

FINAL MASTERS PROJECT

Addressing Overlapping Territorial Disputes Among First Nations

Ermin Isic, MADR

School of Public Administration, University of Victoria

February 20, 2018

*Client Supervisor: Allan Tallman, Senior Director
Treaties and Aboriginal Government – Negotiations West
Department of Indigenous and Northern Affairs Canada*

*Academic Supervisor: Dr. Evert Lindquist, Professor
School of Public Administration, University of Victoria*

*Second Reader: Dr. Tara Ney, Associate Professor
School of Public Administration, University of Victoria*

*Committee Chair: Dr. Emmanuel Brunet-Jailly, Professor
School of Public Administration, University of Victoria*

Executive Summary

With a renewed focus on concluding modern treaties and other forms of self-governance agreements with First Nations the federal governments needs to examine new methods for assisting First Nations resolve overlapping territorial disputes. Treaties and Aboriginal Government Negotiations- West is the branch of Indigenous and Northern Affairs Canada that is tasked with negotiating treaties in B.C. and ensuring the governments “duty to consult” is met in regards to overlaps. Overlaps are geographic areas where more than one First Nation asserts Aboriginal rights and title. In British Columbia this issue is especially prevalent as the majority of First Nations in the province did not sign treaties with the federal government in the 19th and 20th century as colonization was occurring. In B.C. each First Nations has at least one overlap area with another. Having recommenced treaty negotiations in 1993 through the B.C. Treaty process, overlaps and the inability to develop a process that facilitates there resolution in the modern day legal context has caused the conclusion of treaties to be delayed and led to legal challenges for others. If modern day treaties are to avoid legal challenges by Indigenous communities with overlapping territory new methods and approaches to the resolution of overlaps needs to be examined.

This report aims to answer the following research question:

1. What tools and approaches can be used or supported by Treaties and Aboriginal Government Negotiations-West and the Crown in supporting First Nations, inside and outside the treaty process, develop mechanisms to resolve overlapping territorial claims? The secondary research questions related to this are:
 - a. Why are overlaps a contentious issue?
 - b. How have overlaps traditionally been resolved and how are they currently resolved?
 - c. What are the key barriers to the resolution of overlaps?
 - d. How can aspects of Indigenous law and dispute resolution mechanisms be applied to the tools available to TAG-NW to assist First Nations in resolving overlap disputes?

Methodology

This report uses a qualitative approach in answering the questions above. A literature review was conducted to provide an overview of traditional Indigenous laws and dispute resolution mechanism, while focusing on key aspects that may hold value in resolving overlaps. This was done through an analysis of the available literature from academic journals, independent research reports, books, working and conference papers.

A jurisdictional scan was also conducted to examine how other countries are dealing with unresolved Indigenous land claims and the impacts that overlapping territorial disputes are having in delaying claims resolution. The two countries selected for the jurisdiction scan were Australia and Nicaragua. Australia was selected due to having a similar legal system to Canada

and a similar colonial history. Nicaragua was chosen as a country of interest for three reasons. Firstly, Indigenous communities in Nicaragua face similar issues to those in B.C., where they have overlapping territorial boundary disputes that delay resolutions to land claims. Secondly, Nicaragua has a unique situation in which there are two semi-autonomous regions of the country in which land title is being granted. Thirdly, Nicaragua has a legislated process for resolving overlaps.

Data was also gathered through interviews with key information holders. There were 8 interviews conducted, interview participants ranged from hereditary chiefs, chief negotiators, councilors, legal counsel and consultants representing First Nations in B.C. Additionally, an interview was conducted with a federal official due to their extensive knowledge of Canada's "duty to consult" policy.

Key Findings

The literature review revealed that Indigenous laws and dispute resolution mechanism hold many of the same tenets. These tenets are focused on the use of storytelling, maintenance of peace between the offender, victim and greater community, use of traditional teaching, adaptability to the situation at hand and the involvement of the greater community in resolving disputes.

The jurisdictional scan uncovered that while there is no one prominent solution to the resolution of overlaps as, top down approaches are unlikely to work. For a resolution to be effective the Indigenous communities involved in the dispute need to be able to provide input into the resolution process. Additionally, the jurisdictional scan revealed that in both the Australian and Nicaraguan context there is little incentive for Indigenous communities to resolve disputes.

Interviews were conducted after having completed both the literature review and jurisdictional scan. Participants indicated that for effective resolution of overlap disputes the focus needs to be on relationship building between the communities and education on overlaps through community engagement. Participants additionally identified the lack of incentive to resolve overlaps as a major barrier and indicated that this is an area where the federal government could play a role.

Discussion

Through the analysis of the literature review, jurisdictional scan and interviews with key information holders, several crosscutting themes developed:

- Flexible Approaches: Communities involved in the dispute should shape the process for resolving it
- Incentives: First Nations communities need to have a reason to resolve overlaps

Addressing Overlapping Territorial Disputes Amongst First Nations

- Community Engagement: The greater community needs to be involved in possible resolutions not just the leadership
- Role of elders: How involved should elders be in the resolution process?

The results indicated that TAG-NW should seek to understand what roles it can play in supporting First Nations improve relationship between themselves and how the proper stakeholders can be engaged. Additionally, the client should examine what mandate restrictions are in place that may cause problems for recognizing resolutions reached by First Nations.

Options and Recommendations

The key findings from the methods employed to conduct the research helped form the basis of the options and recommendations provided to the client, they are:

1. Begin consultation at the outset of negotiations.
2. Presume that First Nations will resolve overlaps amongst themselves
3. Develop an incentive structure.
4. Increase funds available for community engagement.

The recommendation for the client is to implement a combination of Option 1: Beginning consultation at the outset of negotiations and Option 2: Presume that First Nations will resolve overlaps between themselves while offering requested support. This option has the highest likelihood of being implemented while offering a moderate chance for success. The implementation plan outlines how these two options can be implemented together and the estimated timelines that it will take for these options to be implemented by the client.

