Addressing Disputes Between First Nations: An Exploration of the Indigenous Legal Lodge

By

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Acknowledgments

Thank you to the many people at TAG-Negotiations West for supporting this project. Many of them took the time to discuss their experiences negotiating treaties and how overlaps impact their efforts. They are among the brightest and most committed individuals I have had the pleasure of working with.

Paul Paterson introduced me to this project as part of his efforts to build a case towards an increased federal focus to support reconciliation between BC First Nations. Paul’s example of spearheading an initiative that goes beyond the edges of law and policy has strengthened my belief that, like overlaps, these boundaries are not as fixed as they first appear and there is plenty of space within the federal system for innovation and change.

Tara Ney gave me a tremendous amount of her time, patience and support to navigate the various institutional personalities that shaped this project. Val Napoleon spoke with me over the phone to discuss the origins of the ILL, the focus of the research and turned me towards key concepts and sources that were instrumental in shaping my knowledge.

My participants spent many hours sharing intimate details about their families and communities. They provided me with a window for understanding how histories of oppression impact present day capacities of First Nations to enjoy the same level of social harmony as most other Canadians. Their willingness to explore community norms and principles of dispute resolution with a person from the very culture that has sought to discount them is a testament to these norms and principles as well as the peacemaking philosophies from which they are born.
Executive Summary

The following project is an exploration of the Indigenous Legal Lodge (ILL), a modern forum for First Nations to address issues of overlapping claims and shared territories. The findings and recommendations are intended to contribute to the ongoing work of the Treaties and Aboriginal Government Sector-Negotiations West at Aboriginal Affairs and Northern Development Canada to explore alternative dispute resolution models for addressing overlapping claims (overlaps). The primary objective of this project is to answer the research question: “Is the Indigenous Legal Lodge a suitable framework for resolving overlap disputes between BC First Nations?” To answer this question, the objectives of the project are twofold. The first is to describe the insights about community norms and principles of DR as they are told through the conflict narratives of five Indigenous stakeholders (Phase 1 of the interviews). The purpose of this exploration is to combine the norms and principles identified by the stakeholders with what the research literature demonstrates, and develop criteria for assessing the ILL framework. The second objective is to explore the relevance and merits of the ILL. To do this, I examine the perspectives (strengths and limitations) that participants shared about the ILL (Phase 2 of the interviews) against each criterion developed in Phase 1. From this examination, recommendations are made for implementing the ILL in a variety of BC First Nations’ contexts.

This executive summary begins by providing a background of the problem of overlaps followed by a brief description of the method employed to conduct the interviews. Next, I outline the five criteria for assessing the ILL that emerged from the review of the literature in Phase 1 of the interviews. Finally, I provide a description of the ways the ILL is successful in meeting these five criteria, followed by a list of six recommendations to strengthen the ILL.
Background and Rationale

In the context of the BC treaty process, shared territory and overlap claims (overlaps) refers to situations where more than one First Nation asserts Aboriginal title over a particular geographic area that becomes subject to a proposed treaty. The problem of overlaps stems from a complex interconnection of territoriality and historical relationships among First Nations. The problem is further complicated by federal instruments of colonization such as the Indian Act, which disrupted long-established norms and processes of negotiation that were used among First Nations to negotiate borders and boundaries and shared territory (Thom, 2009). Today, as Canada negotiates treaties with BC First Nations, providing benefits to one First Nation at the potential expense of others, relationships between Nations may become strained or evoke new disputes between historically peaceful Nations.

 Ideally, a negotiating First Nation will reach some form of agreement with its neighbors as to how traditional territories will be shared and managed before substantive negotiations are concluded in an Agreement in Principle (BCTC, 2009b). In most cases, however, First Nations have been unable to address their differences themselves, creating a high degree of risk and uncertainty for all parties involved in treaty negotiations (BCTC, 2009). To date, every case where a First Nation has implemented a treaty (three in BC so far), overlaps have remained unresolved, with a number of First Nations seeking remedy through the Courts.

Due to their limited capacity to engage Indigenous law and general hesitance to make binding decisions on claims to aboriginal title, the courts have instructed the parties to address these issues through negotiation; however, overlap issues have tended to be reduced to “map drawing” exercises that define boundaries between where the territory of one Nation ends and that of the other begins. This practice is seen as problematic because it is limited to the common law concepts
of territoriality and fails to account for important contextual factors such as long-term social, economic and political relationships between communities. First Nations did not historically manage issues of territoriality through the clarification of borders on a map. Rather, a range of indigenous laws and dispute resolution processes would have been drawn upon to address the many issues of how to share lands.

In response to the incapacity of the courts and the BC treaty process to effectively address these issues, Val Napoleon proposed the implementation of an alternative framework called the Indigenous Legal Lodge (Napoleon, 2007a). The ILL is intended as a modern forum within which First Nations draw on their legal orders and socio-political relationships to develop overlap agreements. The ILL model was first considered and supported by First Nations involved in overlap discussions in April 2007 at a meeting between the Treaty 8 Tribal Association and Lheidli T’enneh First Nation, and again in May 2007 at a tripartite meeting between Lake Babine Nation, British Columbia and Canada to address Lake Babine’s overlap with the Yekooche First Nation.\(^1\) It was subsequently explored in a discussion paper entitled *The Indigenous Legal Lodge*, submitted to the Indigenous Bar Association Annual Conference in October 2007 (Napoleon, 2007a).

The discussion paper (Napoleon, 2007) describes both the composition of the Lodge as well as the key stages of the framework. These are described below.

The composition of the Lodge as follows:

- The Parties;

- An appointed panel of three individuals from a neutral First Nation who work with parties to draft agreements;

\(^1\) Treaty 8, a historic treaty spanning a land base across northern British Columbia, northern Alberta and part of the Northwest Territories. Among those in BC are the First Nations of Blueberry River, Doig River, Fort Nelson, Halfway River, McLeod Lake, Prophet River, Saulteau First Nation, and West Moberly.
• Three facilitators with knowledge and experience with Indigenous legal orders and law to work with leadership and members of the First Nations to articulate their Indigenous laws, frame legal perspectives, define legal obligations and principles, and consider their approach to the issues. According to the 2007 proposal, “[the] role of these facilitators is to support and enable full participation and engagement of the parties and the presenters, and ensure the integrity of the process generally” (p. 7);

• An expert in Canadian law to advise and support the panel working with parties to draft agreements (Napoleon, 2007a).

The 2007 proposal further outlines the following key stages of the overall ILL framework:

1. An initial meeting of the parties to determine process design.

2. A feast confirming the commitment of each party to the agreed upon process.

3. The Lodge itself would sit for a minimum of five days to hear from community representatives who speak to the nature and scope of the overlap area as well as their experiences of the land, current uses, and kinship.

4. The panel works with parties to draft non-binding agreements on managing joint interests in the area and on future political affirmation and commitment requirements for each generation.

5. If there is no consensus around the agreement, the facilitator makes a non-binding recommendation to the parties (Napoleon, 2007a).

**Methodology**

The fieldwork for this project consisted of narrative interviews with five Indigenous stakeholders. There were two phases to these interviews. In Phase 1, participants were asked to describe stories of conflict in their families or communities. The purpose of Phase 1 was to tap into
their insights about Indigenous norms and principles of DR. In Phase 2 of the interviews, participants linked their narratives to the composition and framework of the ILL as the basis for exploring its strengths and limitations. The purpose of Phase 2 was to actively engage participants in the analytical work to link their stories and experiences with the ILL framework.

Method

The audio interviews were transcribed and analyzed using a holistic method of analysis in which the entire content of participants’ narratives were coded according to common conflict issues, the norms and principles for addressing conflict (Phase 1) and their perspectives of the ILL (Phase 2).

Findings

Section 5 of this Report links the findings from the review of the literature and Phase 1 interviews to verify a framework for assessing the ILL. In order to make the ILL more amenable to a variety of BC First Nations’ contexts, these findings suggest that the ILL must:

1. Be flexible enough to apply across a range of legal and cultural contexts, but proceed from an agreed upon framework that reflects the specific legal and political contexts of the disputing parties. This criterion is defined as “flexibility”.
2. Be developed at a local level and emerge from the human and cultural resources available within communities. This criterion is defined as “local development”.
3. Be respectful of dynamic and sometimes competing governance structures by seeking to identify how multiple perspectives and interests can be included. This criterion is defined as “inclusivity”.
4. Develop mechanisms for communities to address issues of trust. This criterion is defined as “trust mechanisms”.


5. Establish criteria for selecting third parties that is reflective of community expectations of impartiality and neutrality and broad enough to include other forms of facilitation such as witnessing. This criterion is defined as “criterion for third parties”.

**Highlights from the Analysis**

The analysis of participants’ narratives in Phase 2 of the interviews highlight a number of strengths of the ILL. First, the ILL provides a flexible framework from which First Nations can be brought together to discuss issues of overlap and work towards eventual agreements. Though it is supportive of a larger project to re-introduce core elements of traditional social institutions to resolve contemporary conflicts, it is not exclusively based on them. A second key strength of the ILL lies in its general support for the principle that there is no one-size-fits-all model for dispute resolution respecting lands and resource disputes. By drawing on the experiences and perspectives of community members, and inviting them to explore how the overlap issue can best be resolved, the ILL draws from the human and cultural resources within communities. Third, because the ILL includes a range of community representatives who speak to their experiences of land, as well as the current nature and scope of the overlap, the ILL is more representative and inclusive than other processes in which only treaty negotiators are participants. As such, the work of the ILL is to explore relationships created through marriage, kinship, trade etc. to make decisions about the status of lands and resource management; these considerations are an potential of the ILL to cut across the “freeze-dried” political identities of Indian Bands imposed by the Indian Act to reflect more fluid understandings of Indigenous citizenship and nationhood.

Fourth, the feast was supported as a key institution of dispute resolution and an important ingredient for the success of ILL. Not only does the feast demonstrate a commitment by the host community to resolve the dispute, but it also provides an important opportunity for building trust,
setting a positive tone for future dialogue and gives parties a sense of an incremental accomplishment to resolve the overlap. The role of the panel as witnesses during the feast and throughout the sitting of the lodge was viewed as important to create a safe environment for discussions and enshrine agreements into the collective memory of the communities. Finally, this study validated expectations that select facilitators be well versed in Indigenous traditions, cultures and in the history of the parties.

**Recommendations**

In order to strengthen the ILL and make it more amenable to a variety of BC First Nations’ the ILL framework should:

1. Develop a strategic plan for undertaking consultations at various levels in order to ensure all relevant perspectives are included in the design of the lodge and as the lodge process unfolds;

2. Establish defensible criteria for who will speak to their experience of the overlap;

3. Consider whether community ratification (as opposed to a Band Council Resolution) is required to ensure eventual agreements will be honored by the communities at large;

4. Where possible, include more formal or informal opportunities for First Nations to build trust and reconcile internal political issues;

5. Consider how the expertise of the BCTC can be utilized in the development and undertaking of the lodge process; and

6. Consider the value of including an expert in Canadian law in conjunction with the work of developing the overall legal framework of the process.
# Table of Contents

Acknowledgments .................................................................................................................................................. 1  
Executive Summary ............................................................................................................................................... 2  

Section 1: Introduction ........................................................................................................................................... 11  
1.1 Problem Statement ......................................................................................................................................... 11  
1.2 Rationale ......................................................................................................................................................... 12  
1.3 Overview of the Indigenous Legal Lodge ..................................................................................................... 13  
1.4 Project Goals and Objectives ......................................................................................................................... 16  
1.5 Research Limitations ..................................................................................................................................... 17  
1.6 Significance and Benefits ............................................................................................................................... 18  

Section 2: Background and Context ................................................................................................................... 21  
2.1 A Snapshot of BC Treaty History .................................................................................................................. 21  
2.2 Where Worlds Collide: BCTC Policy Respecting Overlaps ........................................................................ 23  
2.3 Negotiations and the Duty to Consult: Federal Policy Respecting Overlaps ............................................ 26  
2.4 First Nations Respond: Overlaps and the Courts ......................................................................................... 29  
2.5 Beyond the Courts: Overlaps and Alternative Dispute Resolution ............................................................ 31  

Section 3: Literature Review ................................................................................................................................. 33  
3.1 Overview of Indigenous Law and Dispute Resolution .................................................................................. 33  
3.2 Dispute Resolution System Design in Indigenous Contexts ...................................................................... 39  
3.3 Summary ......................................................................................................................................................... 47  

Section 4: Methodology ........................................................................................................................................ 49  
4.1 Narrative Inquiry ............................................................................................................................................ 49  
4.2 Method ........................................................................................................................................................... 51  
4.3 Recruitment ................................................................................................................................................... 52  
4.4 Limitations ..................................................................................................................................................... 53  
4.5 Ethical Considerations .................................................................................................................................. 53  

Section 5: Analysis of Narrative Interviews ...................................................................................................... 56  
5.1 Trust: You’re not Going to Get Very Far Without it ....................................................................................... 56  
5.2 Leading towards Dispute Resolution: The Role of Consultation .............................................................. 58  
5.3 Clearing the Air and Sharing Your Truth: The Role of Storytelling .......................................................... 60
1.4 Providing Advice and Maintaining Harmony: The Role of Third Parties........................................62
5.5 Summary and Assessment Criteria.................................................................................................65
Section 6: Exploration of the Indigenous Legal Lodge........................................................................69
6.1 Criterion One: Flexibility..................................................................................................................69
6.2 Criterion Two: Local Development and Consultation.................................................................72
6.3 Criterion Three: Inclusivity.............................................................................................................74
6.4 Criterion Four: Trust Building Mechanisms ..................................................................................75
6.5 Criterion Five: Broad Criteria for Third Parties............................................................................76
Section 7: Conclusion and Recommendations......................................................................................80
Bibliography ...........................................................................................................................................84
Appendix A: Concepts.............................................................................................................................93
Appendix B: Indigenous Legal Lodge Work Plan..................................................................................95
Appendix C: Participant Consent Form................................................................................................96
Appendix D: Discussion Guide.............................................................................................................100
Section 1: Introduction

The following is an exploration of the Indigenous Legal Lodge (ILL), a modern forum for First Nations to address issues of overlapping claims and issues of shared territories. The findings and recommendations are intended to contribute to the ongoing work of the Treaties and Aboriginal Government – Negotiations West (TAG-NW) Sector at Aboriginal Affairs and Northern Development Canada (AANDC) to explore alternative dispute resolution models for addressing overlapping claims (overlaps). This introductory section discusses the problem of overlapping claims, followed by a rationale for the project, with a description of its objectives as well as its significance, limitations, and benefits.

For the purposes of this paper, First Nation refers to the term used by the Government of Canada in reference to communities of people designated as both Status and non-Status “Indians” according to the Indian Act. I use this term when it is referred to in the grey literature and in the context of the BC treaty process. The term Aboriginal is used to refer to First Nations, Inuit and Métis peoples recognized as Aboriginal people under section 35 of the Constitution Act. I use this term when it is referred to in both the grey and academic literature. Where possible, the term Indigenous is used and considered as a more appropriate term to refer to the original inhabitants and societies of Canada who identified themselves politically and socially according to their needs and aspirations and outside the confines of colonial legislation, policy and practice.²

1.1 Problem Statement

Overlaps refer to situations where more than one First Nation asserts Aboriginal title over a particular geographic area that is subject to a proposed treaty. There are currently 60 First Nations

² For a full description of these and other terms engaged throughout this Report refer to Annex A.
in the treaty process, of which 27 (or 45%) are in “active” negotiations (BCTC, 2010). Among them, only one – the Haida Nation – has no known overlaps. For all others, there may be multiple overlaps. For example, at the time the Tsawwassen First Nation was negotiating its treaty, the proposed treaty area overlapped with 53 other Indian Bands (Arvay, 2007).

Put simply, “the main reason for the overlaps is because of the historical reality that traditional territories of First Nations did, in fact, overlap” (Arvay, 2007, p.3). Beyond this simple fact, however, lies a complex interplay of historical and modern relationships between First Nations, the impacts of colonization on First Nations’ relationship with the Crown, and the ways in which these relationships play out across the BC treaty landscape. As Canada negotiates treaties with one First Nation or group of First Nations, pre-existing tensions may resurface or well-established relationships become strained, creating a high degree of risk and uncertainty for all stakeholders of modern treaties.

1.2 Rationale

Two decades have passed since the BC treaty process was first established, and although First Nations are encouraged to make their best efforts to resolve overlaps, most have been unsuccessful, creating a high degree of risk and uncertainty for all parties involved in treaty negotiations (BCTC, 2009). Ideally, negotiating First Nations would reach some form of agreement with its neighbors about how traditional territories will be shared and managed before substantive negotiations are concluded in an Agreement in Principle (BCTC, 2009b). To date, every case where a First Nation has entered final agreement negotiations, overlaps have remained unresolved, with a number of First Nations seeking remedy through the courts on the grounds that the Crown has failed to appropriately consult and accommodate their rights and interests in some way. In response, however, the courts have provided limited guidance in these matters and, to date, no First
Addressing Disputes Between First Nations

Nation has been successful at blocking the ratification of a treaty. The limited guidance by the courts, coupled by the growing number of First Nations moving into advanced stages of the BC treaty process, suggests an immediate need for Canada to be more responsive to the issue of overlaps if treaties in BC are to be resolved in a way that meets the needs of all affected parties.

