"REFLECTIONS ON OVERLAP ISSUES"

Prepared by Christopher Devlin

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INTRODUCTION

In British Columbia, the modern Treaty-making process is starting to produce final agreements between First Nations, Canada and British Columbia. In 2007, three final agreements were reached: Lheidli T'enneh Final Agreement, Tsawwassen Final Agreement and the Maa-nulth Final Agreement.

These modern Treaties are not based on proof of Aboriginal rights or title. The modern Treaty-making process shepherded by the B.C. Treaty Commission (the "BCTC process") does not require a First Nation to prove any legal right to the territory it claims. However, if a final agreement is ratified by the First Nation, the province and the federal government, it becomes a Treaty which expressly conveys legal rights which are protected under section 35(1) of the *Constitution Act, 1982*.

The modern Treaties being negotiated pursuant to the BCTC process cover significant geographic areas of the province. It is a notorious fact that of the First Nations who are engaged in the B.C.T.C. process, they claim well over 100% of the province. Between those claims, and the claims of the First Nations who are not in the BCTC process, there arise significant overlaps, including overlaps with First Nations with existing Treaty rights also protected by section 35(1) of the *Constitution Act, 1982*.

This paper sets out the background to this issue, and explores how this overlap issue may give rise to specific claims.

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I. OVERVIEW OF BCTC PROCESS

A. HISTORY LEADING UP TO THE BCTC PROCESS

Historically, British Columbia and, to a lesser extent Canada, denied the existence of Aboriginal title and rights of First Nations. Canada issued a *White Paper* in 1968 calling for the abolition of the *Indian Act* and the legal assimilation of Aboriginal people into Canadian society, without any distinctive or separate rights. All of this was notwithstanding long-established Imperial law that the Aboriginal peoples of North America had title to their lands subject only to the underlying sovereign title acquired by the British Crown on discovery.[1]

These policy positions began to change with the 1973 decision of the Supreme Court of Canada in *Calder*, a case concerning the Aboriginal title of the Nisga'a First Nation.[2] Although the Supreme Court divided evenly on this point, three judges held that Aboriginal title did exist as a matter of common law. Three did not. One ruled on a technicality (that there was no fiat from the Attorney General so the appeal was dismissed), such that the law was left with a high degree of uncertainty about Aboriginal title.

On the strength of the uncertainty about Aboriginal title resulting from the *Calder* case, the federal government changed its policy and began to negotiate land claims with First Nations under its comprehensive claims policy. British Columbia, however, continued to deny the existence of Aboriginal title – ironically, given that this province was one of the few in which most of the Crown land was not subject to Treaties with First Nations.

In 1991, the B.C. Supreme Court issued its decision in *Delgamuukw*.[3] The trial judge rejected the doctrine of Aboriginal title and held that the Gitksan and Wet'suwet'en First Nations had no such title to their ancestral territories. He further rejected any notion that they exercised jurisdiction, possession, ownership or control of their territories in a manner known to the

[1] *St. Catherine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577
[2] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313
[3] *Delgamuukw v. British Columbia*, [1991] W.W.R. 97 (B.C.S.C.)

common law. He also held that settlement and occupation by Europeans extinguished any exclusive rights that the First Nations may have had. He left the Gitksan and Wet'suwet'en First Nations with only usufructory rights over Crown lands subject to the general laws of the province.

The trial judge's decision was not well received by First Nations. There were widely held views that the trial decision was wrong and would not survive appeal. British Columbia initiated discussions with BC First Nations on how to resolve land claims issues in the early 1990's.

The British Columbia Claims Task Force was struck. It included representatives from Canada, British Columbia and First Nations. It produced the Task Force Report dated June 28th, 1991 (the "1991 Task Force Report"), in which there were significant recommendations.[4]

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[4] The Task Force recommended that [emphasis added]:

1. The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding–through political negotiations.
2. Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.
3. A British Columbia Treaty Commission be established by agreement among the First Nations, Canada, and British Columbia to facilitate the process of negotiations.
4. The Commission consist of a full-time chairperson and four commissioners -- of whom two are appointed by the First Nations, and one each by the federal and provincial governments.
5. A six-stage process be followed in negotiating treaties.
6. The treaty negotiation process be open to all First Nations in British Columbia
7. The organization of First Nations for the negotiations is a decision to be made by each First Nation.
8. **First Nations resolve issues related to overlapping traditional territories among themselves.**
9. Federal and provincial governments start negotiations as soon as First Nations are ready.
10. Non-aboriginal interests be represented at the negotiating table by the federal and provincial governments.
11. The First Nation, Canadian, and British Columbian negotiating teams be sufficiently funded to meet the requirements of the negotiations.
12. The commission be responsible for allocating funds to the First Nations.
13. The parties develop ratification procedures which are confirmed in the Framework Agreement and in the Agreement in Principle.
14. The commission provide advice and assistance in dispute resolution as agreed by the parties.
15. The parties select skilled negotiators and provide them with a clear mandate, and training as required.