Table of Contents

Executive Summary.....	2
1.0 Introduction	8
1.1 Research Question and Project Objectives.....	8
1.2 Organization of Report.....	9
2.0 Background	10
2.1 Indigenous and Northern Affairs Canada	10
2.2 Overlaps	10
2.3 British Columbia Treaty Process	11
2.4 Duty to Consult	13
2.6 How has the Process Evolved	15
2.7 Collective Title and Important Legal Decisions.....	16
2.7.1 <i>Delgamuukw v. British Columbia</i>	16
2.7.2 <i>Tsilhqot'in Nation v. British Columbia</i>	17
2.8 Moving Forward.....	17
2.9 Conclusion: Analytic Framework Guiding this Study	18
Preliminary Analytic Framework.....	20
3.0 Methodology and Methods	21
3.1 Literature Review	21
3.2 Jurisdictional Scan.....	21
3.3 Interviews.....	22
3.4 Data Analysis.....	23
3.5 Strengths and Limitations	23
4.0 Literature Review.....	25
4.1 Overview of Indigenous Laws	25
4.2 Indigenous Dispute Resolution	27
4.3 Summary of Literature Review Findings	30
6.0 Jurisdictional Scan.....	31
6.1 Australia	31
6.1.1 <i>Mabo v. Queensland</i>	32
6.1.2 <i>Native Title Act and the National Native Title Tribunal</i>	32

Addressing Overlapping Territorial Disputes Amongst First Nations

6.1.3 Addressing Overlaps.....	33
6.1.4 Proposed Solutions to Overlap Disputes	34
6.2 Nicaragua	35
6.2.1 Mayagna (Sumo) Awas Tingni Community v. Nicaragua	35
6.2.2 Addressing Overlaps.....	36
6.3 Summary of Jurisdictional Scan Findings	38
7.0 Interview Findings	39
7.1 Relationship-Building	39
7.2 Incentives	40
7.3 Education through Community Engagement.....	41
7.4 Political Will.....	42
7.5 Potential of Tribunals.....	42
7.6 Summary of Interview Findings	43
8.0 Discussion: Findings, Themes and Strategic Implications.....	44
8.1 Summary of Findings.....	44
8.2 Themes Across Methods.....	45
8.3 Flexible Approaches: Communities should shape dispute resolution processes	45
8.4 Incentives: First Nations communities need to have a reason to resolve overlaps.....	46
8.5 Increasing Community Engagement: Reaching beyond the leadership.....	47
8.6 Role of Elders: How involved should elders be in the resolution process?	48
8.7 Strategic Implications and Revised Analytic Framework	48
Revised Analytic Framework.....	50
9.0 Options and Recommendations	51
9.1 Option 1: Begin Consultation at the Outset of Negotiations	51
9.2 Option 2: Presume First Nations will resolve overlaps amongst themselves.....	52
9.3 Option 3: Develop an Incentive Structure	53
9.4 Option 4: Increase Funds Available for Community Engagement.....	54
9.5 Comparing Options	55
9.5.1 – Option 1- Begin Consultations at outset of Negotiations	55
9.5.2 – Option 2 – Presume that First Nations will resolve overlaps between themselves	55
9.5.3 – Option 3 - Develop an Incentive Structure	56
9.5.4 – Option 4 - Increase Funds Available for Community Engagement	56

Addressing Overlapping Territorial Disputes Amongst First Nations

9.6 Recommendation..... 58

9.7 Implementation Plan 59

10.0 Concluding Remarks..... 60

11.0 References 61

1.0 Introduction

The British Columbia (B.C.) Treaty process¹ was established in 1993, over two decades have passed and there has been limited success in finalizing treaties with only seven First Nations having completed modern treaties (BCTC, 2016, p. 24). There are many barriers that prevent modern treaties from being concluded in B.C., from mounting negotiation loan debt to limited government mandates. One of the most prevalent barriers is unresolved overlapping territorial claims (overlaps). Overlaps refer to situations in which more than one First Nation community asserts Aboriginal rights and title to a geographic area. When overlaps are not resolved prior to the completion of these agreements there is a higher chance the agreement will face a legal challenge. Legal challenges occur as a First Nation with an overlap may feel as though their rights and title are being impacted by the agreement in question.

As First Nations throughout B.C. move towards the conclusion of treaties or other forms of self-government agreements such as Incremental Treaty Agreements or models similar to the Westbank First Nation Self-government Agreement, the issue of overlaps remains at the forefront. Overlaps have the potential to delay or prevent treaties from being concluded and may lead to legal challenges of modern treaties. Four of the seven treaties signed in B.C. have been subject to legal challenges from First Nations which asserted Aboriginal title over the same geographic area (Turner & Fondahl, 2015, p. 482). All parties involved in negotiating treaties in B.C. have acknowledged that there is a need to develop more efficient processes to deal with overlapping claims (Dyck and Germain, 2012, p. 6). If legal challenges and major delays in the conclusions of treaties are to be avoided, a suitable framework for resolving overlaps must be established. This project will explore why overlaps are contentious and will provide recommendations on suitable approaches to address the issues of overlaps.

The client for this project Treaties and Aboriginal Government-Negotiations West (TAG-NW) is the branch of Indigenous and Northern Affairs Canada (INAC) tasked with the negotiation of modern treaties and self-government agreements with First Nations in British Columbia. Moreover, TAG-NW is responsible for conducting overlap consultation with First Nations who claim territory in the same geographical area as the First Nation negotiating a modern treaty. As TAG-NW is responsible for overlap consultation, the client seeks new potential approaches to resolving overlaps that will reduce the potential delays in the completion of modern treaties.

1.1 Research Question and Project Objectives

The primary objective of this research project is to answer the question *“What tools and approaches can be used or supported by Treaties and Aboriginal Negotiations-West and the Crown in supporting First Nations, inside and outside the treaty process, to develop mechanisms to resolve overlapping territorial claims?”* The objectives of the research project are to examine why overlaps are a contentious issue between First Nations, how First Nations have traditionally and do currently resolve overlaps, the key barriers to the resolution of overlaps

¹ The B.C. Treaty process refers to the six-step process established by the British Columbia Treaty Commission as described below.

and how aspects of Indigenous laws and dispute resolution (DR) mechanisms can be applied to the tools available to TAG-NW to assist First Nations in the resolution of overlaps.

