UNION OF BRITISH COLUMBIA INDIAN CHIEFS

FIRST NATIONS SUMMIT

ASSEMBLY of FIRST NATIONS • ASSEMBLÉE des PREMIÈRES NATIONS

OVERLAP & SHARED TERRITORY ISSUES

"ALL OUR RELATIONS"

BACKGROUNDER & FRAMEWORK: GOALS, GUIDING PRINCIPLES, BEST PRACTICES, MECHANISMS AND INSTRUMENTS FOR RESOLUTION

SEPTEMBER 2014

CONTENTS

"ALL OUR RELATIONS"
A DECLARATION OF THE SOVEREIGN INDIGENOUS NATIONS OF BRITISH COLUMBIA

We, the Indigenous leaders of British Columbia, come together united and celebrate the victory of the Tsilhqot'in and Xeni Gwet'in peoples in securing recognition of their Aboriginal title and rights – and all those Indigenous Nations and individuals that have brought important court cases over the years resulting in significant contributions in the protection and advancement of Aboriginal title and rights, including the Nisga'a, Gitxsan, Wet'suwet'in, Haida, Taku River Tlingit, Musqueam, Heiltsuk and Sto:lo - shining light on the darkness of years of Crown denial of our title and rights. After pursuing different pathways, we now come together to make this solemn Declaration out of our common desire to be unified in affirming our Aboriginal title.

As the original Peoples to this land, we declare:

- We have Aboriginal title and rights to our lands, waters and resources and that we will exercise our collective, sovereign and inherent authorities and jurisdictions over these lands, waters and resources,
- We respect, honour and are sustained by the values, teachings and laws passed to us by our ancestors for governing ourselves, our lands, waters and resources.
- We have the right to manage and benefit from the wealth of our territories.
- We have the inalienable sovereign right of self-determination. By virtue of this right, we are free to determine our political status and free to pursue our economic, social, health and well-being, and cultural development.
- We have diverse cultures, founded on the ways of life, traditions and values of our ancestors, which include systems of governance, law and social organization.
- We have the right to compensation and redress with regard to our territories, lands and resources which have been confiscated, taken, occupied, used or damaged without our free, prior and informed consent.
- We will only negotiate on the basis of a full and complete recognition of the existence of our title and rights throughout our entire lands, waters, territories and resources.
- We acknowledge the interdependence we have with one another and respectfully honour our commitment with one another where we share lands, waters and resources. We commit to resolving these shared lands, waters and resources based on our historical relationship through ceremonies and reconciliation agreements.
- We endorse the provisions of the UN Declaration on the Rights of Indigenous Peoples and other international standards aimed at ensuring the dignity, survival and wellbeing of Indigenous peoples.

We commit to:

- Stand united today and from this time forward with the Tsilhqot'in and with each other in protecting our Aboriginal title and rights.
- Recognize and respect each other's autonomy and support each other in exercising our respective title, rights and jurisdiction in keeping with our continued interdependency.
- Work together to defend and uphold this Declaration.

We, the undersigned, represent First Nations who carry a mandate to advance Title and
Rights in our homelands today referred to as British Columbia and exercise our authorities in making this Declaration. We welcome other First Nations not present today to adhere to this Declaration if they so choose.

Signed by First Nations leaders on November 29, 2007

****

INTRODUCTION

As Indigenous Peoples, we have unique cultures, languages, laws, and rights, all of which flow from and intricately tie us to the land. Our connections and relationship to our territories, lands and resources is fundamental to our physical, cultural and spiritual survival. We are guided by the principle that we possess an inherent right and responsibility to care for and protect our lands and resources for present and future generations. We uphold the responsibility to ensure those lands and resources continue to exist for the benefit of the generations to come. Further to this, we continue to govern ourselves and to enter into relationships with other Nations, guided by our laws, protocols and legal traditions.

First Nations have traditional mechanisms, processes and protocols for engaging with one another and resolving issues and continue to utilize these tools today to seek resolution on issues of shared territories and overlap. It is widely acknowledged that the resolution of this issue is the primary responsibility of First Nations, without interference from any outside party.