There is a wide spectrum of overlap disputes, ranging from disputes that are more latent in nature to those that include threats of violent conflict. In some cases, addressing overlaps “will be a simple process of mutual affirmation and recognition by First Nations of each other where relations have been stable and based upon mutual recognition and/or where historical or modern treaties or protocols have been established between them” (UBCIC, 2008, p.2). Such was the case with the recent accord reached between the Tseshaht First Nation and the five First Nations comprising the Maa-nulth Treaty Society (Morrow, 2011). In other cases, however, there may be a history of conflict or strained relationships (often referred to as wars of history) between Nations that preclude any sort of agreement between them. One of the more pressing examples is the ongoing conflict between the Yale First Nation (who reached a Final Agreement) and several groups from the Sto:lo Nation. This overlap has been so contentious that Sto:lo Nation Chief Joe Hall has warned that it may “ultimately result in bloodshed and violence” (Freeman, 2011). In cases such as these, according to the UBCIC (2008), “the resolution of overlaps will ultimately involve a process of reconciliation between or among First Nations” (p. 2). To the extent that there has been resolution to these types of overlap disputes, most have been settled by consensual processes conducted pursuant to protocols and laws accepted by First Nation parties (Rush, 2009).

1.3 Overview of the Indigenous Legal Lodge

First proposed in 2007 by Val Napoleon, the Indigenous Legal Lodge ILL) is intended as a modern forum within which First Nations draw on their legal orders and socio-political
Addressing Disputes Between First Nations

relationships to develop overlap agreements. The ILL was first considered and supported by First Nations involved in overlap discussions in April 2007 at a meeting between the Treaty 8 Tribal Association and Lheidli T’enneh First Nation and again in May 2007 at a tripartite meeting between Lake Babine Nation, British Columbia and Canada for addressing Lake Babine’s overlap with the Yekooche First Nation.³ It was subsequently explored in a discussion paper entitled *The Indigenous Legal Lodge*, submitted to the Indigenous Bar Association Annual Conference in October 2007. The discussion paper provides information about the contents of the initial proposals, the Indigenous and Canadian common law authorities from which ILL would derive, the composition and process of the ILL framework and options for eventual remedy in the Treaty 8 and Lheidli T’enneh context. The proposal further sets out a Work Plan spanning a thirteen month period beginning with specific steps for preliminary research, planning and undertaking the Lodge possess through to finalizing an agreement. A copy of the proposed Work Plan is provided in Appendix B.

ILL is premised on the view that Canadian courts do not have the capacity to interpret and apply Indigenous law (Napoleon, 2007a). According to the 2007 proposal, the theory underlying the ILL is that “it is possible to develop a flexible, overall legal framework that indigenous people might use to express and describe their legal orders and laws so that they can be applied to present-day problems” (Napoleon (2007a), p. 1). Thus, rather than focusing on the legal rights of each party as they may be defined through an application of Canadian law, the ILL would focus on the social and political relationships between First Nations, “such as those created through marriage, kinship, trade and other arrangements both modern and historic” (Napoleon, 2007a, p.4). In addition to arriving at agreements about how lands and resources may be used and shared, the

³ Treaty 8, a historic treaty spanning a land base across northern British Columbia, northern Alberta and part of the Northwest Territories. Among those in BC are the First Nations of Blueberry River, Doig River, Fort Nelson, Halfway River, McLeod Lake, Prophet River, Saulteau First Nation, and West Moberly.
discussion paper (2007) suggests other outcomes of the ILL including: “(1) building intellectual capacity, (2) developing indigenous citizenship, and (3) understanding law as a form of social capital” (p.3).

The 2007 paper outlines the composition of the Lodge as follows:

- The Parties;
- An appointed panel of three individuals from a neutral First Nation who work with parties to draft agreements;
- Three facilitators with knowledge and experience with Indigenous legal orders and law to work with leadership and members of the First Nations to articulate their Indigenous laws, frame legal perspectives, define legal obligations and principles, and consider their approach to the issues. According to the 2007 proposal, “[the] role of these facilitators is to support and enable full participation and engagement of the parties and the presenters, and ensure the integrity of the process generally” (p. 7);
- An expert in Canadian law in order to advise and support the panel working with parties to draft agreements (Napoleon, 2007a).

The 2007 proposal outlines the following key stages of the overall ILL framework:

1. An initial meeting of the parties to determine process design.
2. A feast confirming the commitment of each party to the agreed upon process.
3. The Lodge itself would sit for a minimum of five days to hear from community representatives who speak to the nature and scope of the overlap area as well as their experiences of the land, current uses, and kinship.
4. The panel works with the parties to draft non-binding agreements on managing joint interests in the area and on future political affirmation and commitment requirements for each generation.

5. If there is no consensus around the agreement, the facilitator would make a non-binding recommendation to the parties (Napoleon, 2007a).

To date, the ILL has not been implemented or evaluated. Although ILL was developed in the context of overlap discussions between the specific First Nations noted above, it is the only alternative framework among a small handful of proposed alternatives that has been agreed to by a number of First Nations.\(^4\) Given this level of interest, it is useful for First Nations (both inside and outside of the BC Treaty Process) and the Department of Aboriginal Affairs and Northern Development to consider whether it can be adapted to suit the specific dispute resolution needs at other negotiation tables.

### 1.4 Project Goals and Objectives

The primary objective of this project is to answer the research question: “is the Indigenous Legal Lodge a suitable framework for resolving overlap disputes between BC First Nations?” To answer this question, the objectives of the project are twofold. First, to describe the insights about community norms and principles of DR as they are told through the conflict narratives of Indigenous stakeholders. The purpose of this exploration is to combine the norms and principles identified by these stakeholders with what the research literature shows, and develop criteria for assessing the relevance and merits of the ILL framework. The second objective is to explore the relevance and merits of the ILL. To fulfill this objective, I examine the perspectives participants shared about the ILL as they linked their stories about conflict to the broad framework and

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\(^4\) See for example the models proposed in the Union of British Columbia Indian Chiefs. (2008). To the author’s knowledge, these models have yet to be applied to overlap disputes.
composition of the ILL. These perspectives are subsequently examined against each of six assessment criterion and recommendations are made to strengthen the ILL and make it more amenable to a variety of BC First Nations. Overall, this project aims to provide TAG-NW with a starting point in the long-term project of exploring alternative frameworks to bring resolution to overlaps.

Underlying this objective is my position that implementing the recommendations requires a shift from thinking about these issues solely in terms of the department’s legal obligations to one that considers supporting First Nations to address their overlaps. Very rarely, at least in its formal policy, does the Government of Canada look beyond the horizon of treaty-making to consider what impacts strained relationships between First Nations will have for the governance landscape in a post-treaty BC. If a treaty negotiating First Nation and their neighbours are to live with any degree of harmony, it is imperative that strong working relationships between them be supported. By taking a more proactive approach to addressing these issues, supporting First Nations to address their overlaps can contribute to the Department’s mandate and international commitments to support Aboriginal people and Northerners in their efforts to improve social well-being and economic prosperity, develop healthier, more sustainable communities and participate more fully in Canada’s political, social and economic development (AANDC, 2011).

1.5 Research Limitations

With more than 40 major cultural groupings and 11 unique language families among BC First Nations, there are many lifeways and thoughtways that influence the specific norms and principles communities engage to address conflict. While this signals a rich diversity of perspectives to inform this work, it was only possible to canvass a small few, making a clear determination of the broad applicability of the model beyond the scope of this research project.
However, and as will be discussed throughout the discussion of the research methodology, by working with a range of Indigenous leaders and experts from around the province to determine the merits of the ILL framework, this research project serves as a starting point for future research seeking to identify culturally relevant dispute resolution frameworks and processes for addressing shared territory and overlap disputes among BC First Nations.

A second limitation is that although the focus of the project is to assess a framework that deals with overlap disputes specifically, it was not possible to investigate participants’ experiences and perspectives about specific overlap disputes. The sensitivity of the issues involved, and the potential risk to participants that details shared about specific overlap disputes may be used by other parties to further their interests was a principle ethical concern throughout the project design process and required that the scope of the interview questions be broadened to include many different kinds of disputes. However, in sharing a range of stories about family and community conflict, participants’ narratives gave way to a broad scope of principles and norms of dispute resolution which may not have been possible with a narrow focus on overlaps.

1.6 Significance and Benefits

An in-depth survey of the literature suggests that the norms and principles of dispute resolution among Aboriginal peoples, are not well understood. According to John Borrows, “these norms, and the structures they can generate, have not received sufficient protection and preeminence in alternative dispute resolution discussions” (Borrows, 2004, p. 344). With a focus to develop an assessment framework which links the academic literature and the norms and principles identified in participants narratives, this project represents a significant contribution to the few and fractured conversations taking place in academic institutions about DR system design in Indigenous contexts exclusively and can be used by First Nation communities and other level of governments
to assess the design of DR processes that deal with multiple kinds of disputes.

While much has been written on the duties of the Crown to consult overlap First Nations during treaty negotiations,\(^5\) this project is the first of its kind to look at alternative frameworks for addressing overlaps specifically. As a benefit to AANDC, this project may assist in streamlining overlap discussions at AIP and Final Agreement tables. Moreover, where these processes successfully facilitate resolution, the likelihood that a treaty will be challenged in the future becomes increasingly unlikely, in turn providing a higher degree of certainty for all parties involved in the treaty process.

The benefits of supporting overlap and shared territory discussions between First Nations extend beyond the department to include other federal departments and agencies whose business lines require them to undertake consultations with First Nations, both within and outside of the BC treaty process. DR processes that result in the resolution of shared territory issues provide clarity with respect to Aboriginal jurisdiction and decision making on their traditional territories. This in turn provides a clear and authoritative point of contact from which to undertake consultation about a proposed Crown activity taking place on lands over which one or more First Nation has an asserted but unproven claim to Aboriginal rights and title.

The benefits of supporting First Nations to develop their traditions of law and DR, for the purposes of addressing overlaps specifically or for the purpose of supporting Indigenous cultural development more generally, also assists Canada to operationalize its 2010 endorsement of the United Nations Declaration of the Rights of Indigenous People (UNDRIP). According to the Department “Canada's endorsement of the UNDRIP underscores its ongoing goal of ensuring that Aboriginal peoples contribute to and benefit from Canada's development and prosperity as a nation’

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\(^5\) See for example Canadian Bar Association materials from the 2009 National Aboriginal Law Conference Overlapping Claims: Models for Dispute Resolution and Business Structures, Victoria, BC.
(AANDC, 2010). Article 5 of the UNDRIP states “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State” (UNDRIP, 2007). Article 5 is consistent with the ultimate outcome of comprehensive claims negotiations which is “to enable and support good governance and effective institutions for First Nations and Inuit” (INAC, 2009). While the political commitment to UNDRIP and AANDC strategic outcomes for treaties appear mutually reinforcing, Canada’s commitment to UNDRIP can also serve as a motivating consideration for the department to work beyond the boundaries of its consultation processes to support First Nations to cultivate and refine their traditions of law and DR. Not only could this contribute to resolving overlaps and streaming the treaty process as a whole, but would also demonstrate Canada’s commitment to implementing UNDRIP and contributing to the cultural, economic, and social health of BC First Nations now and into the future.

For all the treaty signatories, the means to resolve overlap supports the more effective exercise of Aboriginal jurisdiction and provides the necessary clarity to avoid jurisdictional gaps on First Nation lands. Most importantly, however, the benefits of this project rest with the ultimate stakeholder of treaties in BC: First Nation communities. By developing an assessment framework for DR in Indigenous contexts, the findings inform the development of institutions for shared decision making and the equitable distribution of rights and responsibilities within shared political spaces. Moreover, where communities have opportunities to tap into their internal capacities to resolve disputes, their reliance on external assistance will likely decrease over time. In this way this project also serves to promote a rethinking of how dispute resolution frameworks can be mobilized to build strong governance structures within and amongst BC First Nations.
Section 2: Background and Context

The following section provides background and contextual information identified in the grey literature for understanding the relevant issues and perspectives of the problem of overlapping claims. The section begins with an overview of the BC treaty process and BC Treaty policy respecting overlaps. This is followed by an exploration of federal policy and responsibilities respecting overlaps. The section then moves into a discussion of how overlaps are dealt with by the courts and finishes with a brief discussion of various proposed alternatives.

2.1 A Snapshot of BC Treaty History

Since time immemorial, the area now known as British Columbia has comprised the territories of many Indigenous Nations, each with its own unique language, culture, system of law and government, economy and territory (British Columbia Claims Task Force, 1991). These governments, and their authority to sign treaties with the British Crown, were first acknowledged in the Royal Proclamation of 1763. In 1923, the federal government ceased signing new treaties with First Nations, making it a criminal offence for a First Nation to hire a lawyer to pursue land claims settlements. Instead, the government effectively pursued a policy of assimilation and segregation through the exercise of its s. 91 (24) Constitutional authority over "Indians, and lands reserved for Indians". Though historic treaties were settled throughout other parts of Canada, with the exception of the Douglas Treaties on Vancouver Island and the extension of Treaty 8 from Alberta, no historic treaties were signed in British Columbia.
It was not until 1973 with the conclusion of the seminal case of *Calder v. British Columbia (Attorney-General)*,⁶ that the federal government resumed the negotiation of treaties throughout Canada and implemented a national policy to guide the negotiation of comprehensive land claims.⁷ As a result of increased political pressures from First Nations, a growing number of claims to Aboriginal title in the courts, and increasing economic uncertainty throughout the province, the government of British Columbia joined the federal government in its negotiation with the Nisga’a people in 1990.

That same year, British Columbia, Canada and the First Nations Summit (the “Treaty Principals”), formed the British Columbia Claims Task force to set out a framework for proceeding with treaty negotiations throughout the province. On June 28, 1991, the Task Force delivered its final report to the Principals. In it, they called for the establishment of a "made in BC process" to be coordinated by an impartial body. They further provided 19 recommendations upon which the Principals should move forward with negotiations. The creation of the BCTC, the BC treaty process and the 19 recommendations were unanimously supported by the Principals. In 1992, the BCTC opened its doors and negotiations of the six stage process began. The six stages of negotiation are:

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⁶ [1973] S.C.R. 313 [*Calder*]. *Calder* involved the Nisga’a Tribal Council who brought a claim against the British Columbia government claiming their aboriginal rights had not been extinguished. The trial and appeal court held that even if a there ever was aboriginal title, it had surely been extinguished. However, the Supreme Court of Canada ruled that Aboriginal title existed prior to Confederation but split 3:3 in its determination of whether the Nisga’a peoples’ rights to lands and resources had ever been extinguished. The case was ultimately dismissed on a technicality. The basis for aboriginal title was later expanded on in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (first major judicial discussion of Aboriginal Title after the *Constitution Act, 1982*), and most recently in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [*Delgamuukw*].

⁷ The objective of the 1973 Comprehensive Land Claim policy was to provide a substantive and balanced negotiating process that would produce a long-lasting definition of rights to lands and resources across Canada in those areas not previously covered by a historic treaty. The earliest version of this policy was intended to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in agreement. The 1973 policy was reaffirmed and expanded in December 1986 to include the negotiation of offshore wildlife harvesting rights, sharing of resource revenues and a commitment to negotiate self-government among other changes. The 1986 policy also allowed for the inclusion of provincial and territorial governments as partners at the negotiation table.
1. Statement of Intent to Negotiate.
2. Readiness to Negotiate.
3. Negotiation of a Framework Agreement.
5. Negotiation to Finalize a Treaty; and

2.2 Where Worlds Collide: BCTC Policy Respecting Overlaps

Recognizing that conflict over boundaries and shared territories may pre-date the negotiation of modern treaties, and in its effort to define a scope of what would be appropriate subject matters for negotiation, in Recommendation #8, the Task Force put forward the principle that “First Nations resolve issues related to overlapping traditional territories among themselves” (Task Force, 1991, p.20). Notwithstanding this recommendation, BCTC policy requires that First Nations wanting to negotiate a treaty provide a map outlining the geographic area of their traditional territory and identify any First Nations with whom there may be an overlap (BCTC, 2009a). In general, these maps include areas in which the First Nation historically had sole access and control,\(^8\) sometimes referred to as their “core” territory, as well as other areas where certain activities were carried out but control was shared (Morgan, 2009).\(^9\)

In the early days of the process, First Nations submitted fairly modest maps of their core territory (Browne, 2009). As more First Nations entered the process, however, the trend has been to draw expansive maps which include all areas that might be addressed in their negotiations including areas of where they fished, hunted, trapped and practiced their culture (Browne, 2009; Morgan

\(^8\) In Aboriginal Rights and Title litigation this is contemplated as an asserted but unproven right to Aboriginal title (an exclusive proprietary right in law).