The aim of this paper, building off of previous proposals, is to propose new approaches to resolving overlaps between First Nations through the incorporation of traditional Indigenous laws and DR mechanisms into the tools the federal government has to assist First Nations. Overlaps, and “their unique solutions — have long been part of traditional Indigenous governance” (BCTC, 2016, p. 18). By seeking ways to incorporate these traditional solutions into the tools available to the federal government there may be new opportunities to resolve overlaps. In resolving overlaps prior to the completion of modern treaties, the risk that these treaties will face a legal challenge from First Nations that have overlaps with the treaty First Nation is reduced. The development of new methods that assist First Nations in resolving overlaps prior to the completion of a treaty will help foster better relationships between neighboring First Nations as, “overlap disputes between Indigenous Nations interfere with reconciliation” (BCTC, 2016, p. 18). These new tools will also have the potential to assist the government in meeting the requirement of the duty to consult with Indigenous communities.

1.2 Organization of Report

This report is divided into ten sections. Section 2 provides background information on the client TAG-NW, the various stages of the B.C. Treaty process, the requirement that the client consult with First Nations in regards to overlaps and important legal precedents that have an impact on the question at hand. Section 3 discusses the methods and methodologies employed in conducting this research project. Section 4 offers an overview of Indigenous laws and DR mechanisms. Section 6 examines Australia and Nicaragua to develop an understanding of how overlaps amongst Indigenous groups are being resolved within other jurisdictions and the potential applications to the B.C. context. Section 7 outlines the findings from interviews with key information holders. Section 8 and 9 discuss the findings of the research and provides options and recommendations to the client. Section 10 concludes the report by reviewing the key findings and recommendation of the report.

2.0 Background

The following section discuss the client Treaties and Aboriginal Government-Negotiations West (TAG-NW), how the B.C. Treaty process developed, the various stages of the process, the impact of overlaps on treaty negotiations and important legal cases. It will also look at previous proposals for addressing overlaps.

2.1 Indigenous and Northern Affairs Canada

The project client, Treaties and Aboriginal Government, Negotiations West (TAG-NW) branch of the Department of Indigenous and Northern Affairs Canada (INAC) aims to support Indigenous peoples to improve their social well-being and economic prosperity, develop healthier more sustainable communities, and participate more fully in Canada's political, social and economic development (INAC, 2015). The overarching mandate of INAC is to renew the relationship between Indigenous Peoples on a nation-to-nation basis while focusing on the recognition of rights, respect, co-operation and partnership (Trudeau, 2017). Part of achieving this overarching mandate is the negotiation of modern treaties with First Nations in British Columbia. Modern treaties promote self-reliant communities and seek to provide First Nations in B.C. with the tools needed to identify and implement their own solutions to difficult economic and social problems (INAC, 2010a). Modern treaties will provide the certainty that B.C. needs and create a strong economic base for First Nations, their neighbors, and the province. To achieve this broader goal of improving the socio-economic well-being of First Nations through treaty making, the issue of overlapping territorial disputes must be addressed.

The Government of Canada through INAC, during the treaty negotiation process, has a duty to consult and where appropriate, accommodate Aboriginal groups when certain actions might adversely impact potential or established Aboriginal or treaty rights (INAC, 2013). In the context of the B.C. Treaty process, the duty to consult takes the form of attempting to resolve any issues which may adversely impact Indigenous communities asserting Aboriginal title in the same geographic area as the First Nation negotiating a treaty or other form of self-government agreement.

2.2 Overlaps

Overlaps and the geographic area associated with them may be subject to a proposed treaty or self-government agreement, which First Nations fear will impact their ability to exercise their rights and title to that area. Overlaps are identified by INAC through the use of Statement of Intent and Writs, while the provincial government also uses Consultative Area Databases (CAD) in the identification of overlaps (Government of British Columbia, p. 11). Currently there are 65 First Nations participating in or which have completed treaties through the B.C. treaty negotiations process (BCTC, 2017). These 65 First Nations represent 105 of the 203 *Indian Act Bands* in B.C., meaning that 51.7% of all *Indian Act bands* in B.C. are actively negotiating or implementing modern treaties (BCTC, 2016, p. 25). Of these, each has at least one overlapping geographic area with neighboring First Nations communities.

Overlaps or shared territories² did not emerge from the B.C. Treaty process; rather, overlaps have been an ongoing issue throughout B.C.'s history and long before settlers arrived in the area. Boundaries between Indigenous communities pre-date contact with European settlers, and changed from time to time as the result of wars and intermarriage. These boundaries were permeable and not meant to “exclude others, but rather, provide for the social interaction of different social groups within common places” (Thom, 2009, p.181). So, while boundaries did exist between communities pre-contact they were not rigid. The B.C. Treaty process has led to the delineation of rigid boundaries, since First Nations had to identify their traditional territories on maps. Boundary issues returned to the forefront when some Indigenous communities attempted to negotiate modern treaties (Point, 2014, p. 9).

2.3 British Columbia Treaty Process

British Columbia is uniquely situated when it comes to negotiating treaties in Canada. During the 19th and 20th century when colonization was taking place, First Nations across Canada signed treaties with the Crown. In B.C. this was not the case: only fifteen treaties were signed with First Nations, including the Douglas Treaties signed between 1850 and 1875 (INAC, 2013a) and Treaty 8 signed in 1899 (INAC, 2010). The Douglas Treaties were signed with 14 First Nations covering most of Vancouver Island, while Treaty 8 covered parts of northeastern B.C. (INAC, 2010, 2013a). None of these treaties extended to the Lower Mainland and left a large area of the province as unceded First Nations land in which there continues to be unextinguished First Nations rights to the land and resources of the province.

In December of 1990, the B.C. Claims Task Force was established consisting of the Government of Canada, the Government of B.C. and the First Nations Summit³ in a response to the growing unrest and direct action of First Nations (BCCTF, 1991). Its purpose was to establish a process for negotiating modern treaties in B.C. (BCCTF, 1991). The task force issued 19 recommendations, which the parties agreed to and led to establishing the B.C. Treaty process and the B.C. Treaty Commission (BCTC) in December of 1993 (BCCTF, 1991). The B.C. Treaty process, under the guidance of the BCTC, was designed to address issues unique to British Columbia and provide a framework for negotiating treaties. The role of the BCTC is to facilitate the negotiation of treaties in B.C. through a six-stage process as described below, the BCTC is responsible for monitoring and reporting on the progress of treaty negotiations, assisting in dispute resolution between the negotiating parties if requested, and allocating funding to First Nations to support participation in negotiations (Dyck & St. Germain, 2012, p. 1). The following outlines the BCTC's six-step process:

- 1) *Statement of Intent to Negotiate*: The first step when a First Nation wishes to enter in to treaty negotiations under the B.C. Treaty process is to file a statement of intent (SOI). The SOI identifies the First Nations governing body for the purposes of negotiating a

² The terms 'overlaps' and 'shared territories' are used interchangeably throughout this report.