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

There is widely held, general agreement that resolution of overlap and shared territory issues is foremost an issue to be resolved among First Nations, through approaches grounded in our cultural traditions, practices and Indigenous laws. However, as we move forward, whether as individual First Nations or through a coordinated collective voice, there are many additional approaches and tools that can be considered or relied upon to support unity and resolution of shared territory and overlap issues. This framework provides a legal and economic context and outlines guiding principles for understanding and addressing shared territory and overlap issues. The aim is to outline an agreed upon approach and to and ultimately bring together our collective efforts to generate instruments and mechanisms that may be of assistance to First Nations in efforts to achieve resolution of this issue.

PART ONE - CONTEXT

BACKGROUND

British Columbia (BC) is unique within Canada as the majority of First Nations located within BC have not signed treaties, resulting in an "Indian Land Question" which remains and continues to perpetuate uncertainty on the ground. Throughout the history of BC, Governments have continued to deny the existence of our Aboriginal Title and Rights and have continued to issue interests in the lands and resources as if the Crown Governments have complete authority and jurisdiction to do so. An important and significant example of this colonial approach includes the proclamation of James Douglas (the first Governor of British Columbia) who on February 14, 1859, proclaimed that "[a]ll the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee", disregarding the rights of First Nations to their territories and resources, treating our lands as *terra nullius.*

Traditional lands were taken without the consent of or compensation to First Nations. Further, with the introduction of the *Indian Act*, First Nations were organized into *Indian Act* bands, placed on specifically, sometimes isolated and small, defined tracts of land and further alienated from our traditional lands and resources. It is felt and understood by many First Nations in BC that the issue of overlaps/shared territory is a result of the imposition of colonial law, institutions and policies.

It is understood and acknowledged that the process of sorting out territorial issues is part of the process of decolonization. Resolution of this issue is also about achieving mutual recognition and respect amongst ourselves as First Nations and to set the table for a fuller form of reconciliation.

LEGAL AND ECONOMIC LANDSCAPE

In considering resolution of the overlap and shared territory issue, it is generally agreed that we must remain focused on supporting and building processes created by First Nations, which are grounded in our cultural teachings, practices and Indigenous laws and approaches. However, our current reality also requires us to be mindful of the current legal and economic landscape.[1]

Numerous decisions of the Supreme Court of Canada ("SCC") have confirmed that these lands were indeed "occupied" by peoples with distinctive societies and cultures. Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.

Further, Canadian courts have emphasized the desirability of First Nations resolving overlaps and shared territory issues between themselves. In *Gitanyow v. Canada*, Justice Williamson of the BC Supreme Court reflected that, "…if the parties fail to deal with the conspicuous problem of overlapping claims, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated solutions". More recently, the SCC decision in *Tsilhqot'in*[2] addressed the issue of Aboriginal title and in that context; the decision underscores the need for careful consideration and resolution of overlap and shared territory issues. While not directly addressing overlap and shared territory issues, the decision raises closely related practical considerations for the federal and provincial governments, First Nations, and industry in moving forward.

---

[1] This section of the document is not intended to serve as a full legal opinion on the scope and content of Aboriginal title and rights and related issues. Rather, it is meant to turn our minds to some key legal and economic considerations and act as a starting point for dialogue.

[2] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

The SCC decision highlights significant legal issues such as consultation and consent of the proper title and rights holders and the importance of respecting traditional governance structures and legal systems. It is likely that as a result of the decision, there may be a rise in strength of claims assessments. In BC, we are currently working to resolve the outstanding land question. Where title remains unresolved, the consultation framework as set out in *Haida* still applies. Therefore, the scope of consultation required is dependant on a First Nation's strength of the claim. Overlap and shared territory issues are key considerations for all First Nations in building and responding to any strength of claim analysis. Legal issues such as consultation are further addressed in subsequent sections.

Although the resolution of overlap and shared territory issues is largely a political exercise, many legal questions arise that must inform part of the strategy in seeking resolution. Further, important considerations in this discussion are the economic interests of First Nations and related opportunities.

LEGAL QUESTIONS/ISSUES

The following section provides a high-level overview of examples of legal questions and issues, which are primarily grounded in Crown-Indigenous relations. This is not intended to be an exhaustive list, but merely intended to start the dialogue.

A. Proper Title and Rights Holder

The issue of "proper title and rights holder" is an important one for First Nations to consider when contemplating the issue of overlap and shared territories. High-level court cases such as *Delgamuukw* and *Tsilhqot'in*, highlight that the question of proper title and rights holder as a key feature when considering where Aboriginal title exists, and determining whether the Crown has met its legal obligations (e.g. its constitutional duty consult and accommodate First Nations when it contemplates activities that may have impacts to a Aboriginal title and rights).