\(^9\) In Aboriginal Rights and Title litigation this is contemplated as an asserted but unproven right to Aboriginal rights as defined within s. 35 of the Constitution Act, 1982.
2009). In some cases, there is a lack of understanding of whether the areas defined consist of core or shared territories. In other cases, even where core territories are well known (reserve lands for example), their may be conflicts about whether they have an appropriate designation and may result in a competing perspective of ownership. As a result, the maps have become a site of increasing tension among First Nations who, in advance of the settlement of a treaty, are unable or unwilling to come to some agreement as to who should own the land, or how it should be shared and governed. Though the maps provide the negotiating parties with a degree of predictability as to what lands and resources may be included as part of future negotiations, many First Nations regard this exercise as an imposition of a Eurocentric and two-dimensional concept of territoriality and the complexity of the issues at stake (Browne, 2009; UBCIC, 2008). According to Browne (2009), “First Nation Territories are not simply lines on a map. Traditionally, the[se] territories were defined by a complex interaction of history, law, place names, language, family and clan relations, seasons and time periods etc.” (p.2).

In their Statement of Intent (SOI), First Nations are also required to describe what First Nation band or group is represented and whether there are other First Nations that claim to represent the people described (BCTC, 2009b). As a logical extension of this requirement, most First Nations come to the process not in their pre-confederation configurations of Indigenous Nations, but as “freeze dried” political and legal constructs of Indian bands imposed by the Indian Act and other colonial legislation. Supported by the BC treaty process and many Indian Act leaders, this SOI requirement pre-supposes that Indian bands and treaty groups are “self-contained and self-sufficient, and able to provide for all the needs of its members” (Napoleon, 2004, p. 189). However, this approach to treaty building is inconsistent with more fluid expressions of Indigenous

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10 According to Val Napoleon (2008), the imposition of Canadian constitutions (1867 and 1982) and legislation such as the Indian Act has amounted to a “freeze drying” of Indigenous people into homogeneous constructs, and are the source of much of the conflict between indigenous people.
citizenship and nationhood among many communities in which family ties extend beyond core territories. What this has meant for negotiations is the possibility of two different groups claiming to represent the same peoples and lands (Morgan, 2009). In the absence of clear consensus about who the proper representative body should be, and when the Treaty negotiating First Nation does not have the blessing of all the members it claims to represent, “progress [in negotiations] is ultimately impeded and the integrity of the process is called into question” (BCTC, 2001, p. 10).

The pervasiveness of this issue, and the impacts internal governance issues will have on the treaty making process more generally was a central issue in Spookw v. Gitxsan Treaty Society, an application to the Supreme Court of BC in which members of the Gitxsan hereditary chiefs launched a lawsuit against the BC Treaty Commission in which they claimed that the BCTC breached its “duty of care” by failing to ensure that the Gitxsan Treaty Society (the representative body of the Gitxsan people in treaty negotiations) is representative and accountable to the Gitxsan people, and in not exercising due care and diligence in lending funds to the GTS.11

As the “keepers of the process”, the role of the BCTC is to facilitate the negotiation of treaties and ensure the parties are making progress in negotiations, including progress made by treaty negotiating First Nations to negotiate a protocol or shared territory agreement with its neighbours.12 As part of a suite of policies, the BCTC requires that First Nations make “best

11 In Spookw v. Gitxsan Treaty Society, 2011 BCSC 1001, the plaintiffs’ (Gixtan Hereditary Chiefs) argued that over the years the GTS has unduly restricted the involvement of the plaintiff hereditary chiefs and Indian bands in treaty negotiations. They complain 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. The BC Supreme Court agreed with the Treaty Commission and dismissed the negligence claim, agreeing with the BCTC, that there was "no genuine issue for trial with respect to the claim".

12 According to Browne (2009), a protocol or shared territory agreement can either be an inter-Nation agreement between First Nations, like an international treaty or convention, or a specific permission given by one First Nation, family or clan to a member from another First Nation, family or clan to harvest or use resources or areas in the Treaty negotiating First Nation’s Territory. Where established, these agreements are generally considered in light of a treaty in one of two ways. The first is that the agreement itself will remove contested areas from the scope of treaty negotiations. The second type, which Devlin and Thelman (2009) call “Side of the Table” agreements, include agreement on contested areas and are joined to the Final Agreement as a binding part of the treaty. In the case that a "side of the
efforts” to establish a process for resolving overlaps with its neighbors and update the commission on progress made (BCTC, 2009a). To assist First Nations with their overlaps, the BCTC allocates funding to facilitate discussions between First Nations and may assist them to obtain outside DR services, or may act as facilitators themselves (East, 2009, BCTC, 2009). Recognizing the issue of overlaps as “more pressing than the parties previously appreciated and that action is necessary now”, the Commission is undertaking its own exploration of new and old approaches to shared territory issues in order to provide further assistance to the parties (BCTC, 2010, p. 8).

2.3 Negotiations and the Duty to Consult: Federal Policy Respecting Overlaps

The BC Treaty process is unique to the treaty negotiation process throughout the rest of Canada. While still operating within the basic framework of the 1986 Comprehensive Land Claim policy, the BC treaty process operates as a political process and does not require First Nations to submit a proof of claim to Aboriginal rights and title. Although treaty negotiations are undeniably about the settlement of outstanding claims to Indigenous rights, the BC treaty process moves forward on the presumption that a non- evidence based negotiation process, as opposed to evidence-based litigation, are the most practical means of achieving certainty and clarity of rights to ownership and use of lands (East, 2009; BCTC, 2009b).

In the first two decades of negotiations Canada required overlaps to be resolved prior to concluding a treaty (East, 2009). However, due to experiences with the Nisga’a Final Agreement, and the growing number of potential overlaps in BC, Canada has relaxed this policy in BC (East, 2009; Kirchner, 2011).\(^\text{13}\) According to East (2009), recognizing that resolution may not always be

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\(^\text{13}\) Negotiations with the Nisga’a peoples began far before the establishment of the treaty process. This agreement was successfully concluded despite outstanding overlaps. In the 1998 case of *Gitanwyw First Nation v. Canada*, [1998] 4 C.N.L.R. 47 (B.C.S.C) [Gitanwyw] at para. 33 the Supreme Court of British Columbia considered overlaps for the first time, rejecting the Gitanwyw pleading for a declaration that the Crown may not conclude a treaty without their consent.
Addressing Disputes Between First Nations

possible by the time negotiating parties are ready to sign and implement treaties, “Canada moved forward with negotiations in situations where (1) the First Nation has made reasonable and good faith efforts to resolve overlap issues with aboriginal groups with overlapping claims, (2) the First Nation has taken measures to resolve the outstanding overlap issues and, (3) that the treaty contains provisions [in the form of non-derogation language] specifying that it will not affect the aboriginal or treaty rights of any other aboriginal group” (p.3).14

Recent Supreme Court of Canada decisions in *Haida Nation v. British Columbia (Minister of Forests)*15 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*16 expanded the Crown’s role in addressing overlap issues. In these cases, the Court found that the Crown may have a legal duty to consult and accommodate First Nations in respect of claimed but unproven Aboriginal rights.17 The Court did not deal with issues of overlap specifically but do require governments, as part of the treaty negotiation process, to take notice of what rights exist in a given geographical area and to consult with all First Nations in respect of those provisions that may impact or infringe their claimed but unproven Aboriginal rights and title. This requirement logically extends to overlap claims in treaty negotiations since overlap claims may impact Aboriginal rights and title. In these key decisions, the Courts vaguely defined the

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14 The non-derogation clause in included in all treaties negotiated as part of the BC Treaty process and specifies that the treaty will not affect existing Aboriginal or treaty rights of other Aboriginal peoples. There has been much debate about the inclusion of this provision in the treaties. On one side, the provision is viewed as “a complete” answer to the issue of overlaps. On the other side, some First Nations have argued that the provision does not do enough to meet the Crown’s legal obligation to consult with respect to potential adverse impacts on asserted but unproven claims to s.35 Aboriginal rights (East, 2009). To date, the courts have tended to support the former position (East, 2009).

15 2004 SCC 73 [Haida Nation]

16 2004 SCC 74 [Taku]

17 As part of the process of repatriating Canada’s Constitution, s. 35(1) of *The Constitution Act, 1982* was amended to state that: 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. Since Section 35 provides general protection but does not define or set out particular Aboriginal rights, the courts have established tests for proving Aboriginal rights. Among the most significant cases are *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van Der Peet* [1996] 2 S.C.R. 507; *Delgamuukw*, supra; *R. v. Adams* [1996] 3 S.C.R. 101; *R. v. Côté* [1996] 3 S.C.R. 139; *R. v. Powley*, 2003 SCC 43. *Haida Nation* supra. In general, as Aboriginal rights are identified by the Courts, the rights become constitutionally protected.
nature, scope and timing of the duty to consult as lying on a spectrum. This spectrum ranges from a duty to give notice and disclose information to a deeper form of consultation at the high end which may include extending opportunities to Aboriginal claimants to make submissions for consideration and participation in the decision making process (McCulloch, 2009, p.3).

In 2006, the provincial and federal governments undertook overlap consultations with various overlapping First Nations at three final agreement tables: Tsawwassen, Maa-nulth, and Lheidli T’enneh. What they encountered, however, was “opposition and criticism from certain First Nations, who complained that the consultations had started too late in the treaty negotiation process to be meaningful” (East, 2009, p.5). In *Cook v. British Columbia (Minister of Aboriginal Relations and Reconciliation)*, the British Columbia Supreme Court clarified when and how consultation should be conducted within the context of treaty negotiations. In this case, the Courts generally located the duty to consult at the early stages of the treaty process. The Court further noted that the content of the duty will vary at different points of the treaty negotiation process as the terms of the treaty become known (*Cook*, at paras 177 and 179). However, the question still remains how and when exactly to consult within this framework.

In light of these decisions, current federal practice has mainly consisted of assisting treaty negotiating First Nations to develop overlap plans and consulting with overlap First Nations independently from the table when the substantive elements of the treaty, such as the land package, have been agreed upon. While this approach is consistent with Recommendation #8 of the Task Force that First Nation resolve these issues on their own, BCTC policy and procedures, and the more recent opinion of the courts, the question as to whether the Crown has a legal duty to fund

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19 In *Cook v. British Columbia (Minister of Aboriginal Relations and Reconciliation)* (2007), [2008] 1 C.N.L.R. 1 (B.C.S.C.) [Cook], the Supreme Court of British Columbia considered two judicial review applications each from the Semiahmoo First Nation and the Sencot’én Alliance, seeking to prohibit the Minister of Aboriginal Relations and
overlap consultations remains outstanding (East, 2009). More ambiguous still is whether the duty to consult also includes a duty for the federal government to fund consultations between communities, or to support processes that may facilitate resolution of overlaps.

2.4 First Nations Respond: Overlaps and the Courts

Relying on the legal requirements that the Crown consult with them in respect of their asserted rights and title prior to concluding a treaty, some First Nations have sought relief through the Courts.\(^{20}\) To date, these claims have been unsuccessful in preventing the government and their neighbours from ratifying a proposed treaty.

The issue of overlaps is dealt with quite differently in the context of aboriginal rights and title litigation compared to the BC treaty process. While the treaty process is non-evidentiary based, the Court’s treatment of the overlap issue, as with most other Aboriginal rights and title issues, almost always comes down to the question of “Who was doing what when?” (McCulloch, 2009, p. 9). Pursuant to the legal framework defined by *Haida* and *Taku*, the overlap First Nation will undertake historical and anthropological research about the territories it claims overlap with the proposed treaty. In response, the Crown will undertake a similar analysis known as a Strength of Claim analysis (Government of Canada, 2008).\(^ {21}\)

However, in addition to the high costs a First Nation bears to provide anthropological and oral history information to support their claim, locating this historical information strictly within the common law frame for determining Aboriginal rights and title calls into question the Courts’ capacity to facilitate a just outcome to overlaps from the perspective of Aboriginal litigants. For the

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\(^{21}\) In *Cook*, the Courts found that the Crown’s duty to consult is not necessarily triggered as soon as the Crown has knowledge of potential overlap (para. 175). Once the terms of an agreement are known, the Crown must engage in “deeper” consultation. Consultation may continue up to and during the implementation stage of a treaty (para. 197).
UBCIC (2008), the resolution of overlaps in the Courts requires a clearer understanding and acknowledgement of Indigenous systems of land tenure and legal relationships to the land (as defined by Indigenous laws and legal systems). The UBCIC (2008) argue:

Understandings of Indigenous Title, defined by Indigenous laws, must guide and shape the content of Aboriginal Title. 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 (p.2).

Moreover, Canadian court processes have a very different ideological and cultural orientation from that of most Aboriginal cultural decision-making processes (Borrows, 2002). According to Borrows (2002), these differences in systems may conflict with Indigenous norms for evaluating evidence and norms of decision making. Borrows (2002) offers one example of how the adversarial nature of litigation can be specifically problematic for Elders: “Aboriginal Elders frequently have to endure questioning and procedures that are inconsistent with their status in the communities […]. To directly challenge or question Elders about what they know in the world, and how they know it, strains the legal and constitutional structures of many Aboriginal communities” (p. 90).

Thus, although the Courts have been instrumental in getting governments to the treaty negotiation table and have opened the doors for First Nations to be consulted regarding proposed Crown activity taking place on their traditional territories, these issues suggest “a fundamental
incongruence between the substantive nature of aboriginal disputes and the processes for their resolution” (Tzimas, 2009).

2.5 **Beyond the Courts: Overlaps and Alternative Dispute Resolution**

In addition to the required Crown consultation processes for addressing overlaps, Canada and British Columbia are interested in exploring alternatives. For example, in February 2009, the government of British Columbia introduced the *Recognition and Reconciliation Act*. The purpose of the legislation was to reconfigure the relationship between First Nations and the Crown “for shared decision making about the land and resources and for revenue and benefit sharing” (Government of BC, 2009a, p1). In a discussion paper describing the legislation, the BC government proposed the creation of an Indigenous Nation Commission (INC) which would be tasked to identify title-holders and reconstitute the Indigenous Nations of BC based on language, culture, traditions and shared history (Government of BC, 2009b). As a necessary part of the reconfiguration, the vision was that the INC would facilitate issues of overlaps and shared territory (Government of BC, 2009b). However, a series of consultations with BC First Nations revealed a number of concerns about the proposed legislation including the absence of explicit federal support, the unknown impact it would have for First Nations who have ratified a treaty and the risk that a new government-driven institution for reconstituting the Indigenous Nations of BC would ultimately result in another complex bureaucracy (UBCIC, 2009; Devlin & Thielmann, 2009). As a result of these and other concerns voiced by industry and local government, the legislation failed to come to fruition.

Within other circles, there is recognition that there can be no “one-size-fits all” approach to resolving overlaps and several alternative processes, to be applied on a case-by-case basis, have been proposed. Other processes range from more conventional Western style DR such as mediation
and arbitration to facilitated fact finding, the latter being an approach in which a third party assists the disputants to come to some agreement on the facts so that they are better able to communicate about the conflict and focus on what is really in dispute (Rush, 2009). Other, more culturally centered processes were proposed in a draft discussion paper presented at the Chief’s Forum in 2008. The paper proposed processes such as those established by joint working groups, a council of Elders and new institutions such as the Indigenous Legal Lodge. Generally, these processes are founded on the premise that the resolution of overlaps is “not so much a function of determining where the boundary between two nations is but in determining what the underlying value of the lands is to each of the nations” (Rush, 2009 p. 3). In making these determinations, the proposed processes involve the interpretation and application of Indigenous law in order to understand the intersection and interaction of First Nations’ legal relationships to the land (UBCIC, 2008). By engaging Indigenous traditions of law and DR, these processes aim to look beyond Canadian law and what is admissible in court proceedings towards a broader notion of reconciliation between parties (Rush, 2009). This approach, according to the UBCIC, “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” (UBCIC, 2008, p. 4).

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22 For a full discussion on how these approaches might work in the context of overlapping claims see Rush (2009).
23 Refer to footnote 5.
Section 3: Literature Review

The following section provides a foundation for understanding the nature of Indigenous law and DR and the key themes present in national and international academic discussions about DR systems design in Indigenous contexts.