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The British Columbia Treaty Commission ("BCTC") was established by the "British Columbia Treaty Commission Agreement" dated September 21, 1992 between Canada, British Columbia and the First Nations Summit to advance tripartite treaty negotiations in the province. That agreement was confirmed in provincial and federal legislation.

The next year the B.C. Court of Appeal issued its judgment in *Delgamuukw*.[5] The Court of Appeal took issue with many of the trial judge's findings about the customs, traditions and legal rights of the Gitksan and Wet'suwet'en. However, the majority of the court did not overturn the trial judge's conclusions respecting sovereignty, jurisdiction and ownership. The First Nations had no proprietary rights or title. Instead, the majority concluded that the First Nations held unextinguished, non-exclusive Aboriginal rights which were protected by s.35(1) of the *Constitution Act, 1982*. Two members of the five-judge panel wrote strong dissents.

In 1997 the Supreme Court of Canada issued its decision in *Delgamuukw*.[6] The Supreme Court overturned both the lower courts, holding that a First Nation can hold Aboriginal title, which is an exclusive right to possession and control of land exercised by an Aboriginal group. However, the Supreme Court remitted the matter back to trial, rather than to declare that the Gitksan and Wet'suwet'en actually had Aboriginal title, because the trial judge had not had the benefit of the test established by the Supreme Court to prove Aboriginal title.

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16. The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.
17. Canada, British Columbia, and the First Nations jointly undertake public education and information programs.
18. The parties in each negotiation jointly undertake a public information program.
19. British Columbia, Canada, and the First Nations request the First Nations Education Secretariat, and various educational organizations in British Columbia, to prepare resource materials for use in the schools and by the public.

[5] *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 (B.C.C.A)
[6] *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 14 (S.C.C.)

In the subsequent years, there have been other high court decisions respecting Aboriginal title, most notably *Marshall and Bernard*.[7] While the Gitksan and Wet'suwet'en never did go back to trial, the Xeni Gwet'in First Nation has litigated the issue of Tsilhqot'in Aboriginal title over the past eight years in B.C. Supreme Court in Victoria.[8] The trial decision of Mr. Justice Vickers is expected to be issued sometime this fall.[9]

Thus, the legal landscape was shifting constantly as the BCTC process was created and negotiations occurred. Modern Treaty making arose as an alternative to litigation, but in a context of uncertain and evolving legal rights. That has continued to the present.

B. BCTC PROCESS AND CURRENT STATUS

The BCTC process established six stages to negotiate a modern Treaty: Statement of Intent to Negotiate, Readiness to Negotiate, Negotiation of a Framework Agreement, Negotiation of an Agreement-in-Principle, Negotiation to Finalize a Treaty, and Implementation of a Treaty.[10]

If a First Nation submits a Statement of Intent that meets the criteria established by the BCTC, the First Nation's claim is accepted into the BCTC process. A First Nation need only describe its claimed traditional territory – no proof of Aboriginal title or rights is required – in order to be accepted into the BCTC process.

Consistent with the 1991 Task Force Report, BCTC policy requires First Nations negotiating treaties to attempt to resolve possible overlaps with their neighbouring First Nations.[11] But no onus is placed by the BCTC on either level of government to do likewise. Furthermore, there no penalty applied to a First Nation which does not resolve overlaps with its neighbours.

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[7] *R. v. Bernard; R. v. Marshall*, [2005] 3 C.N.L.R. 214 (S.C.C.)
[8] *Tsilhqot'in Nation v. British Columbia*, 2006 BCCA 2
[9] At the time of writing, his Reasons for Judgment had not yet been delivered.
[10] See: http://www.bctreaty.net/files/sixstages.php
[11] See: http://www.bctreaty.net/files/sixstages-2.php

Thus, the BCTC process is voluntary and based on political negotiations, not legal ones. While there are legal and constitutional effects of the negotiations in the form of a Final Agreement, the negotiations themselves do not engage the doctrine of Aboriginal title, or the doctrine of Aboriginal rights. The rationale was to avoid the nasty legal wars typified by *Delgammukw* and to engage in Treaty making from an honourable and respectful perspective. However, this profoundly affects the kind of Treaties produced by the BCTC process and perhaps explains why overlaps are not adequately resolved prior to reaching a final agreement.