The courts have made it clear that Aboriginal title is an exclusive right to the land and includes the right to choose the uses to which the land is put, as well as a right to an inescapable economic component of that title. The determination of the proper title and rights holder is an important discussion and will largely be determined by the history, culture, laws, protocols and practices of First Nations themselves.

Challenging pieces include the creation of "Indian bands" and reserves and other issues which arise when assertions are made by more than one First Nation to a particular area, which has the potential to lead to conflict, and in some cases, litigation. This in effect impacts on First Nations abilities to take advantage of opportunities and damages our relationships. Further complications arise through other issues, such as creation and ownership of traditional traplines or questions around title to bodies of water. This is becoming a reality where First Nations begin competing for accommodation opportunities.

B. Aboriginal Title and Exclusivity

In *Calder*, the SCC confirmed that Aboriginal title exists in BC.[3] Subsequently, in *Delgamuukw* v. *British Columbia*, the SCC elaborated upon this by setting out the nature and content of Aboriginal title and the common law test for proving Aboriginal title.[4]

Further, the SCC has articulated the following attributes of Aboriginal title:

[3] *Calder* v. *British Columbia (Attorney General)*, [1973] S.C.R. 313.
[4] [1997] 3 S.C.R. 1010. E.g. elements of the test include: occupation of land prior to assertion of Crown sovereignty, if present occupation relied on as proof of occupation pre-sovereignty, that there's continuity between present and pre-sovereignty occupation and at sovereignty, occupation was exclusive.

- It is an Aboriginal right to the land itself, alienable only to the Crown and protected by section 35 of the *Constitution Act, 1982*;
- It is a right to the *exclusive use and occupation* of the land for a variety of activities, not all of which need be integral to the distinctive culture of the Aboriginal society;
- The ranges of uses must not be irreconcilable with the nature of the Aboriginal society's attachment to the land which forms the basis of their Aboriginal title; and
- It is a collective right to the land, held by all members of the Aboriginal group.

The SCC has determined that "exclusivity" means that a First Nation must demonstrate that a claimed territory is its sole ancestral territory and not the territory of another First Nation. *This differs from non-exclusive use, which can give rise to more limited Aboriginal rights.*[5]

However, overlap and shared territory issues are not necessary fatal to a claim of exclusivity. The SCC also determined that the test for exclusive occupation must take into account the context of the Aboriginal society at the date the Crown asserted sovereignty. This means that exclusive occupation may still be demonstrated regardless of whether another Aboriginal group(s) was present.[6] In such circumstances, a First Nation can demonstrate exclusivity by showing "an intention and capacity to retain exclusive control."[7] The presence of other Aboriginal groups by permission could potentially reinforce a finding of exclusivity if such groups were allowed access with permission.[8]

In *Marshall and Bernard*[9], the SCC further elaborated on the attributes of Aboriginal title, clarifying that "occupation" means "physical occupation" and "exclusive occupation" means the intention and capacity to retain exclusive control of the land. Further, it held that whether nomadic groups had sufficient "physical" possession giving rise to Aboriginal title is a question of fact.[10]

C. Joint Aboriginal Title – Shared Exclusive Use

The SCC held in *Delgamuukw* that exclusivity means that an Aboriginal group must show that a claimed territory is its ancestral territory and not the territory of an unconnected Aboriginal society. However, the Court also recognized the possibility that two or more Aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life.

The "exclusivity" requirement does not necessarily preclude the possibility of "joint title", which arises where a portion of territory is shared between two or more Aboriginal nations and where each recognizes the other's entitlement to the exclusion of others. Although on a number of occasions First Nations have argued against the concept of "joint title", the SCC has discussed this option in various cases. In *Delgamuukw,* Chief Justice Lamer stated that, "In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant Aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two Aboriginal groups in the same territory."[11]

By extending the application of the concept of "shared exclusivity" to Aboriginal title, Chief Justice Lamer acknowledged that two or more Aboriginal groups could become *co-owners* of lands that they exclusively occupied

[5] *Delgamuukw*, at paras 138-39 and 159.
[6] *Delgamuukw*, at para 156.
[7] *Ibid*.
[8] *Ibid*.
[9] *R*. v. *Bernard; R.* v. *Marshall* 2005 SCC 43.
[10] The BC Court of Appeal focuses on this point in its decision in *Tsilhqot'in*.
[11] *Ibid*, at para 158.

together at the time of Crown assertion of sovereignty.[12] The SCC was of the view that the requirement for exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from *shared* exclusivity.