³ The First Nation Summit is made up “of a majority of First Nations and Tribal Councils in British Columbia and provides a forum for First Nations in BC to address issues related to Treaty negotiations” (First Nations Summit, 2018)

treaty and the people that governing body represents. Further, the governing body must demonstrate that it has a mandate from the people it claims to represent to negotiate a treaty on their behalf. The SOI must describe the geographical area that the First Nation claims as representing their Traditional Territory and identify any other First Nations that may have an overlap with that territory (BCTC, 2009a).

- 2) *Readiness to Negotiate*: The BCTC convenes a meeting between the three parties (the Government of Canada, the Government of B.C. and FN claimant) once it has accepted the SOI filed by the First Nation in question. It is required that the three parties demonstrate that they have a commitment to negotiate, a qualified negotiator, the necessary resources, a mandate, a process to develop the mandate and ratification procedures. If the three parties have met the criteria established under the B.C. Treaty process the BCTC will declare the table ready to commence negotiations of a framework agreement (BCTC, 2009b).
- 3) *Negotiation of a Framework Agreement*: This step involves laying out the items to be negotiated during the negotiations of a comprehensive treaty. In addition the framework agreement also allows the parties to establish a time frame for concluding Stage 4 negotiations (BCTC, 2009c).
- 4) *Negotiation of an Agreement in Principle*: This stage involves substantive negotiations, where the three parties aim to reach agreement on a wide range of topics including the rights and obligations to “existing and future interests in land, sea and resources, structures and authorities of government, relationship of laws; regulatory processes; amending processes; dispute resolution⁴; financial component; fiscal relations” (BCTC, 2009d) and many other areas of interest to all parties.
- 5) *Negotiation to Finalize a Treaty*: The parties build upon the signed Agreement-in-Principle (AiP). The technical and legal issues are resolved and issues that were not discussed during Stage 4 negotiations are also addressed (BCTC, 2009e).
- 6) *Implementation of the Treaty*: Negotiations on how to implement the treaty are tailored to each agreement and phased in as agreed to by the parties. Over time the specific aspects of the treaty become realized and a new relationship between the parties begins (BCTC, 2009e).

When a First Nation files a SOI, the SOI areas are not scrutinized by the BCTC and accepted as submitted by the First Nation, as the BCTC makes no determination of the boundaries of a First Nation’s traditional territory (BCTC, 2009b). This occurs as the B.C. Treaty process is not a rights based approach but rather an interest based one. First Nations are able to submit their SOI areas without scrutiny but they are expected to resolve overlapping territorial claims under the B.C. Treaty process amongst themselves, as per recommendation 8 of the B.C. Claims Task

⁴ ‘Dispute Resolution’ refers to the process set out in the treaty for the resolution of disputes between parties.

Force (BCCTF) which states “First Nations resolve issues related to overlapping traditional territories among themselves” (BCCTF, 1991, p. 27).

Though the BCCTF is vague about when the overlaps are to be resolved, under the B.C. Treaty process, First Nations negotiating a treaty are expected to have resolved their overlaps with neighboring First Nations before completing stage four AiP negotiations (BCTC, 2009f). While the BCTC and the principles to the process set this as a target for resolving overlaps, it is rarely adhered to and does not prevent the parties from moving forward to Final Agreement negotiations as has been demonstrated at various treaty negotiation tables such as Tsawwassen and Maa-nulth (Devlin and Thielmann, 2009, p. 10-13). Although overlaps may not be resolved prior to final agreement negotiations, the parties generally have a plan in place to engage in overlap discussions with the neighboring First Nations prior to concluding AiP negotiations referred to as the consultation plan (Government of Canada, 2011, p. 50-51). Even though this was the recommendation laid out by the BC Claims Task Force (BCCTF), which later led to the creation of the BCTC and the current process, it has not had the intended effect, which was to ensure overlaps were resolved prior to the completion of modern treaties. In its 2014 Annual Report, the BCTC highlighted overlapping territorial disputes as one of the major barriers to concluding modern treaties in B.C. (BCTC, 2014, p. 1).

In practice two main approaches are used to resolving overlaps used by First Nations: (1) the First Nations in a dispute over the territory agree to move the disputed territory off the table, meaning that the territory in question cannot be included in a Final Agreement (FA) and the rights to that territory will not be affected by the FA (Devlin and Thielmann, 2009, p. 7); or (2) through shared territory agreements, set out the terms on how the territory will be shared, and how shared use will occur including shared harvesting rights and resource management. This type of agreement allows for the territory in question to be included in the FA (Devlin and Thielmann, 2009, p. 7).

Recent Supreme court decisions have clarified two issues with significant implication to overlap claims: 1) “duty to consult” and 2) collective title. These are reviewed in more detail below.

2.4 Duty to Consult

Even though the BCCTF stated that First Nations should resolve overlapping territorial claims amongst themselves, this does not absolve the federal government of its “duty to consult” with First Nations in situations in which they may be adversely impacted by actions taken by the federal government. In two early but key court decisions, the *Taku River* and the *Haida* decisions in 2004, the Supreme Court of Canada held that “the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights” (INAC, 2011, p. 6).

In the context of overlaps the “duty to consult” results in a need to invite overlapping groups to participate in the proposed activity (treaty negotiations) and invite all affected First Nations to participate in the consultation process (INAC, 2011, p. 47). In this regard, First Nations with

overlapping claims are invited to identify any potential adverse impacts that may result from completing a modern treaty. Consultation meetings, correspondences and interactions with First Nations, which may be adversely impacted, are documented, catalogued and stored to create a consultation record. The federal government is expected to maintain an issues-management tracking table summarizing Indigenous concerns about potential adverse impacts, Crown effort's to consult and address concerns raised by Indigenous groups, and document any communication with Indigenous groups in regards to consultation and the identification of adverse impacts (INAC, 2011, p. 52).