In British Columbia there are 195 Indian Act "bands" eligible for enrolment in the BCTC process. As of May 22, 2007, there were 108 bands participating in Treaty negotiations, representing approximately 55% of the eligible bands in B.C.. These 108 bands are at the following stages of negotiations:

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

Stage 2: Preparation for Negotiations (5)

Stage 3: Negotiation of Framework Agreement (3)

Stage 4: Negotiations of Agreement in Principle (86)

Stage 5: Negotiation of Final Agreement (14)

Stage 6: Implementation of Treaty (0)

As noted above, there have been only three First Nations which have completed Stage 5 with a Final Agreement: Lheidli T'enneh First Nation, Tsawwassen Final Agreement, and Maa-nulth First Nation.

The Lheidli T'enneh Final Agreement was initialed in October 2006 and began ratification in March 2007. The first step was community ratification. The Final Agreement did not pass. The ratification process has stopped. However, the community may hold a second vote later this autumn.

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The Tsawwassen Final Agreement was initialed in December 2006 and began ratification in July 2007. The community vote was successful. The next step is provincial ratification. The provincial Legislature resumed sitting on October 15th, and one of the first pieces of legislation introduced was the settlement legislation. If it passes,[12] then federal ratification will proceed after that. The expected effective date for the Treaty is late 2008 or early 2009.

The Maa-nulth Final Agreement is the first multi-band Final Agreement to be initialed, in December 2006. The Huu-Ay-Aht First Nation, first of the five First Nations signatory to the Final Agreement, held its community ratification vote in July 2007, which passed the Final Agreement. The other four may hold their community votes sometime this autumn.

With all three of these final agreements, there are significant overlaps. With all three, most of the overlaps were resolved prior to the initialing of each agreement but not all. Significantly for this paper, the Lheidli T'enneh Final Agreement overlapped with the territory of Treaty No. 8 to the degree of 5700 square kilometres. The Tsawwassen Final Agreement overlaps with most of the traditional territory of the Sencoten First Nations[13] in Canada and a significant portion of the traditional territory of the Cowichan Tribes. Neither Canada nor British Columbia, let alone the BCTC, required that these overlaps be resolved prior to the initialing of each agreement, contrary to the 1991 Task Force Report and to BCTC policy.

[12] As of the date of writing, the settlement legislation had not yet been passed but was expected to be done.
[13] Tsawout First Nation, Tsartlip First Nation and Pauquachin First Natios, situated in Saanich, Vancouver Island, and the Semiahmoo First Nation situated at the east end of Boundary Bay on the Lower Mainland.

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II. POTENTIAL RELEVANCE OF FINAL AGREEMENT OVERLAPS TO SPECIFIC CLAIMS

The issue of unresolved overlaps is a significant one. It may be useful to remember the words of Mr. Justice Williamson:

> I think it inevitable that if the parties fail to deal with the conspicuous problem of overlapping clams, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated solutions.[14]

Notwithstanding the clear recommendations of the 1991 Task Force Report and current BCTC policy, Canada and British Columbia are pushing First Nations to initial Final Agreements before they have resolved overlap issues with its neighbours. This has resulted in at least five pieces of litigation to date, as neighbouring First Nations realized no one has satisfactorily addressed their concerns.[15]

There are at least two ways in which specific claims may arise as a result of this failure to address overlap issues prior to ratification of final agreements achieved through the BCTC process. The first arises from the specific non-exclusive nature of Treaty rights; the second from the notion of priority respecting limited natural resources.

A. NON-EXCLUSIVE RIGHTS

It is important to understand the nature of many of the rights granted under these modern Treaties. For the most part, the rights are non-exclusive and participatory only, with respect to traditional resources such as wildlife harvesting, fishing, migratory birds, cultural practices, and