Given the predominant focus of the Indigenous Legal Lodge on exploring Indigenous traditions of law to inform the resolution of overlaps, the first half of this section is meant to orient the reader toward the nature and function of Indigenous traditions of social structures which encompass governance, law and dispute resolution. Notably, there is a tremendous diversity of Indigenous traditions in British Columbia and Canada, varying widely across cultures and evolving over time. Though it is not possible to canvass them all, some examples are provided to highlight common features across traditions. Key search terms used a combination of “Indigenous”, “First Nation” and “Aboriginal” with “legal traditions”, “law”, “dispute”, “dispute resolution”, “alternative dispute resolution”, “conflict”, “conflict resolution”, “peace”, “peacemaking”, and “peacekeeping”. More specific search fields yielded far too few results. The second section builds on the review of these sources and focuses on key issues and considerations for designing dispute resolution frameworks in Indigenous contexts. This part of the review will be used in conjunction with the analysis of participants’ narratives in the following section to develop criteria for assessing the ILL.

3.1 Overview of Indigenous Law and Dispute Resolution

Indigenous traditions of law and dispute resolution pre-date the arrival of Europeans and the introduction of common law and civil law systems of justice in Canada (Chartrand, 2005; Borrows, 2006). Historically, these traditions played a role in harmonizing relations between families and Nations, which was essential to ensure the sustainability of Indigenous societies (MacGinty, 2008).
Laws were developed to govern a range of human behaviours, activities and ways of relating (Dunnigan & Price, 1995; Osi 2008-2009; Chartrand, 2005; Napoleon, 2007b; Borrows 2006). The application of laws and the desire to restore harmony between communities often resulted in treaties and agreements between Indigenous Nations for recognizing trade relationships, marriages, the status of lands, and determining arrangements for sharing resources. (Napoleon, 2007a; MacGinty, 2008). Today, peaceful relationships between many Nations continue to be premised on the linchpin of peacemaking but “revised over time to respond to contemporary needs and challenges” (Law Commission of Canada, 2006, p.6).

3.1.1 Worldview, Culture and Governance: The Foundation of Indigenous Law and Dispute Resolution.

All traditions of law and dispute resolution are a cultural phenomenon (Napoleon, 2007b; Law Commission of Canada, 2006). They are developed and maintained within specific cultural contexts and “tailor-made” to suit the specific worldviews of the societies to which they apply. Throughout the literature, Indigenous worldviews and understandings about human nature are characterized as being both epistemologically and ontologically distinct. The Western perspective posits human nature as essentially competitive, with conflict arising as a consequence of problems faced by autonomous individuals who naturally seek to satisfy their individual needs and desires (Bush & Folger 1994, p. 9). In contrast, some Indigenous worldviews posit human nature as being essentially cooperative, and conflict represents a disturbance to the peaceful network of interconnections that defines the community (Behrendt, 1995; Walker, 2004).

Growing out of this worldview is a notion of justice as restorative (as opposed to retributive), with the goal of dispute resolution to restore peacemaking relationships that
connect Indigenous people to each other and their territories. LeResche (1996) offers this perspective on the meaning of peacemaking:

From my perspective peacemaking is what I call “Sacred Justice”: when the circle has been broken, how to mend it; how to repair it; how to build healthy relationships again in the wider circle and among the immediate so-called “parties” who are not getting along. That’s what peacemaking is to me. It’s a guiding approach, an advising approach toward coming back together again in balance and in harmony- harmony not only among ourselves as people, but harmony with the universe and all living things in it, as well as harmony within yourself so that your emotions are not overruling and so that your mind isn’t taken over or unbalanced in any way” (p.124).

This predominant philosophy of peace and harmony are identified throughout the literature as being “the linchpin to an effective understanding of Aboriginal Dispute Resolution” (Dunnigan & Price, 1995, p.2). For Ross (2006), understanding these philosophies leads to an important distinction between systems of law and justice. Ross (2006) argues that justice, from the perspective of Indigenous people, involves much more than a legal system and includes a range of institutions, traditions and mechanisms that create the social conditions that minimize wrongdoings. According to this author, law encompasses “all the social mechanisms that teach people from the moment of their birth how to live a “good life”. In fact, “good life” is often an expression that has the same meaning as “the law” (Ross, 2006, p. 270).

According to Napoleon (2007b), “[s]ince law is a cultural institution, societies that are centrally organized will have centralized processes for enacting law. This is the case in Canada,
Addressing Disputes Between First Nations

which is centrally organized as a nation-state with hierarchical levels of law-making authority and adjudication” (p. 6). Within the Canadian state, legal processes and systems of dispute resolution are managed by discrete institutions. Within non-state Indigenous social structures, however, law is interwoven in the social, political, economic, and spiritual fabric of societies, and reflected in decentralized systems of governance (Napoleon, 2007b).

Although the exact nature of Indigenous laws vary according to their source, laws can be both explicit in the sense that they are enacted or authoritatively declared, or informal in the sense that they arise as predictable normative patterns of social behaviour and reinforced over time in a variety of social institutions and interactive processes (Napoleon & Overstall, 2007). The feast, instituted as an international mechanism for settling disputes and demonstrating ownership over contested territory among the Witsuwit’en, as well as their Nisga’a and Gitxsan neighbours of the Northwest Coast of British Columbia, offers one example of how legal norms and mechanisms for resolving disputes are interwoven within a larger system of culture and governance.

The central institutions of governance among the Witsuwit’en and their neighboring First Nations of the Northwest Coast of British Columbia are clans and houses. Each house and clan is led by a head chief who, by virtue of his or her title, has exclusive jurisdiction and decision making authority over a distinct territory. Organized according to the law of matrilineage, every community member is placed within a house and clan and has individual rights to use the territory of the house or clan in line with the direction of the head chief. However, no single individual has

24 There are various sources of Indigenous law which can be interpreted and applied simultaneously in a given situation. The sources of Indigenous law are variously regarded as sacred, natural, positivistic, deliberative and customary (Borrows, 2006). Sacred laws are laws given by the Creator in precise fashion for the world to follow while natural laws are discovered through observations of the physical and spiritual world and are used as a basis for instructing people about the principles and practices of natural norms of order, and the remedies if they are violated (Borrows, 2006). Sacred and natural law cannot be changed by human agency without external consequence. Positivistic traditions are generally regarded as being of human origin and can be formally proclaimed in a number of settings such as feast halls, council houses, wampum readings and other similar settings (Borrows, 2006, p. 7). Other laws are customary in that they are established through patterns of behaviour verified through the observation of specific routines and procedures associated with conduct within a community (Borrows, 2006, p.8).
the right to alienate the territory of the clan, and the entire clan is responsible for the actions taken by its members.

The feast is central to maintaining this Witsuwit’en system of land tenure. It is at the feast where people are given their titles, robes, and crests. As a central place of governance “the feasts make the jurisdiction of the high chiefs clear to all concerned and demonstrate that such jurisdiction is based on a deep appreciation of the spiritual qualities of the land, the animals, and the holder of titles” (Mills, 1994, p. 44). When a head chief dies, his or her title and associated territory is passed on to another clan member and the transfer being witnessed by neighbouring peoples (Mills, 1994). No transaction concerning the land is legally binding unless it takes place at a feast (Mills, 1994).

The Witsuwit’en commonly refers to law as deni biits wa aden or “the way the feast works” (Mills, 1994, p.141). In addition to the accession of titles and property, the feast functions as a place where disputes are resolved internally among individuals and externally with neighbouring Nations, as in cases of boundary disputes and trespass. Intermarriage and adoption, long part of the tradition among the Witsuwit’en and their neighbours, is integral for keeping peace among Nations. Where a dispute arises, feasts provide the opportunity for reconciliation through compensation in the form of titles, crests, goods, land, and historically, people.

3.1.2 The Importance of Stories.

Many Indigenous peoples have laws embedded in story, ritual, and ceremony (Borrows, 2005). Although there is a great diversity of oral traditions among the Indigenous Nations of Canada, many of these laws continue to promote values such as respect, restoration, and consensus (Law Commission of Canada, 2006). Imbued with these qualities, Indigenous laws command positive behaviours and ways of relating, and are often communicated in the form of lessons about how people should approach living (Lowe and Davidson, 2004). For example, in many stories
there is a character known as Trickster who teaches good things and bad things. According to Borrows (2005), “Trickster had principles that would direct their answers to questions and guide their thinking about resolving disputes” (p. 4). Indigenous laws can be identified by analyzing lessons drawn from stories in order to make meaning of conflict situations and decide on an appropriate course of action (Borrows, 2005). In some cases, lessons offered by a respected community member in a story or some other form may be considered more significant than any type of correctional interaction that might be proposed (Lowe & Davidson, 2004).

Indigenous laws can also be codified and transmitted through memory devices such as totems, petroglyphs and land forms used to preserve and transmit traditions and belief systems (Chartrand, 2005). For example, the ceremonial curtains or Thliitsapithkim of the Nu’cha’nulth people of the Northwest Coast of British Columbia codify stories of the history of the ha’wilth (a hereditary chief) and inscribe ceremonies pertaining to naming, marriage, mourning, and reconciliation between tribes. Identity is core to these ceremonial curtains. In essence, the curtains tell stories that confirm stories about history and also reflect the laws of the Nu’cha’nulth peoples, including the status, rights, and responsibilities of families and individual family members. As a curtain is being made, it is the obligation of its owner to consult with the broader family to ensure that what is being depicted on the curtain is historically correct (Casavant, 2010). When displayed during a potlatch, the curtains provide a basis for examining and confirming historical events. Casavant (2010) explains that in cases where these histories are contested, it is appropriate for the story depicted on a curtain to be challenged publicly, with a competing narrative being offered as evidence. In this way, the curtains provide a platform for engaging and contesting law and represent community consensus about the past.
3.2 Dispute Resolution System Design in Indigenous Contexts

The vast majority of Canadian literature on law and DR in Indigenous contexts has focused on Euro-Canadian law and the issues related to common law as it concerns Aboriginal people and the state. There has been comparatively less focus on the application of Indigenous principles of law and DR to disputes between Indigenous communities. However, the issues highlighted in this body of literature can be drawn from to identify key considerations for designing DR frameworks that deal exclusively with disputes between Indigenous communities. For example, authors such as Bell and Kahane (2004) call into question the transferability of Western mechanisms for dispute resolution into Indigenous contexts because the values that support them, while often held to be universal, may find little resonance within Indigenous communities (Victor, 2007). This claim to universality is supported by overwhelming acceptance of the Harvard model of negotiation across the discipline of DR theory and practice as the alternative to the courts. Though the Harvard model has made great strides in assisting parties in a variety of disputes to look beyond hard-line positions to discover their interests, this approach is not always suitable for disputes involving Indigenous peoples, particularly as they relate to issues of Aboriginal rights and responsibilities (Woodward, 1996; Walker, 2004). The Harvard model’s focus on problems, not relationships; outcome, not process; and, objective criteria of success versus value based decision making makes it problematic for implementing in Indigenous contexts (Walker, 2004; Osi, 2008-2009).

In response to a growing need for more multifaceted approaches to resolving conflict, many practitioners have begun the project of re-crafting conventional processes. In general, they are shifting their focus to identifying and accommodating multidimensional values at stake in disputes and securing outcomes that are accepted not simply because they are “win-win”, but because they are reflective of broader cultural realities (LeBaron 1992; Kahane, 2003). This shift in focus is
largely based on the work of conflict transformation theorist John Paul Lederach and others who share the basic assumption that in order for a DR process to deal meaningfully with the root causes of a dispute and satisfy people’s needs in a comprehensive way, they must be respectful, inclusive, and rooted in culture (Lederach, 1995; LeBaron, 2004; Osi 2008-2009; Bell, 2004; MacGinty, 2008). As an outgrowth of this assumption, these authors share the view that external conflict “experts” do not hold a monopoly on understanding DR processes and skills, and draw attention to the importance of community participation in the work of process design.

3.2.1 Finding and Applying Indigenous Law and Dispute Resolution.

Despite their centrality to Indigenous culture, Indigenous traditions of law and DR have been significantly undermined by the imposition of colonial instruments including the Gradual Civilization Act (1857), the Indian Act (1876) and the prohibition of the potlatch in 1885. According to the Law Commission of Canada (2006) “in place of laws and dispute resolution mechanisms that resonated with the values and beliefs of the various peoples that were governed by them, a legal system reflecting the values and culture of the European settlers was imposed” (p.2). For some communities, the erosion of their traditions as a consequence of the impact of colonization has been so severe that people have been cut off from traditional teachings, often for several generations, and left to absorb Western approaches to DR (Ross, 2006).

Despite the corrosive effects of these colonial mechanisms, many Aboriginal communities have maintained and continue to develop their distinctive laws and “continue to be guided by them in governance and dispute resolution” (Law Commission of Canada, 2006, p. 2). Like those of other societies, Indigenous legal orders and the cultures that support them are not frozen in time. Rather, they are living systems of beliefs and practices, revised over time in response to the imposition of other cultures’ modes and customs (Borrows, 2005; Law Commission of Canada,
2006; Kahane 2003). As a result of both the erosion and evolution of Indigenous legal orders, communities will have degrees of connections to both contemporary and traditional systems, and modern Indigenous-specific processes will draw from the dual sources of both western and traditional practices (Bell, 2004; Ross, 2006; MacGinty, 2008). Given this diversity, there can be no one-size-fits all approach to DR.

The varying degree of connection Indigenous community members will have to their traditions “raises difficult questions about how to balance the need to revive and protect Indigenous traditions of law and dispute resolution, [while] at the same time, be accountable to those in the community who have become separated from traditional ways” (Bell, 2004, p. 246-247). On the one hand, the value of engaging traditional laws and techniques of dispute resolution, according to Osi (2008-2009), is that culturally centered DR, as opposed to the courts, provides Indigenous people around the world “with a venue and platform by which they can fully express their views, unobstructed by restrictions created by legal processes totally alien to them” (p. 169). However, despite the failings of the present system, it is the one on which many Indigenous people currently rely and may be preferable to the confusion that could result from the replacement of one unfamiliar system with another (Ross, 2006). Thus, taking stock of these varying degrees of connections is a central feature of the academic literature, and therefore a key consideration for designing dispute resolution in Indigenous contexts. While the tensions that exist between choosing an exclusively indigenous approach over a Western one are highlighted throughout the remainder of the review, it cannot be stressed enough that DR framework must, first and foremost, be flexible to accommodate this diversity.

3.2.2 Drawing on Human and Cultural Resources.
According to Lederach (1995), a successful DR process “must actively envision, include, respect and promote the human and cultural resources within a given setting” (p.212). Therefore, in an Indigenous context, it is critical to identify respected people in a community (i.e., Elders) and conduct preliminary consultations with them to identify community needs and interests and gather clues about perceptions of conflict and preferred approaches to conflict resolution (LeBaron Duryea & Potts, 1993). As an example, practitioners can work directly with Elders and other knowledge-holders to identify what place will be given to ritual, ceremony, and storytelling in a DR process. Other resources that provide guidance on DR include community constitutions or charters (Law Commission of Canada, 2006).

However, Lederach (1995), Mac Ginty (2008) and Napoleon (2004) caution practitioners against equating traditional norms of law and DR as being inherently “good” or of higher normative value than other approaches. Practitioners should therefore be aware of, and actively guard against, the danger of designing a process that privileges ceremony or ritual over substantive issues of power, jurisdiction, ownership, and revenue-sharing (Napoleon, 2007b). For Ross (2006), the changing socio-cultural realities of Aboriginal communities’ means that capitalizing on the human and cultural resources of a community should not require that every traditional process be revived. Instead, Ross suggests a more practical approach is to identify traditions and cultural resources already in place, and to work with communities to evaluate the respective strengths and weaknesses before they are integrated into a proposed process. As part of the evaluative process, according to Kahane (2003), the DR process itself should include mechanisms that “allow claims about cultural values to be contested from within, in a plurality of forums and contexts” (p. 14).

Though consultations throughout the design process are likely to be time and resource intensive, the return on this investment will be significant. First, working directly with key
knowledge-holders, this approach allows for specific local patterns of DR to be identified (Grose, 1994). Moreover, it allows practitioners to explore the whole history and context of the dispute and assess the extent to which Indigenous laws can reasonably be articulated and enforced within a community (Bell, 2005). In addition, investing in these exploratory consultations allows for a more meaningful level of community control over process design, engenders a grassroots legitimacy, and increases public adherence to decisions made; all of which may be lacking in instances where conventional Western processes are imposed by outsiders (Lederach, 1995; Mac Ginty, 2008). Finally, by validating and building on people’s input and other resources within the community setting, exploratory consultations makes important information available to help build capacity within communities to address future conflict.

3.2.3 Design Features: Parties, Participants, and Decision Making.

Recent litigation involving the BCTC and Gitxsan hereditary chiefs noted in Section 2 draws attention to the reality that First Nations communities are often divided with respect to who may rightfully participate in decision-making processes on behalf of Indigenous communities. Though practitioners may have little control over choosing “the parties”, consultation within the larger community can facilitate a deeper understanding of family and community relationships, as well as of their internal obligations, duties, and constraints with respect to representation and participation in the process (NADRAC, 2006). Ultimately, however, defining the terms of representation and participation in dispute resolution processes should be lead by communities themselves, rather than on parties from outside the community paternalistically ruling on contests over proper representation” (Kahane, 2003).