The Supreme Court decisions and case law related to “duty to consult” now require the federal government to engage with overlapping groups throughout the treaty process and consult them in regards to the adverse impacts they may face and find ways of accommodating this impact if it exists. The nature and potential of adverse impacts occurring are identified through consultations with the potentially impacted Indigenous community and through the undertaking of a Strength of Claim assessment (SOC). A SOC is an “historical and anthropological analysis of the facts of a particular claim asserted by an Aboriginal group in the area of proposed activity” (INAC, 2011, p. 41). Through these mechanisms the Crown contemplating the action must identify potential adverse impacts on an Indigenous community and accommodate the community if it is determined that adverse impacts will occur as the result of actions taken by the Crown. The duty to consult is an evolving requirement for both the federal and provincial governments as *jurisprudence* on the subject continues to evolve.

The Supreme Court of Canada has released two important decisions in recent years that have refined the understanding of “duty to consult”. In *Tsilhqot'in Nation v. British Columbia (2014)*, the Court reaffirmed what had been articulated in *Haida Nation v. British Columbia (2004)*. The Court articulated that the “duty to consult” rests on a spectrum based on the strength of the claim to Aboriginal title “as the claims strength increases the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong – for example, shortly before a court declaration of title – appropriate care must be taken to preserve the Aboriginal interests pending final resolution of the claim” (2014). The greater the claim to Aboriginal title by the First Nation in question the greater the consultation and accommodation requirements become for the provincial and federal governments.

Additionally, and as recently seen in *Ktunaxa Nation v. British Columbia (2017)*, the Supreme Court of Canada articulated that the Crown's obligations under the duty to consult “guarantees a process, not a particular result” (2017). While the Crown must engage in consultation with First Nations if a proposed action has the potential to adversely impact the Nation in question there is no requirement that the result of that consultation process be satisfactory to the First Nation. Rather as was articulated in *Grassy Narrows First Nation v. Ontario (2014)*, the process must be conducted “in good faith, and with the intention of substantially addressing their concerns” (2014). If the Crown can demonstrate that consultation has occurred in good faith with attempts made to address concerns then the “duty to consult” can be considered as being achieved even if the outcome of that process may not be satisfactory to the First Nation in question.

2.6 How has the Process Evolved

Since the B.C. Treaty process began in 1993 a number of challenges to completing treaties have been identified by the Parties involved in the negotiations. Moreover, several court decisions in addition to *Taku and Haida* (2004) have impacted the process. This section briefly explores the challenges with the B.C. Treaty process, the implications of the *Degalmuukw* (1997) and *Tsilhqot'in* (2014) Supreme Court decision and previous such as the Eyford Report and the Multilateral Engagement Report for moving the negotiation process forward.

The B.C. Treaty process is unique compared to other across Canada and possesses distinctive challenges. Among these challenges are: what the role of the BCTC should be; how to address the issue of negotiation loan debt; and, most importantly for the purpose of this paper, how to address the issue of overlaps. Overlapping territories have been a long-standing area of dispute for Indigenous communities that pre-date contact with westerners (Eyford, 2015, p. 65). This tension stems from Indigenous nations with “different histories, languages, cultures, government structures, and spiritual beliefs” (Eyford, 2015, p. 65). Each community or nation was distinct in what territory it occupied and used.

While the issue of overlap territories existed in pre-contact times it was not as pervasive as it is today. In today’s context, the issue of overlaps is defined and consequently exacerbated within the context of western legal principles and notions of territory, which requires defining territorial boundaries when concluding a modern treaty. In pre-contact times Indigenous nations were not divided geographically with firm borders, instead nations were far more transient and moved from area to area. This meant that there were areas where multiple nations simultaneously occupied a space. In today’s contexts that leaves the possibility that Indigenous title to an area maybe be shared by more than one Indigenous nation (Eyford, 2015, p. 65).

The situation of overlaps was re-ignited in B.C. when the province decided to re-engage in treaty negotiation and allowed Indigenous communities to submit claims if they were an *Indian Act Band*⁵ rather than allowing only the larger nation to submit a land claim (BCTC, 2009a). This categorization has led to a greater amount of overlap issues, as there are 203 *Indian Act* bands in B.C. able to submit treaty claims if they choose to do so. Since the B.C. Treaty process does not require Indigenous communities to prove their rights to a claimed traditional territory, it has led to some alleged abuses of the system. For example some First Nations have claimed a traditional territory far greater than what historically would have been considered their traditional territory leading to an increase of overlaps, since they are intruding on the territories of other Nations (Eyford, 2015, p. 66). With First Nations able to claim traditional territories without having to prove their claim to rights, the ability to resolve overlaps has been complicated. Another issue is that Indigenous groups are under no legal obligation to engage

⁵ An *Indian Act Band* “means a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purpose of this Act” (*Indian Act*, 1985).

with other Indigenous groups aspiring to complete a modern treaty (Eyford, 2015, p. 67), and no incentive to do so. It is solely up to the good will of First Nation to engage with one another in resolving overlap issues.

2.7 Collective Title and Important Legal Decisions

The B.C. Treaty process allows for Indigenous groups to self-identify. Problematically, the *Indian Act Bands* permits an individual *Indian Act Bands* (or a subset of a Nation) to pursue a modern treaty claim through the B.C. Treaty process. Self-identifying for treaty negotiations causes tensions within a larger Indigenous Nation: members of that Nation fear their collective rights are impacted by members choosing to pursue a treaty as a sub-set of the collective Nation. Even though modern treaties possess non-derogation provisions that state nothing in the treaty will affect section 35(1)⁶ rights of Indigenous groups not party to the treaty, it has not prevented Indigenous groups from pursuing injunctions or other actions to prevent signing of the AiP or Final Agreement (Eyford, 2015, p. 66-67). This is the main grounds that First Nations have challenged the validity of the B.C. Treaty process, using previous court rulings to support this position. A number of “the most challenging disputes result from negotiations with First Nations who are sub-sets of larger historic collectives, where the larger collective asserts ownership of Aboriginal title on behalf of the smaller group (Multilateral Engagement Report, p. 38). Essentially, the Federal government categorization of *Indian Act Bands* and the B.C. Treaty process that uses this categorization, has unknowingly pitted FN within a Nation against one another, when historically, they were one Nation. Two important cases found that Aboriginal title is held by the collective and not the individual, *Delgamuukw v. British Columbia* (1997) and *Tsilhqot’in Nation v. British Columbia* (2014). These will be discussed below.