[14] *Gitanyow v. Canada*, [1998] B.C.J. No. 1453 (B.C.S.C.) para 41
[15] *Apsassin v. Attorney General of Canada*, 2007 BCSC 492; *Tseshaht First Nation v. Huu-Ay-Aht First Nation*, 2007 BCSC 1141; *Semiahmoo First Nation v. Minister of Aboriginal Relations and Reconciliation*, S.C.B.C. Vancouver Registry No. S-074496; *Sencoten First Nations v. Minister of Aboriginal Relations and Reconciliation*, S.C.B.C. Vancouver Registry No. S-074887; *Cowichan Tribes v. Minister of Aboriginal Relations and Reconciliation*, S.C.B.C. Vancouver Registry No. S-076136

so on. So far, all the "natural resource" provisions in the three completed Final Agreements (Lheidli T'enneh, Tsawwassen and Maa-nulth) provide harvesting rights to broad geographical areas defined in each final agreement. These harvesting rights are non-exclusive in nature, and are subject to the applicable federal or provincial regulation. First Nations also obtain a limited right to participate in resource management decisions of those federal or provincial regulators. But First Nations negotiating Treaties in the BCTC process must agree to share resources and resource habitats with other users, First Nation or otherwise, notwithstanding their historic use of particular resources or occupation of particular resource habitats.

These rights may be contrasted with the existing historic Treaty rights in British Columbia, pursuant to Treaty No. 8 and the Douglas Treaties of the 1850's.

Treaty No. 8 protected the First Nations' right to hunt, fish and trap both commercially and for subsistence.[16] The Supreme Court of Canada has held that these rights may be exercised on unoccupied Crown lands, and on Crown lands which have been "taken up" or "occupied" i.e. put to an active use which is incompatible with the Treaty right in question.[17] With respect to privately held lands, Treaty No. 8 does not afford a right of access to "occupied" private lands except those to which the Indians have a right of access by custom, usage or consent of the owner or occupier, for the purpose of hunting, trapping or fishing.[18] However, if the privately owned land is not "required or taken up" in the manner described in Treaty No. 8, then Treaty adherents have a right of access to such land. The courts have held that this geographical limitation is based on the concept of "visible incompatible use."[19]

[16] *R. v. Horseman*, [1990] 3 C.N.L.R. 95 (S.C.C.) ("*Horseman*")
[17] *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.) ("*Badger*") at paragraph 59
[18] *R. v. Mousseau*, [1980] 2 S.C.R. 89 at 97
[19] *Badger,* at paragraphs 51 and 54

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The Douglas Treaties of the 1850's confirmed the full panoply of pre-Treaty Aboriginal hunting and fishing practices of the Saanich Tribes previous to entering Treaty with the Crown.[20] These practices included both subsistence and commercial hunting and fishing. Hunting practices included deer hunting on private yet unoccupied land and hunting at night with illumination. The Douglas Treaty confirmed the *sui generis* right to fish as formerly, which is not limited and includes rights incidental to the operation and the place/habitat of fisheries such as access to the fishery, and economic rights.[21]

How are these specific historic Treaty rights to be reconciled with the modern Treaty rights granted through the BCTC process? Will Treaty 8 beneficiaries be able to hunt over settlement lands granted in fee simple under a modern Treaty, so long as such lands are not put to a visibly incompatible purpose? Will Douglas Treaty beneficiaries be able to engage in habitat management of their fisheries, and access those same fisheries notwithstanding the fishery harvest plans made pursuant to a modern Treaty?

It seems reasonable to expect conflicts between historic and modern Treaty rights as issues like these arise in the future. Each of the final agreements contemplates litigation where rights under the final agreement may come into conflict with the Aboriginal and Treaty rights of other First Nations. But Canada is a party to the final agreements reached under the BCTC process. It is conceivable that some First Nations may wish to file specific claims against Canada rather than to litigate. Breach of Treaty is a breach of a lawful obligation all the same.

[20] *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (C.A.) at par. 50; *R. v. Morris*, 2006 SCC 59, paras. 22 and 25
[21] *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79 (C.A.)at 82, 85, 90, 91

B. PRIORITY

Consider another hypothetical scenario: in a particular territory, there is one moose left to shoot, or one salmon left to fish. Should a historic Treaty right holder have a priority over a modern Treaty right holder with respect to the harvesting of scarce resources?

As noted above, modern Treaty rights respecting wildlife harvesting and fishing are made subject to the applicable provincial and federal regulations. Modern Treaty rights are harmonized to the existing regulatory regimes. For example, wildlife harvesting rights are entirely subject to provincial laws and regulations. In addition, the province can unilaterally infringe the Treaty rights granted under a modern Treaty by entering into another Treaty with another First Nation. These are lesser Treaty rights, in terms of their protection from provincial infringement.