The meaning of shared exclusivity is well known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared.[13]

D. Boundary Issues

In the context of treaty negotiations, there are instances in which treaties are being challenged by First Nations who claim that part of the area subject to a proposed treaty with another First Nation is within their traditional territory or in other words when a First Nation enters the BC Treaty Process each First Nation must produce a Statement of Intent which includes a map showing boundaries of their claimed traditional territory. Often these maps include neighbouring nation territories within the claimed boundaries. In such circumstances, First Nations may choose to engage with one another and work toward a process for resolution or seek remedy through the Canadian legal system.

In some instances, the fact remains that even where a process is established, the parties may fail to reach agreement, while in other situations, one or more parties may not be interested in participating in a resolution process at all. This leaves a couple of outstanding questions, including:

- What happens to an interest that is impacted by an advancing claim (such as a treaty or other agreement)?
- What can a party do if it has an interest that is impacted by another First Nation's advancing claim?

In the context of treaties, Canadian courts have in some cases looked to non-derogation clauses as an answer to challenges brought by a First Nation alleging that its rights will be adversely impacted by an agreement.[14] A non-derogation clause is meant to provide protection of Aboriginal rights and ensure that they are not altered or diminished. The Federal Court of Canada has articulated that non-derogation provisions offer "some measure of protection". Concerns have been raised as to the legal strength of non-derogation provisions. A non-derogation clause could be considered as one tool among many for providing "greater certainty" and as a means to acknowledge the neighbouring First Nations' asserted title and/or rights.

Further, despite challenges, willing participants may choose to remain committed in attempt to reach some form of boundary agreement in which the parties:

- continue to work towards agreed upon terms for sharing the lands, harvest rights or for jointly managing resources;
- agree that they will each exclude contested territory from inclusion in a final agreement; or
- agree that the treaty will proceed to ratification, with the understanding that rights will not be exercised in the contested area until a resolution can be achieved.

Where parties cannot agree or are unwilling to participate in a resolution process, the party with the impacted interest has the option of pursuing litigation and turning to the courts for a remedy.

E. Consultation and Accommodation

---

[12] McNeil, Kent, "Exclusive Occupation and Joint Aboriginal Title", a research report prepared for the Hul'qumi'num Treaty Group, July 2003, at pgs. 3-4.
[13] *Delgamuukw*, para 196.
[14] *Tseshaht First Nation v. Huu-ay-aht First Nation*, 2007 BCSC 1141, at para 25; *Cook v. Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722, at para 199.

Under Canadian common law, the Crown is required to consult with neighbouring First Nations before completing any agreement. In particular, Canadian courts have reflected on the application of the Crown's duty in cases where more than one First Nation asserts Aboriginal title or rights, such principles are discussed below.

While responsibility for resolving overlapping territory issues rests primarily with First Nations, Canada and BC have a continuing obligation to consult with First Nations whenever they are making a decision that could impact on their Aboriginal Title and Rights. Further complicating factors include the Crown's obligation to consult non-aboriginal communities and issues. In particular, in the recent *Tsilhqot'in Nation v. British Columbia* decision, the SCC highlighted the need for respecting Aboriginal claims and preserving interests. In particular, the SCC stated that, "As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim."[15] Ultimately, if the Crown does not meet its obligation to consult, the certainty that it is seeking to achieve could be compromised. This becomes a critical factor in relation to other third party interests.

Legal principles articulated by the courts will be of assistance in determining whether the Crown may have a duty to consult with neighbouring First Nations when it is negotiating non-treaty agreements, such as economic development agreements, Strategic Engagement Agreement (SEAs) or revenue and benefit sharing agreements.

The duty to consult confirmed by the SCC is a critical tool for First Nations in addressing Crown initiatives that impact upon or threaten Aboriginal title, rights and treaty rights. However, the duty to consult is increasingly being used by one First Nation against another in arguments presented in litigation. This creates challenges because no First Nation has a legal or constitutional duty to consult with another in dealing with overlap and shared territory issues. Yet, where the court agrees that the Crown has breached its duty to consult, it is both the Crown and the First Nation that wants its treaty ratified that must live with the consequences.