Working directly with the parties, practitioners should seek to gain a better understanding of group dynamics as well as the rules that govern decision-making within the represented
Addressing Disputes Between First Nations

Once all affected parties are identified, consideration should be given to how multiple parties and interests can best be aggregated and represented as the process proceeds (Kahane, 2003). This will be particularly important in cases where there are legal constraints to participation or where there are strict rules in place in which participation is determined by an individual’s status in the community. In some cases, it may be necessary to extend participation beyond the community setting. For example, in the Gitxsan tradition “the interest group was kept larger than the community. Depending on the type of conflict situation, one didn’t just deal with the house members of one community, but rather with house members, closely-aligned house groups, clans from the other villages, and sometimes clans from other nations” (Napoleon, 2004, p.189).

Questions of who should participate and in what capacity may require practitioners to consider community requirements of confidentiality. In many cases, the public nature of social life in small First Nations communities, coupled with a whole-of-community interest in the disputes relating to lands and resources, may preclude the kind of confidentiality one might typically expect in Western approaches (Grose, 1994). DR practitioners should therefore inquire about parties expectations of confidentiality and be mindful that the imposition of strict rules of confidentiality may contravene a community need to have collective control over the outcomes of the dispute (Grose, 1994).

Determining at the outset how decisions will be reached is equally critical for the design process. For many communities, consensus is the primary goal to be achieved, and collective interests will take precedence over individual needs (Osi, 2008-2009; Dunnigan & Price, 1995). In other cases, there may be a requirement for members to defer to the advice of Elders or other respected people known to the community. Traditionally, Elders have had an especially important
role in promoting the peaceful coexistence between families and communities. Among the Coast Salish, for example, it was traditional to have a council of Elders give advice on an appropriate course of action (Mansfield, 1993; Dunnigan & Price, 1995; Mayer, 1998). As part of the resource exploration process, then, practitioners should work with communities to regain an understanding of the traditional roles played by Elders and to determine whether and how their role as decision makers can be supported within a process.

3.2.4 Design Features: Selecting Third Parties.

Unlike in Western ADR processes, the need for a facilitator who is both impartial and neutral may not be of paramount concern in Indigenous contexts. According to LeBaron Duryea and Potts (1993), dominant cultural processes involving a “neutral” third party may contrast with the tradition of many First Nation peoples. Instead, there may be a cultural imperative that facilitators be sought selected for their wisdom, knowledge and capacity to be “fair-minded” (Grose, 1994; Osi, 08/09). In these contexts, there may be a perceived advantage in enlisting people with specialized or first-hand knowledge and experience of the dispute, and someone who is tied directly the culture and community (Borrows, 2004; Bell, 2004; Victor, 2007).

Victor (2007) sets out two key reasons to distinguish between third party (mediator) “must-haves” identified above:

First, simply imposing Western values upon and Aboriginal dispute will bias both process and outcome. Second, claiming Western norms and values as universal undermines the potential and realization of other equally important ways of understanding the world. Traits important to an Indigenous process reflect important tenets of their worldview such as life as an indivisible whole and the importance of oral tradition […]” (p. 32).
Recognizing that communities will be more closely oriented with a Western perspective of DR, however, means that for some communities, “independence, impartiality, fair process, and neutrality are integral parts of their concept of justice and looking within small communities for decision-makers will raise serious concerns about nepotism and bias, particularly when decision-makers are appointed by local governments or community processes dominated by extended families” (Bell, 2004, p. 249). In highlighting the differences in preferences that may exist across Indigenous contexts, it is imperative for practitioners to assess the relative value of facilitator impartiality and neutrality and give thorough consideration to alternative skills, dispositions, and virtues that may be required of third parties (Kahane, 2003).

The literature highlights that the capacity of facilitators to address asymmetries of power between parties is also an important design feature to consider. Though these issues are generally discussed as arising in the context of disputes between Indigenous communities and states, they may also exist between Indigenous families and communities. Issues of power and power imbalances can arise in the form of personal attacks by one party on the other and in cases where one party is established as the sole arbiter of reasonableness and neutrality, in turn marginalizing the valid perspectives of the other party or parties in a dispute (Kahane, 2003). According to Osi (2008 – 2009), relying on the neutrality of a facilitator will not guarantee that power will be balanced in a DR process.

To avoid reinscribing these authority relationships, it is critical that DR processes have mechanisms to attend to asymmetries of power or risk becoming a vehicle for achieving the substantive goals of the more powerful party (Woolford, 2004). Thus, a key question to ask during process design is “whether the particular modes of dispute resolution, such as processes that hinge on the neutrality of facilitators, 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 disenfranchises and those on the margins, the powerful over the powerless (or any combination thereof)” (Borrows, 2004, p. 354). In answering this question, attention should be paid to the language, metaphors, and other expressions of the parties that might offer clues about the extent of the power dynamic between them. Ultimately, “designing checks and balances to diffuse power and reduce bias is more likely to overcome the issues of justice in small communities than an over reliance on technocratic, third-party decision makers” (Borrows, 2004, p. 355).

3.3 Summary

There is a rich variety of Indigenous traditions of law and DR in Canada. Across Indigenous cultures, legal orders and norms of DR are interwoven within complex social structures and systems of governance, often articulated through ceremony, story and ritual. Woven through these fora and mediums is a basic function of peacemaking and restoring harmony between people and their environments. While many of these traditions continue to thrive in Indigenous communities, others have been eroded through the imposition of foreign colonial structures and legal systems. As a result, Indigenous communities encompass a broad range of experiences and capacities, and there are varying degrees of practice of traditional forms of law and DR. Given this diversity, two central theses arise from the literature: first, while DR rooted in traditional norms and practices can and should be applied to dispute involving Indigenous communities, there can be no one-size-fits-all approach. Second, DR processes must be flexible enough to permit a broad range of community perspectives and connections with traditions of law and DR.

For practitioners tasked with designing new processes or integrating Indigenous norms and processes of DR into Western ones, the literature points to essential criteria for taking up this work. First, processes should be as inclusive as possible and emerge from the resources available in a
particular community setting and in response to the specific needs of the relevant parties. In attempting to articulate the legal and DR traditions within a community, respected members in the community should be identified and engaged throughout the design process and undertaking. Of equal importance is the need for facilitators to encompass a broad spectrum of skills and relationships to the parties. Finally, while it is important that processes fit the cultural contexts in which they will be applied, DR systems must be mindful that peacemaking projects may be undermined where a preference for traditional resolution practices limits opportunities to address the substantive issues of the dispute.

In an effort to develop a framework for assessing the relevance and merits of the ILL, a primary task of this project is to link the findings above with the norms and principles of DR among Indigenous stakeholders in BC in order to develop criteria to assess the ILL. In the following section I describe the methodology and methods used to analyze participants’ interviews and the method used to identify the norms and principles of conflict within their collective narratives and how this information is used to assess the relevance and merits of the ILL.
Section 4: Methodology

The following section describes the methodological perspective and method employed throughout the fieldwork and data analysis stages of the research project. It also describes the limitations of the methodology and how participants were recruited to participate in the interviews.

4.1 Narrative Inquiry

This project was conducted pursuant to the epistemological foundations and methods prescribed by the qualitative methodology of Narrative Inquiry. Narrative Inquiry (also often referred to as Narrative Research) is a methodological approach to studying human experience through the practice of storytelling. Lieblich, Tuval-Mashiach, and Zilber (1998) define narrative research as “any study that uses or analyzes narrative materials to make comparisons among groups, learn about a social phenomenon or historical period, or to explore a personality” (p. 3). Beginning with the examination of human experience as expressed in lived and told stories; Narrative Inquiry embraces storytelling as both a form of data and a method of analysis. For this methodology it is the story, rather than the storyteller, that is the focus of narrative research.

As an interpretive approach to social science research, Narrative Inquiry is a qualitative methodology which looks to both the form and content of a story as a means to understanding how people make sense of the realities they observe. Beginning with the work of sociologists such as Daniel Bertaux in 1981, to its current uses in the disciplines of history, anthropology, linguistics, and criminology, researchers across the social sciences engage this methodology using a variety of analytical strategies and tools (Elliott, 2005). Regardless of their discipline, “all narrative researchers share the use of narrative materials in some way in their research” (Pinnegar & Daynes, 2007, p. 5)
Narrative Inquiry begins from the assumption that the story is a foundational social mechanism with which human experience is made meaningful. According to Doherty (2001) “[h]uman beings tell stories because it is in their nature to do so, and in telling stories they make their worlds […] and provide a conceptual foundation upon which to build social situations[...].” (p. 61). Through stories, narrative becomes an instrument to construct and communicate meaning and knowledge. Narrative is therefore both a practical site for research as well as an analytic tool for exploring human behaviour about an individual’s or group’s relationship to social, cultural, and physical environments (Benham, 2007).

As a social phenomenon arising in all societies, individuals’ and communities’ experience of conflict, as well as the norms and structures they engage to resolve conflict, can be revealed through the narratives of those who have experienced them. According to Kellett and Dalton (2001), “in order to determine how conflict should be managed ideally requires an understanding of the meaning of conflict for those engaged in it” (p.vii). LeBaron Duryea and Potts (1993) identify story as an ideal mechanism for understanding how people make meaning of and manage conflict. According to these authors, “[t]hrough story, factual information conveyed about values and conflict-related behaviors becomes more real and amenable to retention when brought to life through narrative” (LeBaron Duryea and Potts, 1993, p. 388).

In addition to its ability to elicit important information about the ways people do conflict and the methods they employ to confront it, Narrative Inquiry is particularly well suited to research involving Indigenous people and communities. By placing stories at the centre of inquiry, this methodology engages the lived values that form the basis for Indigenous governance and regeneration (Corntassel, 2010). According to Jeff Corntassel (2010) “Indigenous storytelling is connected to [Indigenous] homelands and is crucial to the cultural and political resurgence of
Indigenous nations” (p. 1). Moreover, stories communicate conflict-related values held by Aboriginal people and continues to be an important medium for exchange in many Aboriginal cultures (LeBaron, Duryea & Potts, 1993). For researchers from different cultural or value systems, “the story functions as a translator; it is told in language all can understand, yet it conveys the values of cooperation and equality that are fundamental in Aboriginal culture and traditions” (LeBaron Duryea & Potts, 1993, p. 391).

4.2 Method

The fieldwork for this project was completed in two phases. In all cases, the two phases took place in a single visit, and varied from two to three hours. In Phase 1, participants were asked to describe stories of conflict in their families or communities. The purpose of this phase was to gain insight about Indigenous norms and principles of DR. For Phase 2, participants were given a copy of the basic outline of the ILL and invited to explore linkages between their stories and the ILL, and to identify its strengths and weaknesses.

The audio interviews from both phases were transcribed and analyzed using a holistic (rather than categorical) method of analysis in which the entire content of participants’ narratives were analyzed and compared in order to develop an understanding of the patterns and regularities between them (Elliott, 2005). These patterns and regularities are reflected in themes used as the framework for the analysis of Phase 1 of the interviews; they are: trust, consultation, storytelling and third parties. In general, the themes were identified from an analysis which brought together my hand written notes from the interviews as well as the transcriptions. Once compiled, I made notes of common conflict issues, norms and principles as they emerged through an initial scan of these sources. Once I had a general idea of the patterns and regularities between transcriptions, I conducted a word search to understand the relevance and frequency of key words and phrases. I
then connected the key words and phrases with similar meanings and that had the highest frequency back to larger portions of the transcripts to ensure the integrity and context of the stories were preserved.

As noted in the introduction, the ILL has yet to be assessed or evaluated. Though there are frameworks available for analyzing ADR processes that address Indigenous rights disputes between Indigenous peoples and the state, no similar framework exists for evaluating discrete processes that deal exclusively with disputes between Indigenous peoples in Canada. In order to achieve the research objectives, Phase 1 interview findings were combined and six critical principles for designing DR frameworks were identified. These principles then provided the framework for assessing the relevance and merits of the ILL. The final work of the research was to examine the perspectives (strengths and limitations) that participants shared about the ILL in Phase 2 against these six criteria. Finally, the recommendations were derived from the challenges participants identified in the ILL.

4.3 Recruitment

Interview participants ranged from hereditary chiefs, former Indian Act chiefs, and academic experts from various BC First Nations. They were identified through a review of the grey literature, and internet searches of BC First Nations communities. Four of the five participants were women. Two participants were from Vancouver Island, one from northern BC, one from the interior of BC and one from the Vancouver lower mainland area.

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4.4 Limitations

One drawback of Narrative Inquiry is that narratives are born from a narrators’ individual experience. Thus, although participants come from a variety of BC First Nation communities, their experiences and perspectives do not reflect a whole-of-community perspective, which limits the ability to assess the applicability of the ILL to any one particular community. However, there is a great deal to be gained by focusing on a single set of experiences as a way to confront widespread issues such as shared territory and overlap disputes. In spite of the fact this project was conducted with a small group of individuals, the quantity and quality of data gathered was significant and provided for a deeper and more complex understanding of the issues at play in participants stories about conflict.

A second limitation pertains to the identification of participants. Identifying who is an “expert” in the DR norms and practices of BC First Nations is inherently political. According to Antonia Mills (1994) “the true experts in any cultural system are those experienced and wise leaders who have been taught to know their own laws and values and to understand how they fit together to serve their communities” (p. xiv). In this case, participants were identified as experts based on their experience as community leaders as well as their proximity to the issues as academics working in various fields of Indigenous studies. Thus, while each participant in this project is an expert in their own right, the extent to which they are considered experts in these matters by their own community remains elusive.

4.5 Ethical Considerations

How participants’ knowledge is appropriated and represented was a fundamental consideration throughout this project. The history of colonization of Indigenous people around the world has largely been excluded from research that explored their cultures and customs. Typically,
Addressing Disputes Between First Nations

research involving Indigenous peoples has been driven by a colonial agenda to control what was perceived as foreign, deviant, and cultural “other” (Tuhiwai Smith, 2006; Denzin & Lincoln, 2005). As a result, “most existing research on Indigenous peoples is contaminated by Eurocentric biases” (Battiste, 2008, p. 503).

As a Euro-Canadian, I brought multiple levels of bias to the project that risk reinforcing the destructive forms of knowledge production and appropriation of the past. This is an especially important consideration given the authority and influence the author wielded over how participants’ narratives were constructed and analyzed. Although participants were given space to share their stories without interruption, once completed, a guided conversation began in which I focused the line of questioning on specific elements of participants’ stories, thereby privileging some features of the original narrative over others. Furthermore, through the analysis, the meaning derived from these co-constructed narratives was further rendered intelligible according to my perspectives of what constitutes a DR norm and practice. As a result, I had significant influence over the architecture of the findings.

To avert these risks, I moved forward with the research with the view to empower, not oppressing. Identifying and choosing an appropriate methodology was key to this process. In addition to its ability to elicit important information about conflict, Narrative Inquiry was ultimately chosen for its capacity to recognize the inherent value of Indigenous knowledge and for its congruence with the principle that Indigenous leaders, academics, and other cultural experts should be the first storytellers and owners of the story. By working directly with participants in the analysis of their narratives in Phase 1 of the interviews, the possibility of misappropriating their knowledge and/or misrepresenting the ways in which the narratives were analyzed and linked to the ILL was significantly decreased. Additionally, participants were invited to review the draft report
in order to ensure their personal anonymity and preserve the integrity of their stories. Every participant was also given an audio copy of their interview and an electronic or hard copy of the final report.

Through their stories, participants shared their knowledge about the intimate and sensitive nature of the cultural spaces in which DR norms and principles are located. Indigenous societies around the world have preserved these spaces as a living part of their cultures, passing on wisdom about how to call forth the best of their communities in the most difficult situations life can bring. By recognizing the value of participants’ knowledge of these spaces, and by highlighting the collision of this knowledge with current practices for addressing shared territory and overlap disputes, it is anticipated that this project will lead to the rethinking of how existing Indigenous norms and practices for addressing conflict can be better mobilized to benefit indigenous communities (Benham, 2007).
Section 5: Analysis of Narrative Interviews

The analysis to follow will reveal common conflict issues, norms and principles for addressing conflict arising from Phase 1 of the interviews. The findings from these various narratives are grouped under the four headings of trust, storytelling, consultation and third parties. Each of these themes is discussed in order, with highlights from the findings provided in a concluding summary. The section closes by identifying six criteria that will be used to assess the ILL in the following section.

5.1 Trust: You’re not Going to Get Very Far Without it

A common issue discussed throughout participants’ conflict narratives’ was a profound lack of trust relationships between families and communities. Issues of trust were described as root causes of both family and community conflict. Moreover, issues of trust between communities were interconnected with issues of trust between families because, for all participants, family ties cross reserve boundaries.