This may be contrasted with existing Treaty rights. While they may be affected by such regulatory regimes, they exist quite apart from them. Furthermore, in the case of provincial regulations, the province does not have the constitutional competence to regulate them *qua* Treaty right. Provincial laws of general application cannot derogate or meaningfully diminuate existing Treaty rights, subject to the terms of the particular Treaty.[22]

Should historic Treaty rights, which are less subject to Crown regulation, be granted priority over modern Treaty rights with respect to harvesting of scarce natural resources? In other areas of Canadian law, priority of rights holders may be determined on when a right crystallized in time. Could Canada be held liable, as a party to each kind of Treaty, where it does not protect a historic Treaty right holder's priority interest to a particular hunting, fishing or trapping resource over the interest of a modern Treaty right holder? If so, it is possible that a First Nation may elect to use the specific claim process to settle such questions, rather than the courts.

[22] *Saanichton Marina*, at 92, *Morris*, paras. 54 and 55

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III. WESTERN BOUNDARY OF TREATY NO. 8

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

What is now being pursued in British Columbia is a completely different model, one in which conceivably there could be multiple Treaties overlapping the same territory or geographic area. These modern Treaties no longer use the nomenclature of extinguishment, but instead "modify" the Aboriginal interests in a particular area, as expressly set out in the modern Treaty.[23] What is left uncertain is how that can be done in regards to unextinguished Aboriginal title held by another First Nation, because Aboriginal title is an exclusive proprietary right in law.

As noted above, what is also left uncertain is how overlaps with existing Treaties will be reconciled once there are, effectively, competing Treaty rights to the same resource. An interesting "boundary" issue involved six of the eight Treaty 8 First Nations of British Columbia.[24] They have brought an action against Canada and British Columbia claiming that the western boundary of Treaty No. 8 is along the Arctic-Pacific watershed. Canada agrees, but British Columbia say the boundary is mush further to the east, along the easterly flanks of the Rocky Mountains. This territorial difference of opinion amounts to over 100,000 square kilometers. The First Nations brought the action due to the uncertainty of where they can

[23] E.g. "cede and surrender"
[24] West Moberly, Saulteau, Halfway River, Doig River, Prophet River and Ft. Nelson First Nations.

exercise their Treaty rights, given the province's position. The action is still n early stages, with document discovery almost complete and with no trial date set as yet.[25]

If the province is correct, will the Treaty 8 First Nations have a specific claim against Canada for having represented the Treaty territory to be something that it is not since 1900? Will they have a specific claim that the "cede and surrender" provision of Treaty No. 8 do apply to the traditional territories of the B.C. Treaty 8 First Nations to the west of the boundary?

As well, there are several other First Nations currently engaged in the BCTC process that claim territory within the boundaries of Treaty No. 8 as understood by the Treaty 8 First Nations and Canada.[26] One of which, the Kaska Dena Council, obtained leave of the Court to be added as a defendant in the proceedings, due to the potential effect of the outcome of the litigation on its BCTC negotiations.

If the First Nations and Canada are correct about the boundary's location, the problems identified above respecting overlapping claims between First Nations engaged in the BCTC process and First Nations with existing historic Treaty rights remain alive respecting over 100, 000 square kilometers. If Canada and British Columbia do not address the overlap issues prior to entering modern Treaties with the nine First Nations with overlapping BCTC claims to Treaty No. 8 territory, specific claims may very well arise to this significant area of British Columbia.

[25] For a summary of the proceedings, all the pleadings filed to date, and other information about this litigation, see http://www.devlingailus.com/links.html and then click on the "Willson" litigation.
[26] Lheidli T'enneh, Yekoochie Nation, Kaska Dena Council, Carrier Sekani Tribal Council, Tsay Key Dene Band, Acho Dene Koe First Nation, Teslin Tlingit Council, McLeod Lake Indian Band, Gitxsan Hereditary Chiefs.

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IV. CONCLUSION

In British Columbia, the issue of overlapping claims is very much a live one. The recent "success" of the BCTC process has brought attention to the overlap issue, and to the Crown's failure to address the issue in the advent of granting new Treaty rights that overlap existing historic ones. There has already been significant litigation in the past year on the overlap issue, and it is reasonable to expect more. Where there is litigation, there are claims and some of those may conceivably be diverted into the specific claim process.

While I cannot prognosticate on all the possible ways in which specific claims may arise as a result of the overlap issue, I have presented two scenarios in which First Nations may claim a breach of lawful obligation by Canada resulting from modern Treaty rights being overlapped onto existing historic Treaty rights. The magnitude of this problem is well illustrated by overlapping claims to a significant area of the territory of Treaty No. 8, at least as it is understood by the signatories of that historic Treaty. While one might suggest that these scenarios have stretched to make the argument, it is fair to say that the specific claim process may yet have to content with the overlap issues arising in British Columbia.