F. The Duty to Consult While Engaged in Negotiations

Since the duty to consult is grounded in the honour of the Crown, the Crown cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of negotiations.[16] Further, the courts have clarified that the duty to consult requires that the Crown take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them.[17] The duty "derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right."[18] A complicating factor in ensuring that this work is done as effectively and efficiently as possible, are government's "openness protocols" which restrict and in some cases, prohibit First Nations from sharing information arising from negotiations.

While it is reasonable and appropriate for Canada to "encourage" First Nations to resolve competing claims and to facilitate those discussions – the fostering of overlap negotiations cannot serve as a substitute for direct consultation by Canada with the affected First Nations.[19]

The courts have focused on the SCC's statement in *Sparrow* that section 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." In *Delgamuukw*, the SCC elaborated that "[t]hose negotiations *should also include other Aboriginal nations which have a stake in the territory claimed*. Moreover,

---

[15] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 91.
[16] *Samba'a K'e*, citing *Haida*, at paras 83-84.
[17] *Ibid*, citing *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, at para 86.
[18] *Ibid*, at para 87.
[19] *Ibid*, at para 204.

the Crown is under a moral, if not a legal duty to enter into and conduct those negotiations in good faith…"[20] The Crown's duty exists to protect the Aboriginal interest pending reconciliation through treaty or in the courts.

Since the honour of the Crown is always at stake in its dealings with Aboriginal people, the duty will apply in the context of all negotiations, whether treaty-related or otherwise. The strength of the Aboriginal group's claim and seriousness of potential impacts that can be demonstrated through evidence will determine the scope of the Crown's duty in any given circumstance. The fundamental question is always what is required to uphold the honour of the Crown and advance reconciliation.

In *Samba'a K'e Dene Band* the Federal Court was of the view that "proceeding with negotiations with the Acho Dene Koe First Nation (ADKFN) and excluding the applicants from any direct discussions despite their repeated entreaties to be consulted *does little to promote reconciliation between Canada and the SKDB and NBDB, and may very well have the opposite effect*."[21] Where the claim of the other Aboriginal group is a strong *prima facie* case and the government's proposed decision may irretrievably affect the claim, the government may be required to take steps to avoid that harm and to minimize the infringement. If the contemplated Crown decision potentially puts the neighbouring First Nation's claims or interests in jeopardy in a real (not merely hypothetical, surmised or imagined) way, the Crown will have a duty to that First Nation.[22]

The courts have held that as long as the consultation is meaningful, there is no obligation on the Crown to reach an agreement and that First Nations have no legal right to demand a specific form of accommodation. Rather, accommodation requires that "Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process."[23]

ECONOMIC CONSIDERATIONS

With both Canada and BC increasingly turning their attention to our traditional territories and resources, with the aim of making economic development through major resource and energy infrastructure projects a top Crown priority, resolution of this matter becomes increasingly urgent. Further, a growing number of additional factors give rise to the necessity of timely resolution (e.g. the negotiation of modern-day treaties, disagreements over the appropriate governing body to speak for the lands and people, litigation, the role of the Crown and funding issues).[24] Regardless of our chosen mechanisms to achieve resolution of the land question, overlap and shared territory issues arise and resolving such issues is relevant to all First Nations in BC.

The provincial and federal governments' greatest source of economic wealth comes from the lands and resources in First Nations' traditional territories, while First Nations' greatest source of poverty is our dispossession from these same lands and resources. In BC, we continue to deal with the consequences of this continued alienation and diligently work toward addressing the outstanding land question through many different avenues.

In BC, First Nations have constitutionally-protected unextinguished Aboriginal Title and Rights which continue to exist despite Governments and industry efforts to alienate our Nations from our territories. Further to this, the SCC has confirmed that Aboriginal title is an Aboriginal right which includes the right to the exclusive use and occupation of the land, the right to choose the uses to which the land is put, and that it entails an "inescapable

[20] *Delgamuukw*, at para 186.
[21] At para 187.
[22] *Samba'a K'e*, at para 182.
[23] *Sambaa K'e*, citing *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74, at para 90.
[24] This is not purported to be an exhaustive list, but rather intended to provide examples of situations.

economic component." First Nations have a protected right to economically benefit from their lands and resources.