Participants generally attributed the breakdown of trust relationships to the loss or erosion of traditional family and governance structures as well as due to a loss of key people that ensured cohesion both within and between communities. One participant spoke at length about the impacts that colonialism has had on individuals, families and his whole community and said, “[t]here is no longer the trust. Trust in self, trust in other, [or] trust in family that was the backbone of systems in place that would have served for dispute resolution”. In speaking to the issue of overlaps specifically, another participant said that without the core element of trust, a DR process was “not going to go very far”.

Throughout the narratives, issues of trust between families presented as a difficult barrier for effective governance and the ability of Chief and Council to make decisions about lands, resources and treaty negotiations. For example, one participant described an incident in which the elected chief of a neighboring community openly questioned the ability of her community to negotiate an agreement where outstanding “business” between two families’ regarding naming a hereditary chief continued to be unresolved.

Collectively, participants’ narratives suggest that DR processes must include mechanisms and opportunities for communities to build trust. When prompted to explore potential tools and methods for rebuilding trust, participants all expressed the need to focus on creating a network of cooperative relationships among members and leaders. To support this network, one participant recalled her own efforts, as a leader, to emphasize positive historical relationships between community members and using them as a model for positive ways of relating. This participant recalled a time when the youth from her community and the neighboring community held a deep connection as “Aboriginal cousins” and a sense of belonging to one another. She described this connection to be “like a gang almost. Not a gang in the negative sense, we played [games], we did fund raisers and we had dances and you know we kind of just all belonged to each other, and that was really nice.”

Participants all spoke to a need to return to traditional teachings about ways of relating and explore histories of inter-marriage as a basis for building a network of cooperative relationships as a basis for building trust. According to one participant, inter-marriage was a primary mechanism employed by her community to resolve conflict “because you’re not going to beat up your own family.”
Participants’ narratives all highlighted that the single most important tool for rebuilding trust both within and between communities lies in a community practice of “just being together”. According to one participant, “The most effective thing is spending time together, getting to know the respective interests and being able to dialogue and educate each other. A lot of times mistrust is the result of poor communication. Spending time together and having a genuine interest in resolving conflict - trust-building can happen”. In recalling past discussions with the neighbouring community about their overlap issue, one participant noted that the neighbouring Nation “had all these fears of worst case scenarios. They were happy we went to talk to them.” She went on to add, “Any forum where people are sincere. There are all kinds of opportunities for it. And it doesn’t have to take a long time”. Another participant said, “It is most important for families and communities to be together. We are the medicine. You get to know each other better. That’s part of a healthy community, a healthy family, a healthy individual”.

5.2 Leading towards Dispute Resolution: The Role of Consultation

As community leaders themselves (both hereditary chiefs and Indian Act chiefs), four participants described their personal challenges to make decisions while conflicts between governments established under the Indian Act and traditional governments, or conflicts about the makeup of these social structures, are ongoing. In order to overcome these challenges, participants spoke to the importance of acknowledging the difference of views that can come from these systems by consulting at various levels such as internally with heads of family, with Elders, as well as with chiefs from other communities within the Nation. Collectively, participants’ narratives confirmed the essential criteria identified in the literature that DR processes must work within diverse social structures and give consideration for how multiple interests and needs within communities will be represented as the process unfolds.
In their own efforts to fulfill this criterion, participants spoke generally about two types of consultation they practice: consultations with heads of families and consultation with the collective community.

Participants’ discussions about consultations with heads of family centered predominantly upon sharing information and gathering advice. Taking place in both formal and informal settings, this level of consultation was described as being integral for deciding on the appropriate timing and approach for conflict intervention and for learning about tools for responding to aggression as they move the discussion of sensitive issues into more formal settings. For example, in anticipation of the disruption that the passing of a chief’s name would cause at the following day’s feast, one participant recalled how she called upon members of her father clan, high chiefs from other clans, and respected Elders to explore proper protocol and provide advice on managing potential angry positioning. In her narrative, the participant describes how she “told them what was happening. They asked me a few questions. They gave me some examples that they’d known about on the passing of a name, how it’s handled and what is proper”.

The role of Elders was discussed at length by each participant. Elders were commonly described as key members within the community to whom parties in conflict can turn for advice about traditions and protocol for resolving disputes. Two participants described how seeking and following the advice of Elders served an important supportive function in their personal struggles as community leaders to bring resolution to a family and community conflict of identifying a hereditary chief. For one participant, “the only way I could play this game was to bring the Elders together to talk about protocol, how do we do and what do we do and [a community member at the centre of the conflict] would attend those meetings and so I would just follow the role of those learned ones and follow what they would tell me to do”.
In addition to consulting both formally and informally with heads of households and leaders outside the immediate community setting, a second type of consultation process described took place within a larger, more formal community setting. Recalling a public meeting in which the community was engaged to share information and make a decision on an infrastructure related issue that had caused problems with the neighbouring First Nation and municipality, one participant recalled organizing an “open floor” process to explore proper protocols for settling the dispute. Although the open-style consultation about this dispute gave rise to difficult conversations and debates about proper protocol, it nevertheless allowed for an evaluation of community expectations of a DR process and defensibility of the eventual process as a whole.

Participant’s emphasis on leading from a principle of inclusive decision-making suggests that requirements of confidentiality may not be appropriate for DR processes in First Nations contexts. For example, one participant recalled that in a meeting open to all community members, “anytime you said confidentiality there was a red flag. Everybody in the community thinks everything should be open to everybody”. In the same vein, another participant said, “you can try as you will to have a closed door process but it’s all going to get out it’s going to spread like wild fire”.

5.3 Clearing the Air and Sharing Your Truth: The Role of Storytelling

To varying degrees, each conflict narrative confronted issues faced by First Nations to reconcile multiple and often inconsistent stories about the relationships between distant relatives and the current living generation as well as the relationships between communities and land management. Among the most pervasive examples were disputes about who can rightfully carry the title and responsibilities of a hereditary chief. The problem of divergent understandings about bloodlines and interpretations of the rules for passing down names was described as all-
encompassing and one that cuts across reserve boundaries into all spheres of community life, from the schoolyard to the treaty negotiation table. For one participant, the breakdown of trust between families has been the “breaking point” in the life of her community.

The practice of storytelling and taking opportunities to hear and share stories as a way of discovering “truth” and addressing conflict about history and identity was an important point of intersection between participants’ narratives. All participants described stories as containing important threads of truth about these issues. Participants commonly referenced their own stories about the history and identity of either their family or the community, and spoke in-depth about the sources and validity of their knowledge. Participants spoke about different families as having their own sets of stories and truths. Their acknowledgment of “others” truths, and the value of hearing those truths, suggested that while stories may not always provide certainty of historical facts, the capacity of stories to help clear the air about controversial matters is an important and enduring feature of decision making processes among First Nations.

Because conflicting stories have become a major source of tension between communities, there was a lack of consensus about the value of designing DR processes centered exclusively in a historical truth-seeking perspective. One participant questioned this perspective in light of current realities that family ties travel across reserve boundaries. For her, efforts made by one community to create an exclusive and separate history from its neighbours may be disrespectful of these relationships and only serve to exacerbate existing tensions. This participant suggested that stories should be told with a view to emphasizing a principle of reciprocity between communities or families, rather than for the purpose of arriving at a common understanding about history. She further suggested that, as a result, resolving overlaps might simply be a matter of formalizing
current arrangements, even if such arrangements are not consistent with one or the other’s historical perspectives of traditional use and ownership of a shared territory.

Similarly, another participant questioned the extent to which reconstructed histories can meaningfully translate into modern arrangements for sharing lands and resources. This participant said “in the post-colonial context, whether within or between First Nations, you are reconstructing a false history to conform with modern concepts of territories and boundaries. It’s so super complicated, but there are aspects of those traditions that can bring resolution to those decisions. Do you go back to pre-colonial times? Or is it more collaborative and forward-looking? There are so many lenses you can take.” For this participant, it was important to establish the purpose a historical perspective would serve in a process and to evaluate how decisions based in oral history align with other legislative and jurisdictional requirements. While the use of story to understand a community’s orientation to DR is highlighted by the work of Lowe and Davidson (2004) and LeBaron Duryea and Potts (1993) there is a lack of consensus among participants’ about how communities find agreement on the purpose and place of storytelling and oral histories as the basis for eventual agreements.

1.4 Providing Advice and Maintaining Harmony: The Role of Third Parties

Participant’s narratives each touched on the important role played by third parties in addressing family and community disputes as well as their expectations regarding the role and responsibilities of third parties in DR. Their narratives described a variety of third parties including community leaders, heads of family, Elders, and non-Aboriginal mediators. The role of witnesses as third parties was also discussed as a key element of facilitation insofar as witnesses played an important role in setting the tone of a process, managing emotions, making agreements official, and enshrining new relationships into the collective memory. Together, the narratives spoke to a central
thesis that, independent of their relationship to the parties and the issues, the primary purpose of third parties in DR is to give advice and maintain harmony among disputants.

Participants’ narratives were consistent with the views of Borrows (2005), Bell (2004) and Victor (2007) that facilitator impartiality may not actually be necessary in order for a process to be successful. In four narratives, participants offered examples of or discussed their preference for engaging a facilitator with ties to either one or both parties to a dispute. Two participants spoke about their preference for engaging someone of high status such as a chief or clan leader who had a record of “acting in a good way”. Another participant recalled the active role a non-Aboriginal person employed by a neighbouring Nation took in developing mutually beneficial options for sharing resources. In that case, the participant said the partiality of the facilitator became a non-issue as their level of expertise and ability to earn her community’s trust became evident.

In the same vein, there was consensus among the narratives that strict criteria of facilitator neutrality are not necessarily an essential ingredient for a successful DR process. Other criteria, such as an in-depth knowledge about the history of the parties, familiarity with traditional protocol of DR, the ability to listen and understand competing perspectives, and the ability to facilitate dialogue between competing interests and identify options were consistently valued higher than facilitator neutrality. For one participant, it was more important to know “what they bring to the table” than to spend time and energy on debating a facilitator’s neutrality in a dispute.

Participants also explored both explicit and implicit roles that witnesses play in balancing power and preserving harmony at a negotiation table. Throughout the narratives, witnesses, particularly Elders and respected people in the community with knowledge of language and protocol, played an important role in setting a positive tone, for example, through the use of prayer and song. In one example, having an Elder or respected community member perform a rite was
important in helping to disarm people who had come to the process from a place of anger. According to one participant, these traditions “strike you emotionally. You don’t have to believe in that, you don’t have to believe that we are calling our ancestors when we sing a song like that and we use the rattle. We’re calling on them for strength. We’re saying, ‘get with us here. We need your help.’ We’re calling on ghosts. And when people understand what we’re doing, it’s big”.

Notably, however, there was significant diversity among the narratives regarding the extent to which many Elders are personally equipped to act in traditional and Western roles of DR. Participants spoke of the impacts that residential schools have had on the health and well-being of today’s Elders. There was also concern about a lack of respect for their traditional roles by other community members. One participant expressed reservations about deferring to the decision of Elders in DR and said that, “there are other people who are informed and honorable, know the history, know what role they should be playing in the interest of everyone. And that’s great. Our community doesn’t have very many of what you would call “Elders””.

Witnesses also served an important role in helping to make agreements “official”, and acting as catalysts to bring agreements into force. Referring to a conflict about passing on a Chief’s name, one participant said that once decided, it would be “a matter of calling witnesses, doing that in front of witnesses.” There are processes for actually carrying on. Then it shouldn’t be questioned again”. This statement linked closely with the narrative of another participant who described the role witnesses have in preserving agreements as part of her communities’ evolving oral history. This participant spoke about choosing young witnesses and members of other communities for their ability to recall an agreement “well into the future”. The participant said, “There are people from other tribes who know our history, or else they’re from our tribe, but maybe their Mom was just from our tribe, but they know our history, so you can pull them in, and they can recount what they
know. What you want is other people to know your truth. So you have those witnesses there so that you can substantiate something. We come from an oral society. [...] You need those witnesses there to say, ‘I was there and I saw that’”. While participants’ narratives are concurrent with the criteria established by Grose (1994), Osi (08/09), Borrows (2004) and other that facilitators encompass a broad spectrum of skills and relationships to the parties, but identified witnesses (including Elders and other respected people), in particular, as the kinds of facilitators required to balance power.

5.5 Summary and Assessment Criteria

A breakdown of trust relationships both within families and between communities was described as a significant barrier to resolving disputes between First Nation communities. Participants’ narratives all point to a common principle that DR processes must have mechanisms for rebuilding trust. To rebuild trust, participants’ narratives supported the creation of a network of cooperative relationships among members and leaders. They further suggested that, where they exist, cooperative relationships should be highlighted and drawn from as a basis for restoring trust. The single most important tool identified in the narratives for establishing trust is in the practice of “just being together”.

Participants’ narratives revealed that the presence of conflict within and between communities creates significant barriers to effective community governance and a weakened ability of leaders to make decisions. To overcome these issues, participants described the essential criteria that DR processes take an inclusive approach to making decisions about family or community disputes by creating opportunities for multi-level community consultations to explore proper protocol, timing and approach for a DR and decision making process. All participants stressed the importance of taking opportunities to explore and evaluate community expectations as well as to
understand how resources are used and by whom. These opportunities, particularly in whole-of-community settings, were also important for reaching a level of certainty over decisions reached and the overall defensibility of a process as a whole. Moreover, these discussions link closely with the essential criterion identified by Lederach (1995) and others that “key” people in the community be identified and engaged in order to bring some understanding to community needs and interests, keep control over process design and allow for varying perspectives about participation to be contested from within.

The practice of storytelling and taking opportunities to hear and share stories as a way of sharing “truths” and addressing conflict about history and identity was an important point of intersection between participants’ narratives. Despite the importance participants placed on taking opportunities to discover “truth”, there was a lack of consensus about the value of designing DR processes centered exclusively on a historical, truth-seeking perspective. While the literature points to the importance of using stories to illicit information about community expectations of DR, collectively, these narratives point to an essential criterion that DR processes designed to address lands and resource issues begin with agreement on the legal framework that will be engaged in a DR process and the purpose and place of storytelling within it.

In terms of expectations of third parties, participants’ narratives all stressed that it is more important for third party interveners to be skilled and familiar with the conflict issues and history and have a capacity to facilitate dialogue than it was for them to be impartial and neutral. Witnesses were described as having important traditional roles in balancing power between parties and ensuring agreements are brought into the communities’ collective memory. The narratives spoke to a central thesis that, independent of their relationship to the parties and the issues, the primary role of third parties is to provide advice.
In linking the key considerations for DR systems design identified in the literature with the findings above, the criteria that will be used to assess the ILL in the following section are listed below.

In order make the ILL more amenable to suit a variety of BC First Nations’ contexts it must:

1. Be flexible enough to apply across a range of legal and cultural contexts and proceed from an agreed upon framework that reflects the specific legal and political contexts of the disputing parties. This criterion is derived from the literature which speaks at length about the varying degrees of connections First Nations communities will have to their legal orders and laws. It is also derived by participants’ discussions about the value of storytelling and the need to find agreement on the purpose and place of storytelling and oral histories as the basis for eventual agreements. This criterion is defined as “flexibility”.

2. Be developed at a local level and emerge from the human and cultural resources available within communities. This criterion is derived from as the perspectives of Lederach (1995), Grose (1994) and Bell (2005) who advocate for community consultations in the design of DR frameworks. This criterion is defined as “local development”.

3. Be respectful of dynamic and sometimes competing governance structures by seeking to identify how multiple perspectives and interests will be considered as the process unfolds. This criterion is derived from participants’ narratives which focused on the need for inclusive forms of decision making which respect multiple lines of authority in the community such as those that exist by virtue of a hereditary system, as well as those born out of the Indian Act. This criterion is defined as “inclusivity”.

4. Include mechanisms for communities to address issues of trust. This criterion is derived from participants’ discussions about issues of trust as a root cause for conflict between families
and communities and the need for DR to include opportunities for building trust. This criterion is defined as “trust mechanisms”.

5. Establish criteria for selecting third parties that is reflective of community expectations of impartiality and neutrality and broad enough to include other forms of facilitation such as witnessing. This criterion is derived from the literature, for example from Grose (1994), Osi (08/09), Borrows (2004) and participants narratives noted above. This criterion is defined as “criteria for third parties”.
Section 6: Exploration of the Indigenous Legal Lodge

The following section was developed in fulfillment of the second research objective to explore the relevance and merits of the ILL. To do this, I will examine the perspectives (strengths and limitations) that participants shared about the ILL in Phase 2 of the interviews against each criterion established in the previous section. The conclusions and recommendations for strengthening the ILL are provided in Section 7.

