making processes and make their own decisions about extent of country and group composition;

2. The RPFCP should coordinate resources provided by stakeholders, including the Victorian Government and Native Title Services Victoria provider, to ensure Traditional Owner groups are able to effectively participate in agreement making;

3. The RPFCP should investment in preparation, including identifying Traditional Owner representative structures and their relationships, identifying and ascertaining the nature of overlap disputes, and identifying, in collaboration with Traditional Owners, gaps in negotiation capacity with a view to addressing inequities in capacity among groups;

4. The RPFCP should provide education, including programs and communication concerning, for example, the RPFCP, and the role and responsibilities of groups participating in the project, agreement-making processes, and the legal and policy context of the settlement framework;

5. The RPFCP should seek to address institutional, policy, and other systemic barriers to agreement making;

6. The RPFCP should employ facilitators agreed to by the parties, by developing a recruitment and selection process to identify appropriately skilled facilitators, and to support Traditional Owner groups to agree on selection of facilitator(s) to support Indigenous agreement making;

7. The RPFCP should employ processes which respect cultural authority and practices, including those which embed existing decision-making structures, and that match Traditional Owner needs;

8. The RPFCP should develop guidelines for the use of research in agreement making which promotes Traditional Owners’ understandings of research and respects confidentiality of information where appropriate;

9. The RPFCP should ensure the free, prior and informed consent of Traditional Owner groups at each stage of the agreement making process; and

10. The RPFCP should employ processes which strengthen relationships between and among Traditional Owner groups, and support the negotiation of agreements which set out the basis for how groups will conduct their relationships with each other into the future (RPFCP 2011, 57-59).