2.7.1 *Delgamuukw v. British Columbia*

The *Delgamuukw* case was filed on behalf of 51 Hereditary Chiefs of the Gitksan and Wet’suwet’en First Nations claiming Aboriginal title over approximately 58,000 square kilometers of land along with a right to self-government (Dacks, 2002, p. 240). Although the court did not rule on the specific issues in this case based on a technicality, the Supreme Court of Canada did articulate principles that furthered the understanding of Aboriginal rights and titles, as well as the jurisdiction of governments in regards to Aboriginal rights and title (Dacks, 2002, p. 240).

For this paper, the most important part of this articulation concerned identifying the proper rights holders for Aboriginal title. The decision in *Delgamuukw v. British Columbia* articulated that Aboriginal title is held in a “communal nature, in that Aboriginal title is a collective right to land held by all members of an Aboriginal nation” (*Delgamuukw v. British Columbia*, 1997, para. 115). This runs contrary to a key principle of the B.C. Treaty process that allows First Nations to self-identify for the purposes of treaty negotiations (BCTC, 2009a). If Aboriginal title is held in a

⁶ Section 35(1) of the *Constitution Act* states that “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” (*Constitution Act*, 1982)

communal nature by the “Aboriginal Nation⁷” and not a subset of that Aboriginal Nation, as expressed by the Supreme Court of Canada, the process as laid out by the BCTC, that permits a First Nation to come forward and self-identify becomes problematic⁸.

With smaller groups able to initiate treaty negotiations, a larger number of overlaps to be present and larger Nations to have concerns that the Nations rights and title will be affected by a small sub-set of the historical Aboriginal Nation. The notion that Aboriginal title is held by the collective was furthered in *Tsilhqot’in Nation v. British Columbia*.

2.7.2 *Tsilhqot’in Nation v. British Columbia*

The *Tsilhqot’in* Aboriginal title case revolved around attempts by the *Tsilhqot’in* Nation to prevent logging in their traditional territories and the exploitation of natural resources in claimed traditional territories (McCue, 2014). While this case took over twenty years to resolve, in 2014 the Supreme Court of Canada found that the *Tsilhqot’in* Nation had Aboriginal Title to over 1,700 square kilometers in the B.C. interior. The significance of this was enormous: the court found that the *Tsilhqot’in* Nation had Aboriginal Title to lands outside of their reserves and old villages contrary to the claims of both the federal and provincial governments (McCue, 2014). The court also ruled:

Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. (Tsilhqot’in Nation v. British Columbia, 2014, para. 75)

This ruling confirmed what the court articulated in the 1997 *Delgamuukw* decision: Aboriginal title is held by the Nation and not individual *Indian Act Bands*. Those opposing the B.C. Treaty process point to these two decisions as fundamentally contradicting the self-identification provisions of the process.

2.8 Moving Forward

The challenges posed by overlaps have been identified as a key barrier to the conclusion of modern treaties by the BCTC on several occasions. While Canada and B.C. have a duty to consult Indigenous groups while completing a treaty, current processes and tools have not been effective in resolving overlaps and alternatives are needed. With critical court decisions as described above now in place, the federal government has shown a willingness to explore new approaches to overlap resolutions, such as those proposed in the 2015 Eyford Report and the 2016 Multilateral Engagement Report to Improve and Expedite Treaty Negotiations in British Columbia. The recommendations from these key reports will be summarized below.

⁷ “Aboriginal Nation refers to a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories” (Erasmus et al., 1996, p. 104).

⁸ Historically there are 60 to 80 Aboriginal Nations in Canada (Government of Canada, 1996).

The Eyford Report (2015) provided several potential ways to reform overlap consultation:

- 1) Establish a roster of retired judges and dispute resolution experts to assist in the resolution of territorial boundary disputes.
- 2) The federal government should encourage and support resolutions methods which incorporate both Indigenous law and common law.
- 3) All three parties to the treaty process in British Columbia should establish criteria for receiving funding for the resolution of shared territories and overlaps.
- 4) Canada should encourage First Nations in British Columbia through the First Nations Leadership Council to pursue the aggregation of rights-holding collectives (Eyford, 2015, p. 69).

The Eyford Report identified the need to develop new approaches to resolving overlaps in B.C. if more modern treaties were to be concluded. The Report acknowledged that the approaches taken by the Crown have not been sufficiently effective. Of the proposed approaches to resolving overlaps listed above, support for methods involving Indigenous law are of particular importance to this report and merit further consideration in Section 9.

The need for a new approach to the resolution of overlaps was also echoed in the Multilateral Engagement Report. This was acknowledged by the principles involved in the B.C. Treaty process (Canada, British Columbia and the First Nations Summit, 2016, p. 4) as they endorsed the recommendations of the report and committed to exploring the implementation of the recommendations. It recommended that the following options be explored:

- 1) Dedicated funding to support the resolution of overlap issues;
- 2) Creating a best practices guide and public inventory of shared territory agreements; and
- 3) Exploring new approaches to incentivize First Nations not actively negotiating a treaty to reach agreements with their neighbors (2016, p. 5)

These two reports demonstrate that the current process for resolving overlaps is lacking and new mechanisms need to be explored. The Eyford Report's recommendation that the federal government should explore resolutions incorporating both Indigenous law and common law should be explored further, as it offers a potential new approach to resolve overlaps. In exploring how Indigenous laws and DR mechanisms can be incorporated into the resolution of overlaps, new tools could be developed and applied to the issue.

2.9 Conclusion: Analytic Framework Guiding this Study

The B.C. Treaty process anticipated that First Nations would resolve overlaps amongst themselves prior to concluding a modern treaty (BCCTF, 1991, p. 27). Supreme court decisions related to "duty to consult" as well as definition of "collective title" have shed light on assumptions that have been problematic, contributing to legal challenges being brought forward to four of the seven modern treaties completed and delayed other negotiations. Legal cases have outlined key concerns with the current B.C. Treaty process and have further

articulated TAG-NW and the Crown's duty to consult. If future legal challenges to modern treaties and self-government agreements are to be avoided, new approaches to resolving overlaps are worth considering. The Eyford Report and the Multi-lateral Engagement Report began this process by suggesting new approaches to deal with overlaps, and this project seeks to build on the proposed approaches that take seriously the complicated relationship between both Indigenous law and common law and facilitate a more effective process to resolve overlaps.