6.1 Criterion One: Flexibility

As stated in the 2007 proposal, the purpose of the model is to support and create a political space in which overlap nations explore their legal principles, precedents, rules, practices, and legal reasoning processes in an effort to come to some understanding about how their overlap areas are to be used and shared. Participants supported the DR approach of the ILL and pointed to the strength inherent in the framework to explore Indigenous law without requiring the process to be exclusively based in it. This strength was highlighted by all participants who spoke to a general lack of community knowledge about legal traditions and a lack of people within the community who can transmit this knowledge. This gap was identified by one participant who spoke about an initiative currently underway in her community to revitalize its traditions of law and DR, and noted that “[i]ts challenging and it hasn’t been done. The Indian Act undermined traditional governance. We are removed from those traditions. It’s about getting them back.”

Another participant highlighted the issue that, as would be the case for any society, traditions of law and DR that fall out of community practice are not likely to enjoy a high degree of validity. For example, one participant said “not everybody knows these traditional laws but I mean I’ve been taught these laws since I was young. […] But it is hard for me to say to the
community you know that this is what I understand because they get mad. And so it was easier to slide [my particular legal knowledge] under the rug and try to work around it.” For this participant, even in cases where Elders and other “experts” are still alive to help describe Indigenous law and the ways it can be applied, “in the end if people don’t believe in those laws you’re not going to resolve things”.

Another participant’s response in Phase 2 demonstrates the blurry lines that may exist between understandings of “hard Indigenous law” and community principles about ways of relating. To this end, the participant said:

People will say things like “Well we’re a family and this is the way families behave and my grandmother always told me that we traded with so and so.” Are those laws? Is that history? Is it a law that we should work through this and can we make one up? Look this is come about from modern times. We’re talking treaty, we’ve got all these things going, we’ve got the legal perspective but that’s not us. What is us? […] Everything you hear from old people it’s about being empathetic, it’s about helping, it’s about family, it’s about sharing. Kind of like Christian values and if we’re those kind of people if that’s the way the [name of First Nation retracted] people behave, let’s agree to behave that way. So when you say laws - Indigenous laws - is that what we mean and should we say that then? Should we say that it’s a law that we respect our family, should we say it is one of our laws to share?

These varying perspectives about Indigenous law and its applicability to overlaps gives way to the imperative described in the assessment criteria that DR frameworks proceed from an agreed upon framework that reflects the specific legal and political contexts of the disputing parties. The 2007 proposal is consistent with the criteria by providing for a discrete phase in which the overall legal framework is developed prior to design of the Lodge process itself.
In the words of one participant,

I think this is great from a procedural/process perspective. There are still things that might be hard to overcome in my experience. For example, historical looking rights and title perspective versus the forward looking perspective is a crucial issue and it’s not that either is right or wrong. But it really changes the focus of the discussions. Looking in the past or sharing the resource in the future. This process is here, but if you can’t agree to what your objective is, then that could provide some challenges.

In order to ensure the legal framework is truly reflective of the legal orientation of each community, this participant suggested that it would be important for this phase of the ILL framework to include opportunities for First Nations to acquire a basic literacy about the various frameworks (broadly discussed as reconciliation based or historical claims to rights), the tensions between them and the range of outcomes they may produce.

The kinds of outcomes to be produced by the ILL may, according to the 2007 proposal, vary from agreements in the form of treaties, shared jurisdiction, joint management arrangements to recommendations of the panel. Where formal agreements are the outcome, the ILL proposes that they would be non-binding on the parties (Napoleon, 2007a). Two participants with significant experience of overlaps foresaw challenges in making an agreement binding when the treaty itself does not usually recognize overlap arrangements and generally agreed that agreements resulting from the ILL should, therefore, be non-binding.

These participants further noted a difficult challenge for implementing agreements based solely in Indigenous law where these laws may result in arrangements that are more restrictive than what would be required in a treaty or enforced by the courts and may be difficult to implement where they involve working with other levels of government. For example, one participant noted
“other governments management regimes come into play regardless. We had discussions with some First Nations where they wanted us to have a higher standard of accountability to them than the public does. […] But this isn’t what we want to do. So the whole fact that this is convoluted by other layers of bureaucracy and jurisdiction has to be considered as well”. Thus, while agreements based in Indigenous law may, according to the UBCIC (2008), produce more just outcomes from an Indigenous legal perspective, the flexibility of the Lodge also supports the development of agreements which are viewed as just from a Canadian legal perspective.

6.2 Criterion Two: Local Development and Consultation

Rather than prescribe a particular process, the 2007 proposal sets out a broad framework to guide First Nations to design processes tailored to their needs and interests. In Phase 2 of the interviews, participants linked the ILL and the principle that there is no one size fits all model for DR respecting lands and resource disputes. Moreover, frameworks such as the ILL which are developed locally and with significant input from disputing communities were identified as enjoying a higher degree of legitimacy than those imposed by governments. The overall relevance of implementing a framework within the BC treaty process that supports First Nations to be the drivers of DR was strongly supported among four participants who had direct experience with overlap issues. In the words of one participant:

I think any process that allows First Nations to dialogue on the issues is super helpful because communication and understanding of the different objectives of the different First Nations is most of the battle. I just think that there are certain things within the treaty process that have been very unhelpful to Aboriginal relations. The maps is a big one.[…].That line is so provocative. The lines in the maps of the final agreement are so provocative. Part of the problem is that if the other party doesn’t want to talk because they
feel blindsided when you reach a treaty. You can make all kinds of efforts and yet they don’t come. Maybe there should be a mandatory process or else you have to hold your peace.

For this participant, there was a significant benefit to establishing “a pre-set process where everyone understands the rules of engagement and everyone knows how to make the moving pieces work”.

By drawing on the experiences and perspectives of community members, and inviting them to explore how the overlap issue can best be resolved, another key strength of the ILL is that it draws from the human and cultural resources within communities. The ILL is further supported by a key argument highlighted in the literature that people on the ground with direct experience of the lands and resources are the true “experts” in DR. Though participants foresaw a need to defer to external, technical experts for advice on land use planning and other issues of relevance to a given dispute, participants placed significant value on hearing the stories and experiences of community members as part of the process.

The ILL is also consistent with the criterion that DR frameworks include consultations with communities. The Work plan includes five junctures in which facilitators meet with communities: 1) for information gathering 2) for sharing results about the information collected, 3) to facilitate discussions about the lodge process and agreement options and 4) to hear from the communities once the hearings of the panel are complete. However, the details of who will be involved in each of these consultations and in what kinds of settings are not clear. Participants’ narratives and the review of the literature clearly describe a necessity to undertake multiple levels of consultation when exploring issues of process design, history and law.
6.3 Criterion Three: Inclusivity

A key strength of the ILL is that it invites a range of community members to explore relationships created through marriage, kinship, trade etc. in order to make specific legal determination of the status of lands and sharing of resources. Moreover, a second key strength of the lies in the framework’s potential to cut across the “freeze-dried” political identities of First Nations imposed by the Indian Act. Participants described this aspect of the ILL as an important departure away from the courts which give little consideration for decision making based in traditional systems of governance and land tenure. Moreover, because the ILL includes a range of community representatives who speak to their experiences of land, current uses and the nature and scope of the overlap, participants envisioned the ILL to be a more representative and inclusive process than those in which only treaty negotiators are participants.

However, the 2007 proposal does not provide a specific strategy for selecting members to share their experiences during the sitting of the Lodge or the extent that these individuals will collectively be representative of the community at large. Participants’ narratives identified two issues with respect to this oversight. First, they suggested that disputes about political representation and who can claim authority as experts about lands, resources, governance and law present a significant challenge for successfully resolving overlaps. Despite the focus of the ILL to explore these issues, the legitimacy of eventual agreements may be called into question in the absence of justifiable criteria of who specifically will be called upon to represent their family or community.

Second, participants spoke to a need to balance both individual and collective rights within the ILL framework. In the words of one participant “Fish is a good example. It gets into the business of individual versus communal rights. If our fisherman could, they would make all
decisions. But the fish belong to the entire community. The community allows the fisherman to benefit from that communal resource. So in issues of conflict or policy, I think you need all perspectives; the individual and the collective.”

The possibility of misrepresenting various perspectives throughout the design and undertaking of the ILL lead to an important question of whether passing a Band Council Resolution (BCR) agreeing to participate in the Lodge and adhere to the final decision, rather than seeking community approval through a ratification process, reasonably signals community support for embarking on the ILL. Though the Work Plan provides for a discrete step in which the communities are engaged to discuss the lodge process, it cannot be assumed that it will enjoy *de facto* legitimacy just because the communities have been engaged in the work of process design.

### 6.4 Criterion Four: Trust Building Mechanisms

A centerpiece of the ILL, and one which was highlighted by participants as an important institution for building trust between communities, is the feast. According to the proposal, “[t]he business of the feast is to confirm the intention of the communities to actively participate in the Indigenous Legal Process” (Napoleon, 2007a, p.6). Participants described hosting a feast as being a particularly time and resource intensive undertaking and the effort put forth by families to host a feast (in this context) is meant as a symbol of its commitment to reconciliation. For one participant, the feast has “been a discrete activity and component of our meetings and requires commitment from both parties […]. It is an important and symbolic step in reconciliation.” Overall, discussions from Phase 2 highlight that not only does the feast demonstrate a commitment by the host community to resolve the dispute, but also provides an important opportunity for building trust by “just being together”. More specifically, participants described the feast as having the capacity to
set a positive tone for future dialogue and leaving communities with a sense of incremental accomplishment in resolving the overlap.

However, participants’ narratives from Phase 1 of the interviews suggest that the ILL could be strengthened by including more strategies or opportunities for “clearing the air” and building trust. As noted in Section 5, other opportunities may include initiatives taken by community leaders and other key people to create networks of cooperative relationships which can facilitate a shift in focus to highlight peaceful relationships such as those established through marriage, business and other social institutions. Whether these initiatives are undertaken as discrete processes within the ILL framework or linked with other, more long-term, community planning initiatives, trust building mechanisms were viewed by participants as foundational for creating tangible experiences of reconciliation between families and communities.

6.5 Criterion Five: Broad Criteria for Third Parties

The 2007 proposal sets out three kinds of third parties: the panel, facilitators, and an expert in Canadian law to support the panel. In general, the kind of support provided by panel members and facilitators were seen as important components of a process to explore issues of overlaps. However, discussions from Phase 2 suggest that the emphasis the ILL places on the neutrality of the panel and the inclusion of a Canadian legal expert to support should be revisited.

Throughout our discussions, participants’ linked the practice of seeking advice from members of other First Nations, as well from respected people within communities, who have significant knowledge of traditions and protocols, to the advisory function of the panel. The appointment of a panel is also supported by participants discussions about the need to have respected people present who, through the act of witnessing, are able to curb angry positioning and
create a safe environment in which members from the communities are supported to work through sensitive subject matters inherent to overlap discussions. For one participant, “I think the panel should be there to provide advice, so if they have ideas or suggestions or can draw on their experiences to share. I think that that’s important and also their ability to step in, you know, even with a facilitator, there are things that can get heated. And I think the panel should step in if that is the case”.

The 2007 proposal describes panel members as coming from a “neutral indigenous group with no direct interest in the dispute” (Napoleon, 2007a, p. 4). Yet, participants questioned the extent that another First Nation could be either partial or neutral given the likelihood that they have a shared history with one or both of the disputing parties. For example, one participant said “is there neutrality? Everybody has an interest in something. You know who are you standing with? Are those your close relatives? Even in the bigger picture, even in the smaller picture […]. We’re all so inter-connected; either married into families, blood families, political alliances, hatred for each other, old fights. Who is neutral?”

Two participants likened the role of panel members to BCTC Commissioners who have assisted other First Nations in overlap discussions. BCTC Commissioners were perceived as having important contributions to make to overlap discussions because of their experience assisting First Nations to resolve overlaps; experience that can be drawn from and applied across negotiation tables. They suggested that as important resources to the BC treaty process, some consideration should be given for a potential role of the BCTC in the ILL.

In terms of the qualities of facilitators, the 2007 proposal is clear that these individuals should have experience in Indigenous law, narrative mediation and any other experience relevant to the overlap dispute (Napoleon, 2007a). Notwithstanding the challenge of identifying experts in
Indigenous legal orders and law, participants expressed general support for the criteria that facilitators be familiar with historical relationships between parties, the particular cultural context of the dispute and knowledge of protocol and traditions as the foremost important attributes of a facilitator. Where facilitators come from, and whether they are themselves Indigenous, was not an issue for participants’. However, they all said that these individuals must enjoy a high level of trust from both parties.

There was some inconsistency among participants with respect to the place of an expert in Canadian Law as a member of the panel. For example, one participant shared his sentiment that DR processes involving First Nations are too often driven by Western institutions which tend to subordinate cultural norms for resolving conflict in favor of applying more familiar Canadian legal concepts grounded in Western perspectives of what constitutes fact. A second participant also questioned the utility of including an expert in light of a framework which aims to bring First Nations together to engage their traditional laws. However, in noting that many First Nations will rely on Canadian law as the basis for resolving overlaps, with respect to including such an expert one participant said “I don’t know if I like it but I can see the need for it”. The tension between these perspectives suggests that the inclusion of experts in Canadian law should be decided in conjunction with the work of developing the overall legal framework of the process.

Discussions about the inclusion of a Canadian legal expert in the lodge gave way to discussions about a broader place for Canada in the ILL framework. Though the 2007 proposal is silent about a specific role other than one of filling a financial gap, participants suggested that leaving First Nations to deal with these issues themselves should not mean a total withdrawal from Canada and that support should be given, either through its formal treaty policy or other mechanisms which support treaty making, to motivate First Nations to participate in the ILL.
One participant anticipated that, like most other initiatives, the ILL will endure a number of growing pains and face difficulties in resolving highly sensitive and political issues. He therefore stressed that the single most important motivating factor for First Nations to engage this or other initiatives would be a demonstration by Canada that it is committed to this initiative in spite of these difficulties. To support this claim, the participant provided the following analogy about the process for preparing ulicans into a medicinal remedy:

Ulicans (or candle fish) - you can dry them and light them as a source of light. When made as oil, it’s clear and full of nutrients. When refined, it looses its bad odor. You get a boat load, dig a hole in a ground and let them ferment. You come back two or three times over to skin the top. At the end of it, you end up with something clear, and it can be used to help heal open wounds. But you have to trust the process. You have to trust that what you have is ulicans. And you have to trust the stinky, smelly process. If you abandon it, you won’t get all of its benefits. So trust it, stay with it, and have enough resources to see it through to the end.
Section 7: Conclusion and Recommendations

The principles of the BC treaty process recognize that overlapping claims are a major barrier to the successful conclusion of modern treaties in BC. When the treaty process commenced in 1992, First Nations were expected to resolve these issues on their own. However, the limited successes First Nations have had in developing suitable overlap arrangements over the course of the last two decades of the BC treaty process suggests that an examination of the problem and potential alternatives is, at a minimum, an important pursuit. The issue of when and how overlaps are negotiated has been the subject of this project.

In 2007, the Indigenous Legal Lodge was put forward as one such alternative but had yet to be assessed or implemented. In light of the lack of knowledge the Department of Aboriginal Affairs and Northern Development currently holds about the relevance and merits of the Lodge, the primary objective of this project was to answer the research question: is the Indigenous Legal Lodge a suitable framework for resolving overlap disputes between BC First Nations? To answer this question, the project began by looking to the academic literature and the stories of five Indigenous stakeholders in order to establish assessment criteria for the ILL. The ILL was then assessed against five criteria that emerged from the analysis. This assessment was largely based on participants’ reactions and perspectives about the ILL in Phase 2 of the interviews in which participants were asked to evaluate the applicability of the ILL to their stories and/or to the issue of overlaps. In general, these discussions demonstrate that the ILL contains all of the necessary pieces to make it a suitable forum in which BC First Nations, both inside and outside the treaty process, can explore and potentially resolve issues of shared territory and overlapping claims.
The project identified a number of key strengths of the ILL. First, the ILL provides a flexible framework from which First Nations with a variety of connections to their Indigenous legal orders can be brought together to discuss issues of overlap and work towards eventual agreements. Though the ILL is supportive of the larger project of re-introducing and/or exploring core elements of traditional social institutions to resolve contemporary issues, it is not exclusively based in them. A second key strength of the ILL lies in its general support for the principle that there is no one size fits all model for DR respecting lands and resource disputes. By drawing on the experiences and perspectives of community members, and inviting them to explore how the overlap issue can best be resolved, another key strength of the ILL is that it draws from the particular human and cultural resources within communities. Furthermore, because the ILL includes a range of community representatives who speak to their experiences of land, current uses and the nature and scope of the overlap, the ILL is more representative and inclusive than other processes. Moreover, the work of the lodge to explore relationships created through marriage, kinship, trade etc. in order to make specific legal determination of the status of lands and sharing of resources suggests an important potential of the ILL to cut across the “freeze-dried” political identities of Indian Act bands and promotes decision-making based on more fluid expressions of Indigenous citizenship and nationhood and, in effect, land management.