As First Nations, we all want to create the best possible conditions for our nations to thrive and we all want to see one another succeed. With this in mind, the commitment to address overlaps or shared territory issues can sometimes become overshadowed by the desire to secure a hold over portions of lands, resources and obtain economic benefits to close the socio-economic gap through various negotiations with the Crown and third parties. This can result in conflict with other First Nations who also have an interest in the same lands and resources. Although such agreements between First Nations and the federal and/or provincial governments provide for First Nations involvement in decisions that affect their rights and provide First Nations with necessary economic opportunities, they also give rise to certain complications that must be addressed.

Federal and Provincial governments are aggressively pursuing many different energy and resource extractive projects that will ultimately impact the traditional territories in which First Nation exercise their inherent Title and Rights. These projects place further pressure on neighbouring First Nations to resolve the issues surrounding overlap and shared territories. The Federal government has advanced their *Responsible Resource Development Plan* which relies upon the position that as a country we must enhance and diversify Canada's export energy markets for the benefit of all Canadians. This is a similar approach taken by the Provincial Government with respect to their Liquefied Natural Gas (LNG) Strategy which aims to grow BC's economy and contribute up to $1 trillion in GDP between now and 2046. These two significant government strategies to access and extract natural resources in the unceded territories of First Nations in BC has placed a considerable amount of pressure to ensure that overlaps and shared territories issues are resolved.

In March 2013, Prime Minister Harper appointed Douglas Eyford as the Special Federal Representative on west coast energy infrastructure, with a mandate to identify approaches to meet Canada's goals of expanding energy markets and increasing Aboriginal participation in the economy. Specifically, Eyford was asked to report on:

- how development projects would affect Aboriginal interests;
- Determine what are Aboriginal interests in pipeline and marine safety initiatives;
- Potential options to create employment and business opportunities for Aboriginals; and
- Environmental and socio-economic factors that may affect Aboriginal participation in projects.

In his report[25], Eyford notes that conflict over traditional territorial boundaries is a longstanding issue among Aboriginal communities and that the impact of overlapping claims and related conflict, including litigation, may influence final investment decisions.

Of particular note in regard to the overlap/shared territory issue, Eyford recommends:

- "In areas impacted by major projects, where territorial overlap disputes exist, Canada should undertake strength of claim assessments (in conjunction with provincial governments where appropriate) to advise on the required level of consultation and apportionment of benefits.
- Canada should establish a federal policy framework and guidelines to address shared territory disputes in the context of major project developments in a consistent manner across all federal departments and agencies".

This raises the question, do we want to leave responsibility for making this important determination in the hands of the Crown? The Crown's assessment will likely have real and long-term implications beyond the issue of

[25] See: Douglas Eyford submitted his report to the Prime Minister on November 29, 2013. His report was made public in early December 2013. The report is titled, *Forging Partnerships. Building Relationships – Aboriginal Canadians and Energy Development. A report to the Prime Minister by Douglas Eyford*. November 2013.

determining overlap and shared territory issues. Likely, there is general consensus that First Nations driven approaches and solutions are the preferred mechanism for resolution.

PART TWO – MOVING FORWARD

At the March 2014 BC Chiefs' Forum on Shared Territories and Overlaps, the Chiefs, technicians and others engaged in discussion on guiding principles, best practices and tools for resolution in building this framework. Following the meeting in March the Union of BC Indian Chiefs and the First Nations Summit held their regular quarterly meetings in April and June 2014 to further engage and discuss this issue.

In some cases, where relations have been stable and based upon mutual recognition and/or where historical or modern treaties, agreements or protocols have been established, moving forward is a simple process of ***mutual affirmation and recognition by First Nations of each other***; however, a process of reconciliation may be required between or among First Nations that have had negative experiences with each other in the past.

Also where shared territories and overlap issues are confounded by external factors such as resource development, boundary issues, and the designation of proper title holder, governments and outside organizations need to find ways to support First Nations developed and led processes. In supporting processes to address overlap and shared territory issues, governments and industry need to be mindful of the significant commitments of time and resources of First Nations, often beyond their existing capacity. The Crown should be prepared to provide financial support for First Nations led solutions on this issue. In this regard, what is required is a secure, stable and long-term source of multi-year funding to support First Nation overlap and shared territory resolution. Both Canada and BC must be prepared to come to the table with financial and other resources to support First Nations' efforts. Given the recent federal announcement in regard to its work on Canada's comprehensive claims policy, there is a reference to the facilitation of resolution of shared territory disputes. In particular, Canada identified a willingness "to facilitate resolution of disputes among groups in the context of major resource development projects where such assistance is requested." We are hopeful that this entails Canada's providing capacity support to enable First Nations to effectively develop and engage in processes to resolve overlap and shared territory matters. The extent of Canada's commitment is not yet known as specific details about what this source of funding and support will entail have not been made public.