Looking at the history of treaty negotiation in B.C. and the challenges posed by overlaps to the completion of modern treaties has set the basis of the research of this report. The inability to develop a process that facilitates the resolution of overlaps in the modern day legal context has caused the conclusion of treaties to be delayed and led to legal challenges for others. If additional treaty negotiations are to be completed in B.C. new approaches will need to be implemented to deal with overlaps. A preliminary analytic framework is presented below, which outlines the key stakeholders involved in negotiating treaties, the goals of this research project, and the desired outcomes that have the potential to assist in the resolution of overlaps. The following section outlines the methods and methodology used in this research project.

Preliminary Analytic Framework

Current State

Challenges

- Lack of incentive to resolve overlaps
- Lack of scrutiny for Statement of Intent Areas
- First-past-the-post mentality
- Concerns surrounding the impact of a treaty on the overlap area

Stakeholders

- Government of Canada and implicated departments
- Government of British Columbia and implicated departments
- British Columbia Treaty Commission
- Individual First Nations
- First Nation Summit

Role of Stakeholders

- Government of Canada has a Duty to Consult with First Nations
- Government of B.C. has its own Duty to Consult with First Nations
- First Nations have agreed to resolve overlaps amongst themselves under the B.C. Treaty Process

Research Goals

- ✚ Develop an understanding of the key barriers to the resolution of overlaps between First Nations.
- ✚ Understand the role the Federal government can play in the resolution of overlaps beyond the duty to consult.
- ✚ Examine how Indigenous Laws and Dispute Resolution mechanisms can be used to help resolve overlaps.
- ✚ Recommend methods that the Federal government can use to facilitate and encourage the resolution of overlaps.

Future State

Desired Outcome

- Improved relationships between First Nations
- Improved methods for overlap resolution that meet the needs of First Nations
- Resolution of overlaps
- Removal of barriers to completion of modern treaties

Figure 1: Preliminary Analytic Framework

3.0 Methodology and Methods

This section will describe the methodological approach and the methods used in this project. A qualitative methodology, thematic analysis, was chosen so that detailed information pertaining to overlaps and traditional methods of resolution could be explored. Several qualitative methods were used including a literature review, a jurisdictional scan, and interviews with key information holders. Employing qualitative research methods allowed the researcher to gain a better understanding of the challenges Indigenous communities face in resolving overlaps. This section will also describe the strengths and limitations of the methodology and how participants were recruited to participate in the interviews.

The literature review provides an overview of traditional Indigenous laws and DR mechanisms, while picking out key aspects of Indigenous laws and DR which may hold value in resolving overlaps. The jurisdictional scan identifies Australia and Nicaragua as two countries that have confronted the resolution of outstanding land claims by Indigenous peoples and overlapping territorial claims. Finally, the interviews with key information holders provided insights into traditional methods of DR and current methods employed to resolve overlaps.

3.1 Literature Review

The literature review sought to establish an understanding of traditional Indigenous laws and DR mechanisms, and builds key guiding principles, and their potential applicability to the issue of overlaps. The research involved reviewing academic journals, independent research reports, books, working and conference papers.

The sources used to find articles were Google Scholar, Summon @ the University of Victoria Libraries, Vancouver Public Libraries, the Simon Fraser University Library Search tool and Virtua the AANDC Library Catalogue. The key search terms used to research the academic literature on this subject area were a combination of “Indigenous”, “First Nations” and “Aboriginal” with “overlaps”, “dispute resolution”, “Indigenous law”, “traditional Indigenous law”, “legal traditions”, “territorial disputes”, “disputes”, “overlapping claims”, “dispute resolution mechanisms”, and “laws”. Focusing on narrow terms and specific First Nations yielded too few results, which led to using broader terms. Information garnered through the searches above was grouped into thematic categories and similar information was combined.

3.2 Jurisdictional Scan

The purpose of the jurisdictional scan was used to develop understanding of how countries other than Canada are dealing with unresolved Indigenous land claims and the impacts that overlapping territorial claims have in delaying claims resolution. The jurisdictional scan began with a preliminary examination of several of countries to determine which would provide unique perspectives on the issues at hand.

Australia was selected due to its similar legal system as Canada and its similar colonial past. Australia faces a similar issue as to the ones in B.C. with discussions about Native Title being impacted by overlapping territorial claims (Vivian, 2009, p. 33). The primary focus of the cross-jurisdictional scan is Australia due to the numerous similarities that exist between the country and Canada while Nicaragua was of secondary focus.

Nicaragua was chosen as a country of interest for three reasons. Firstly, Indigenous communities in Nicaragua face similar issues to that of B.C. Indigenous communities, where they have overlapping territorial boundary disputes that delay resolutions to land claims (Larson, 2010, p. 1147). Secondly, Nicaragua was chosen due to its unique situation in which there are two semi-autonomous regions in the country in which land title is being granted. Thirdly, Nicaragua has a legislated process for resolving overlaps, which warrants further examination (Law 445, 2003). One of the challenges faced in examining Nicaragua's attempts to resolve land claims and overlapping disputes amongst Indigenous groups was that a portion of the information about government policies was only available in Spanish. This may have caused some information to have been missed. However, the key legislative piece, Law 445, was available in English and provided extensive information on the current process for resolving overlaps between Indigenous communities in Nicaragua.

The examination of these two countries was essential in developing interview questions with key information holders and helped identify potential methods shared with interview participants for their thoughts.

3.3 Interviews

A key method of information gathering for this project was completed through semi-structured interviews. The purpose of the interviews was to gain an understanding of how Indigenous communities traditionally resolved overlaps, the challenges they historically faced and currently face in resolving overlaps, potential ways to incorporate traditional methods of DR into today's context and what role the federal government should play in the assistance of resolving overlaps. The interviews were semi-structured so that conversations would have guidance and consistency between participants, while ensuring that there was room to explore each individual participant's experiences. Participants were asked to participate in one interview in person and over the phone. The interviews varied from approximately forty minutes to one hour. Additionally, interviews were conducted on a one-on-one basis or in groups based on the participant's preferences. Participants were asked a range of prepared questions as well as questions that arose based on their responses. The researcher recorded the interview and took hand-written notes.