The feast was supported as an important institution of DR, and thus an important ingredient for the overall success of the ILL. Not only does the feast demonstrate a commitment by the host community to resolve the dispute, but also provides an important opportunity for building trust, setting a positive tone for future dialogue and giving parties a sense of an incremental accomplishment in resolving the overlap. The role of the panel as witnesses during the feast and throughout the sitting of the lodge was supported by participants who identified a need for
including respected people who, by virtue of the respect others hold for them, are able to create a safe environment for discussions and enshrine agreements into the collective memory of the communities. In terms of the criteria set out for selecting facilitators, the expectations that these individuals be well versed in Indigenous traditions, cultures and in the history of the parties was supported by all participants.

In order to strengthen the ILL and make it more amenable to suit a variety of BC First Nations’ the ILL framework should:

1. Develop a strategic plan for undertaking consultations at various levels in order to ensure all relevant perspectives are included in the design of the lodge and as the lodge process unfolds;
2. Establish defensible criteria for who will speak to their experience of the overlap;
3. Consider whether community ratification (as opposed to a Band Council Resolution) is required to ensure eventual agreements will be honored by the communities at large;
4. Where possible, include more formal or informal opportunities for First Nations to build trust and reconcile internal political issues;
5. Consider how the expertise of the BCTC can be utilized in the development and undertaking of the lodge process; and
6. Consider the value of including an expert in Canadian law in conjunction with the work of developing the overall legal framework of the process.

In closing, the evolution of Canada’s policy in the negotiation of comprehensive claims is premised on the theory that by establishing certainty of ownership and decision-making over portions of a First Nations’ traditional territories, and providing tools for economic and social development, modern treaties offer a “complete package” for addressing outstanding issues
between First Nations and the Crown. Arguably, however, a critical piece of enabling First Nations to maximize these benefits in a post-treaty context requires that Canada work across the boundaries of its consultations process to support First Nations to build effective institutions of government that include systems of law and DR that promote internal reconciliation between neighbouring Nations. Though it may not be in the interest of either Canada or First Nations for the Crown to be directly involved in the mechanics of internal reconciliation, if Canada is truly committed to the idea that treaties provide a viable answer to First Nations lands and governance issues in BC, then it certainly has a place in creating the conditions that will bring these mechanics to life.
Bibliography


Cases and Legislation
Addressing Disputes Between First Nations

An Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians, 1857 (UK), 20 Victoria, c. 26 (Province of Canada) [Gradual Civilization Act]


_The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3_ [Constitution Act, 1867]


_Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73_ [Haida Nation]

_Indian Act, RSC 1985, c I-5_


_R. v. Powley, 2003 SCC 43_


_Saulteau First Nations v. Canada (Attorney General), 2007 BCSC 492_


_Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74_ [Taku]

_Tseshaht First Nation v. Huu-ay-aht First Nation, 2007 BCSC 1141_
Appendix A: Concepts

**Indigenous communities, peoples and Nations:** The United Nations Secretariat of the Permanent Forum on Indigenous Issues (2004) offers the following definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system (p.2).

**Aboriginal People:** A collective name for the original peoples of North America and their descendants. The Constitution recognizes three groups of Aboriginal people: Indians (commonly referred to as First Nations), Métis and Inuit. These are three distinct peoples with unique histories, languages, cultural practices and spiritual beliefs. More than one million people in Canada identify themselves as an Aboriginal person, according to the 2006 Census (INAC, 2011).

**First Nations:** In the context of the BC treaty process First Nation means the entity who submitted a Statement of Intent (SOI) to negotiate a Treaty. First Nations who have submitted Statement of Intent to negotiate to the BC Treaty Commission are usually placed in three categories: 1) as Indian Act bands 2) First Nations formed as a result of Indian Act bands joining the process as a collective 3) First Nations formed to represent all of the citizens of an Indigenous Nation (Morgan, 2009).

**Overlapping Claims** (overlaps): Located within the context of the British Columbia treaty process, overlaps refer to situations where more than one First Nation asserts Aboriginal title over a
particular geographic area that is subject to a proposed treaty. In general, there are three varieties of overlaps:

1) External Overlap: Refers to situations where two Indian Act bands who do not share the same culture and history both claim the same territory;

2) Internal Overlap: Refers to situations where two or more First Nations who share history and culture in some way but recognize themselves as distinct groups, have ‘overlapping’ but not identical claims to an area within the larger Indigenous Nation’s traditional territory;

3) Common Title Overlap: Two First Nations who share a common history and culture but through past amalgamations, divisions or ill conceived band designations by the federal government, represent all or some of the same traditional membership and territories (McDade, 2009).

In the context of Aboriginal rights and title litigation, overlaps refers to situations where two or more First Nations make a claim to mutual territory where either the provincial or federal governments are contemplating projects, usually with respect to resource exploration and development.

**Shared Territory**: This term is often used interchangeably with “overlaps” but refers more specifically to territories in which a First Nation is asserting a non-exclusive Aboriginal rights.

**Treaty Negotiating First Nation**: A group with whom the Federal Crown (Canada) is negotiating a treaty.

**Overlap First Nation**: A group whose traditional territory overlaps the claimed traditional territory of the Treaty Negotiating First Nation. Overlap First Nations may or may not also be in treaty negotiations with the Crown.
## Appendix B: Indigenous Legal Lodge Work Plan

### WORK PLAN

<table>
<thead>
<tr>
<th>Month</th>
<th>Tasks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two months.</td>
<td>• BCRs from all bands (pending decision on this action)</td>
</tr>
<tr>
<td></td>
<td>• hire facilitators</td>
</tr>
<tr>
<td></td>
<td>• draft detailed work plan including discussion questions for</td>
</tr>
<tr>
<td></td>
<td>communities</td>
</tr>
<tr>
<td></td>
<td>• review histories</td>
</tr>
<tr>
<td></td>
<td>• appoint panel</td>
</tr>
<tr>
<td></td>
<td>• Lheidli T’enneh to host feast in Prince George and invite</td>
</tr>
<tr>
<td></td>
<td>Treaty 8 communities</td>
</tr>
<tr>
<td>Two months.</td>
<td>• develop overall legal framework</td>
</tr>
<tr>
<td></td>
<td>• meet with communities to research, explore, and discuss</td>
</tr>
<tr>
<td></td>
<td>indigenous legal orders and law</td>
</tr>
<tr>
<td></td>
<td>• design lodge process</td>
</tr>
<tr>
<td></td>
<td>• select presenters on overlap area</td>
</tr>
<tr>
<td></td>
<td>• facilitate community meetings</td>
</tr>
<tr>
<td>Three months.</td>
<td>• draft agreement options for the overlap areas</td>
</tr>
<tr>
<td></td>
<td>• meet with communities to discuss lodge process (legitimacy</td>
</tr>
<tr>
<td></td>
<td>and authority)</td>
</tr>
<tr>
<td></td>
<td>• facilitate discussions with all communities</td>
</tr>
<tr>
<td></td>
<td>• review agreement options</td>
</tr>
<tr>
<td>Three months.</td>
<td>• panel hearings</td>
</tr>
<tr>
<td></td>
<td>• community meetings</td>
</tr>
<tr>
<td>One month.</td>
<td>• draft recommendations / agreement</td>
</tr>
<tr>
<td>One month.</td>
<td>• review recommendations / agreement with parties</td>
</tr>
<tr>
<td>One month.</td>
<td>• finalize agreement (Treaty 8 and Lheidli T’enneh recognition</td>
</tr>
<tr>
<td></td>
<td>processes)</td>
</tr>
</tbody>
</table>

*<IBA Treaty 8 ILL oct20-07.doc>*

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Indigenous Legal Lodge  
October 20, 2007
Appendix C: Participant Consent Form

Addressing Disputes Between BC First Nations: An Assessment of the Indigenous Legal Lodge

You are invited to participate in a research project entitled *Addressing Disputes Between BC First Nations: A Case Study to Assess the Indigenous Legal Lodge*.

The study is being undertaken by Jessica Dickson, a graduate student in the Department of Dispute Resolution, School of Public Administration at the University of Victoria.

Jessica is undertaking this research for two purposes. First, as part of the requirement for completion of Jessica’s Master of Arts degree in Dispute Resolution. Second, to conduct a preliminary exploration of the merits of the Indigenous Legal Lodge (ILL) model on behalf of Treaties and Aboriginal Government, Negotiations West Sector (TAG NW), INAC. The findings of Jessica’s research will contribute to the Committee’s ongoing examination of potential alternative approaches to supporting shared territory discussions among BC First Nations.

**Purpose and Objectives**

The purpose of this research is to assess the degree that a dispute resolution model, the Indigenous Legal Lodge (ILL) model, can accommodate the dispute resolution norms, practices and processes among BC First Nations.

The objectives of the project are twofold. First, to describe formal and informal dispute resolution norms, practices and processes as they are known to community members, Chief and Council members and other experts. Second, to analyze the congruencies and divergence of these norms, practices and processes with those set out in the ILL model. Based on these findings, Jessica will make general recommendations for changes to the model (if any) and explore future directions for its use.

Please note that specific shared territory and overlap disputes in which your community may be involved are not the focus of the research. Rather, the aim of the research is to assess if the model “fits” with the dispute resolution norms and practices your community typically engages to resolve disputes. The analysis of your story will focus on establishing key principles with respect to relationships between the parties, process design and rules of conduct, participation, characteristics of facilitators and agreements.

**Importance of this Research**

Research of this type is important because there is currently no discrete process or mechanism in place for BC First Nations to address shared territory and overlap issues when a treaty is nearing completion. While the ILL model was developed to meet this need, it has never been implemented or assessed. This research is the first attempt to explore the model with First Nations and determine its congruencies and divergences with various community norms, practices and processes of dispute resolution.
Participants Selection

Through a review of the academic literature, grey literature and internet searches of First Nations communities you have been identified as having significant knowledge about the dispute resolution norms, practices and processes either in your community or in the wider context of shared territory and overlap disputes.

What is Involved

If you agree to voluntarily participate in this research, your participation will include two meetings with Jessica. The first meeting includes a private discussion with Jessica who will ask you to share your story of an inter or intra community dispute. You may also be asked to answer a series of open ended question to help Jessica better understand the key elements of your story. It is anticipated that the discussion will take approximately two hours but will likely vary in the event that more or less time is needed for you to share your experiences.

The second phase includes a follow up discussion where Jessica will present you with her analysis of your story, and invite you to explore how your story fits with the ILL model. The purpose of this discussion is to provide you with an opportunity to work with Jessica to contextualize and frame your story within ILL. Please note that participants are welcome to undertake Phase 1 and Phase 2 interviews simultaneously.

Interviews will take place at a location of your choice. In addition to hand written notes, Jessica will use audio-tapes to record the discussion. Once completed, a transcription will be made available to you and stored on Jessica’s personal computer.

Inconvenience

Participation in this study may take time. However, Jessica will make best efforts to select a time that is most convenient for you so as not to interfere with any professional, instructional or family obligations you may have. If you foresee any other inconvenience as a result of your participation, and for which there is no compensation, Jessica will discuss these with you and make best efforts to adequately accommodate your situation.

Possible Risks

There are some possible risks to you by participating in this research and they include the experience of emotional fatigue from sharing experiences of conflict. To prevent or to deal with this risk, you are invited to determine the level of depth of exploration in terms of your story and your responses to the discussion questions. At any point during the discussion, you may refuse to answer any questions or to stop the discussion at any time.

You should also be aware that although your name will not appear in any report, presentation or any other form of information distributed in relation to the research, very detailed or specific circumstances that you may choose to share could permit your identification as the source for this
information. Further, depending on the nature and circumstances of the dispute you discuss, and whether the dispute is ongoing, the details you share may be used by other parties to further their interests in the dispute. However, in order to mitigate this risk, Jessica will use the utmost care to omit any anecdotal or circumstantial information you share, either about yourself or a particular dispute, from the final report or any presentation about the project. Please note that all transcripts and hand written notes will only be available to Jessica and her academic supervisor at the University of Victoria.

**Benefits**

The benefits of your participation include the opportunity to explore ways of resolving disputes that have created barriers for BC First Nations to make successful claims of Aboriginal rights and title through the courts, to negotiate treaties with the Crown, and in reconciling their interests and jurisdiction over lands and resources that have become subject to a proposed treaty. Moreover, research which identifies norms and processes of dispute resolution may be built on to develop institutions for local decision which foster stronger more stable relationships between communities and enable First Nation communities to work together to manage their rights and responsibilities.

**Compensation**

As a way to compensate you for any inconvenience related to your participation, you will be provided with a $15 honorarium for the interview and a $10 honorarium for the follow-up discussion both in the form of a gift certificate. If you agree to participate in this study, this form of compensation to you must not be coercive. It is unethical to provide undue compensation or inducements to research participants. If you would not participate if the compensation was not offered, then you should decline. If you decide to withdraw your participation at any point during or after the discussion, full compensation will be given.

**Voluntary Participation**

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study, all parts of your discussion will not be used unless you give Jessica permission.

**Anonymity**

In terms of protecting your anonymity your name, initials or other identifying information will not appear in any report, presentation or any other form of information about the research disseminated by Jessica.

**Confidentiality**

Your confidentiality and the confidentiality of the data will be protected by all audio tapes, transcripts and hand written notes taken during your discussion will only be available to Jessica and her academic supervisor Tara Ney. The information you provide is for research purposes only and
your specific interview responses will not be attributed directly to you in the final report or any other form of information resulting from this research project.

**Dissemination of Results**

Results of this study will be shared in a report produced for the Overlap Committee at the Treaties and Aboriginal Government, Negotiations West Sector of INAC and the University of Victoria. More specifically, the final report will be shared with Jessica’s committee members through a formal research defense process required by the University of Victoria. It is also anticipated that a presentation will be made to the Overlap Consultation Committee at the INAC – TAG (NW). Jessica will also provide a copy of the final report and presentation to you by electronic mail.

**Disposal of Data**

All data from this study including audio tapes, electronic transcripts and hard copy notes will be destroyed within two years of the last interview.

**Contacts**

Individuals that may be contacted regarding this study include:
Jessica Dickson (Researcher): by phone (604) 721 – 8331 or by email jessicad@uvic.ca
Tara Ney (Academic Supervisor): by phone (250) 250-721-8199 or by email tney@uvic.ca
Paul Paterson (INAC Representative): by phone (604) 775-5467 or by email paul.paterson@ainc-inac.gc.ca

In addition, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria ( (250) 472-4545 or ethics@uvic.ca).

Your signature below indicates that you understand the above conditions of participation in this study and that you have had the opportunity to have your questions answered by the researchers.

<table>
<thead>
<tr>
<th>Name of Participant</th>
<th>Signature</th>
<th>Date</th>
</tr>
</thead>
</table>

A copy of this consent will be left with you, and a copy will be taken by the research
Appendix D: Discussion Guide

A research project is underway to assess the degree that a dispute resolution model, the Indigenous Legal Lodge (ILL), can accommodate the dispute resolution norms, practices and processes of BC First Nation communities. Through an analysis your story, and the stories of members from two other First Nations, it is anticipated that various key norms, practices and processes of dispute resolution will be identified and assessed against the major tenets of the ILL model. Please refer to the background document that has been provided to you for a full description of the research project.

The following questions will provide a framework for our discussion.

Part A: Your Story

Please tell me a story about an intra or inter community dispute. This can include, but is in no way limited to:

a. The issues involved
b. The impacts of the dispute on your community
c. Your community’s ultimate goal and any barriers to achieving those goals
d. The outcomes
e. The approach taken to resolve the dispute
   - The process itself
   - The people participating in the process
   - The people facilitating the process
   - The time frame of the process
f. Of the approaches taken, what worked? What didn’t work? Why?
g. Your perspectives of it when it began, now and in the future?
h. If the dispute was resolved, what changed in the community as a result?

Part B: Follow-Up Questions (Questions and sub questions are for probing purposes only).

1. In terms of process, what consideration should be given for:
   a. The participation of Elders?
   b. The concept of voluntary participation?
   c. Confidentiality of the participants?
   d. Equal participation by all those involved?
2. If a facilitator was used to help resolve the dispute, what qualities did they posses?
   a. Were they neutral? Is facilitator neutrality relevant?
   b. Did they come from the community?
   c. What level of knowledge did they have about the ways your community normally addresses conflict?
   d. Are they regularly consulted by the community when disputes arise?
3. Are there particular rules of conduct that should be observed in processes for resolving disputes?
   a. Are the rules the same for different kinds of disputes?
4. In cases where an agreement is reached, what should it consist of?
   a. How do you know what a good agreement looks/sounds like?
   b. Who should it apply to?
   c. Should someone be responsible for monitoring compliance of the agreement? If yes, who?
   d. What would be required to make an agreement reliable for the community now and in the future?

5. What are some cultural or social tools that communities can draw on when disputes arise?
   a. Do these tools work for resolving all kinds of disputes (inter and intra community conflicts)?
   b. Are some tools better suited to specific kinds of disputes?

Thank you for sharing your experiences, expertise and time