Some of the key considerations in establishing any process to address shared territory and overlap issues include:

- The appropriate design of the process.
- Who should oversee/carry out the process?
- Who will hold the parties accountable?
- How will the process be resourced?
- What is the goal of the process – supporting the parties in reaching a consensus or gathering evidence to enable a decision-maker to make a determination?

GOALS

- As a starting point, to engage in mutually respectful dialogue and work toward achieving or maintaining a mutual, recognition-based relationship and to facilitate reconciliation amongst ourselves;
- To achieve more effective communication and information-sharing among First Nations;
- In areas where there is mutual agreement among First Nations that this is appropriate to do so, to develop new processes for shared-decision making about lands and resources for revenue/benefit sharing
- To ensure that all parties with an interest are engaged as early as possible in the negotiations process;
- To ensure any approach by Canada with respect to shared territories and overlaps respects the guiding principles identified by First Nations.

GUIDING PRINCIPLES

It is acknowledged that there is no "one size fits all" process. The diversity of First Nations in BC and the circumstances of each overlap/shared territories issue will require different approaches and mechanisms for resolution. However, there are some general points of unity for all First Nations attempting to address this issue. In particular, in the All our Relations Declaration, we acknowledge the interdependence we have with one another and respectfully honour our commitment with one another where we share lands, waters and resources. We commit to resolving these shared lands, waters and resources based on our historical relationship through ceremonies and reconciliation agreements. In this context, the following guiding principles are intended to serve as starting points for First Nations in building resolution mechanisms:

- **Inherent legal traditions and jurisdiction:** Since time immemorial, First Nations in BC have lived by and implemented their own Indigenous laws which govern their relationships with one another and to the land and resources;
- **Honour and Respect:** As First Nations, when we reach a resolution of overlap and shared territory issues, it is important that we each honour and uphold the protocols/MOUs/resolution agreements entered into;
- **Decolonization and Recognition:** All First Nations in BC are engaged in the common effort to achieve decolonization, and seek full recognition of our inherent laws, jurisdiction, Aboriginal Title, and Rights and we acknowledge the autonomy of our nations;
- **Cooperation and Partnership:** As First Nations, we must co-operatively engage with one another, to educate each other on how our respective Indigenous laws would apply to the issue and we must do this at the earliest possible opportunity, at the outset of any negotiations or discussions of economic development or opportunities. As First Nations, we each have a responsibility to exercise political discipline and respect for one another;
- **First Nations Driven Process:** It is acknowledged that the resolution of overlap and shared territory issues is primarily a matter for First Nations to resolve among themselves, through processes grounded in First Nations' customs, cultural teachings and practices and laws;
- **Traditional Language:** where possible, in our discussions with one another, our traditional language should be incorporated into the dialogue because our language, our laws and our lands are intimately linked to one another;
- **Community Input:** we must each do our own important internal work by engaging with our community members/citizens of our Nations and seek their input on principles to guide our engagement with our neighbours;
- **Innovation:** We will be open to considering new approaches and tools in the resolution of overlaps and shared territory issues and consider incorporating flexibility and adaptability for use by other Nations who are facing similar challenges; and
- **Capacity:** all First Nations impacted by overlap and shared territory issues need to be adequately funded at the outset of any engagement. All parties need to have access to funding to allow each Nation to build the capacity to fully participate in such important discussions. Without such funding, there is a real and significant risk of creating an unlevel playing field.

BEST PRACTICES, MECHANISMS AND INSTRUMENTS FOR RESOLUTION

Implementing processes for resolution are an opportunity to express and implement Indigenous laws. The challenge is to identify what steps might be followed to facilitate successful resolution, and what support mechanisms may be helpful. Indigenous approaches and laws must be a core feature in any process of resolution.

The following sets out possible approaches, best practices, mechanisms and instruments for resolution. It is not intended to be an exhaustive list, but rather to serve as a starting point in the process of building best available information for First Nations to draw on as needed.

FIRST NATIONS TRADITIONAL & CULTURALLY APPROPRIATE APPROACHES

A. Information Sharing:

If possible and practical, First Nations should share best practices and tools for resolving overlap and shared territory and resource harvesting issues;

B. Establish Working Groups:

A working group of technicians could be established between the parties which could be advised by Elders or others who are culturally knowledgeable as members of the group, or through a separate Elders Council, or directly between appointed representatives. Establish an internal vehicle/mechanisms for regular and effective sharing of information amongst First Nations. Through this working group they could share information relevant to the issue to be resolved.

Further, a working group consisting of youth could also be established to bring the youth perspective into the dialogue. This also has the added benefit of mentoring youth and preparing them for roles in leadership.

A working group could:

Ii. set parameters to define the scope of what subjects/topics they will discuss;
Iii. develop guidelines regarding how they will conduct their business; and
Iiii. establish communication guidelines for communications with the public and with their respective Nations.

C. Cultural Ceremony:

Neighbouring First Nations could meet and attempt to achieve resolution or build an approach through cultural ceremonies that is applicable in their territories and traditions. (e.g. through the big house and related ceremonial practices and traditional laws).

D. Inter-Tribal and other Protocol Gatherings:

First Nations could meet through inter-tribal and other such protocol gatherings to discuss family relationships, historic ties, traditional laws /knowledge and share information and perspectives. It could also be an opportunity to discuss management and interests in the territories and work toward achieving identification of common ground, agreed upon principles and actions to move forward.

PUBLIC DATABASE

An outside, regional or provincial organization could establish and maintain a publicly accessible database of overlap, shared territory and resource harvest protocols, Memorandum of Understandings, Accords other such agreements/templates/tools which First Nations could draw on should they seek to incorporate or use additional tools for resolution.

DISPUTE RESOLUTION MECHANISMS AND INSTRUMENTS

It is generally accepted that the starting point for addressing overlap and shared territory issues is for the parties involved to meet and engage in mutually respectful dialogue. Further, it is acknowledged that resolution mechanisms are best grounded in our respective cultural teachings, laws and practices.

However, in the interest of providing a range of tools and options for consideration, dispute resolution techniques may also incorporate alternative dispute resolution tools.

ALTERNATIVE DISPUTE RESOLUTION (ADR) AND/OR MEDIATATION

Mediators could play a facilitative role within the process, or, depending on the design of the process, a mediation role. A mediation process could include a blending of principles from First Nations traditions, laws and teachings with the tools and guidelines of a more formal mediation process. It is possible for First Nations to work closely with a collectively agreed upon mediator to build a mediation process which is tailored to the parties involved. This could be a helpful mechanism between Nations in the context of the discussion of proper title holder. A mediator may be able to assist the parties in reviewing and conveying information and messages and in reaching general agreement as it relates to the specific piece of the territory in question. A mediation process can also assist in moving towards traditional reconciliation options between the First Nations. As options are identified, it may be preferable if related information remain internal to First Nations and not be accessible to Crown governments.

DATA BASE OF ADR/DISPUTE RESOLUTOIN TOOLS AND RESOURCE PEOPLE

In addition to housing template MOUs, protocols, accords and other relevant tools grounded in cultural teachings, laws and practices, a publicly accessible database could also potentially include various ADR/dispute resolution tools which First Nations could access. The most helpful and relevant tools could be incorporated into a traditionally grounded approach when a roadblock is reached.

Such a database could also potentially include a resource list of certified mediators with an understanding of this issue and the ability to work with First Nations in seeking resolution.

CONCLUSION

This framework has been prepared to facilitate discussion and feedback from Chiefs, technicians and First Nations communities. It will continue to be enhanced and developed in subsequent meetings and discussions during 2014. It will only be finalized when approved by Chiefs through resolution. The framework is a resource for First Nations communities and does not in any way affect the self-determination of each First Nation in BC.

Overlap and Shared Territory Issues intersects with many other areas with implications for all sectors. As governments and industry continue to advance into our territories and the pressure continues to mount it is imperative for First Nations to works towards reconciling with neighbouring Nations and work towards consensus on overlap and shared territory issues. As indicated by the Coast Salish First Nations at the overlap and Shared Territory Forum on March 24th, working against and in opposition to each other will be at the detriment of all parties who hold an interest, so it is in the best interest of all to respect each other and work together to the benefit of all.