Communities were identified in conjunction with TAG-NW negotiators based on their involvement in the resolution of overlap disputes. Once communities were identified an e-mail was sent to a representative of that community requesting participation in and outlining the research project. As a result, interviews were conducted with seven participants

representing communities covering a wide geographic area of British Columbia. Interview participants ranged from hereditary chiefs, councilors, chief negotiators, legal counsel and consultants. Additionally, an interview was conducted with a federal official based on their knowledge of Canada's duty to consult policy and its applicability to overlaps.

3.4 Data Analysis

The literature review, jurisdictional scan and interviews were analyzed using thematic analysis. Data from the literature review and jurisdictional scan was coded, grouped and analyzed prior to conducting the interviews. The data from the interviews was analyzed individually. Thematic analysis allowed for patterns to be identified "within and across data in relation to participants' lived experience, views and perspectives, and behavior and practices; 'experiential' research which seeks to understand what participants' think, feel, and do" (Clarke and Braun, 2016, p. 297). Thematic analysis is a method which, moves "beyond counting explicit words or phrases and focuses on identifying and describing both implicit and explicit ideas within the data, that is, themes" (Guest et al., 2012, p. 9). Its aim is not to create a summary of the collected data, but rather to ascertain and interpret the key information from the data. The themes provide a structure to organize and report the analytical observations of the researcher (Clarke and Braun, 2016, p. 297). This method allowed for all aspects of participants responses to be analyzed including explicit and implicit details.

Findings from the literature review and jurisdictional scan informed the interview questions posed to participants so that lines of inquiry could be established and gaps could be filled. The analysis of the interview transcripts and the researcher's hand-written notes, sought to establish implicit and explicit themes. The researcher compiled notes on the sub-themes emerging in each individual interview, which were grouped into larger themes.

3.5 Strengths and Limitations

The strengths of the methodology employed for this research project are that three different qualitative methods were used to inform the research question.

Since there is a wide range of interests, cultures, histories and priorities, among First Nations in British Columbia it is difficult to make generalizations about possible solutions. Moreover, there is a range of ways that Indigenous groups in British Columbia have resolved conflicts between one another. The diversity would provide for a rich source of potential data to be collected, but it was not possible to interview and collect data from each of the Indigenous communities residing in B.C. Attempts were made to interview and collect data from a diverse set of First Nations representing different linguistic, cultural and geographic makeups. While the number of participants in this research study was relatively small, the diversity of the Indigenous communities represented by the participants provides significant quality data that allows for a more in-depth understanding of overlap conflicts and barriers to resolution.

This project may also be affected by the researcher's role as an employee of Indigenous and Northern Affairs Canada and background as a European-Canadian. There is potential for bias on the part of the researcher. In attempts to mitigate this limitation, interview participants were informed prior to interviews taking place that the information they chose to provide would be kept confidential and that any identifying factors would be removed. Additionally, participants were informed that none of the information would be provided to INAC until it was combined with other participant's information in the final report and would be solely used for this research project. Participants did not request to comment on the report prior to completion although some did request a copy of the final report for documentation purposes. All participants were informed that they would receive a copy of the report once completed.

A third limitation is that participants from the Indigenous communities from which data was collected were not asked about specific overlaps. Due to the sensitivity of the topic, details on how particular overlaps between communities were resolved or how the impact of these overlaps has affected treaty and self-government negotiations was not obtained. Rather, more general information about overlap resolution was acquired, as participants were asked about their community's historical experiences of resolving overlaps. Although details about specific overlaps may have not been shared, it was not the aim of this project to delve into these rather, it was to obtain a general sense of how overlaps have been traditionally and currently resolved.

4.0 Literature Review

The following section provides an overview of Indigenous law and dispute resolution mechanisms. The aim is to develop an understanding of the key themes in national and international academic literature about dispute resolution in Indigenous contexts and in Indigenous law. For many centuries, First Nations in British Columbia and much of Canada were able to establish and maintain their traditional territorial boundaries through time-honored protocols, laws and traditions. In British Columbia alone there are 203 *Indian Act Bands* (INAC, 2016) and numerous others throughout the rest of Canada. There is a tremendous amount of diversity among them; no one solution will work for all First Nations. While it is not possible to include the views of every First Nation in this project, some overarching themes common among many First Nations can be discerned.

The first part will provide the reader with an understanding of traditional Indigenous laws that governed how Indigenous communities interacted within their communities and externally with other communities. The second part examines Indigenous Dispute Resolution (IDR) mechanisms and seeks to identify common mechanisms used by Indigenous communities.

4.1 Overview of Indigenous Laws

Indigenous communities have sophisticated sets of laws predating the arrival of Europeans to North America (Borrows & Law Commission of Canada, 2006, p. 5). These laws governed and continue to govern a wide array of areas including how indigenous communities interacted with one another. Indigenous laws addressed how natural resources were shared between communities and where communities could harvest and could not (Borrows & Law Commission of Canada, 2006, p. 3). Many communities had also established treaties, protocols and agreements among themselves to assist in determining boundaries and mutual access (Borrows & Law Commission of Canada, 2006, p. 3). However, these laws and customs were rarely kept in writing. Indigenous laws, customs and traditions are commonly kept through oral traditions, songs, stories and ceremonies (Borrows & Law Commission of Canada, 2006, p. 4). Their role is to express the gathering of wisdom and experience of IDR processes (Borrows, 2002, p. 13).

Another key feature of Indigenous laws is that they are usually established by consensus within the community to maintain consistency when applied (Borrows & Law Commission of Canada, 2006, p. 4). Once members of the Indigenous community decide on what is to be, all members upheld established laws and customs (Ghostkeeper, 2004, p. 165). Though laws were kept through oral traditions and customs, they were not static and evolved to address new circumstances and situations. Storing laws through oral traditions allowed for constant recreation of the systems of laws. This allows Indigenous communities to meet their current needs (Borrows & Law Commission of Canada, 2006, p. 14-15). Although historically Indigenous laws were kept orally, in more recent years they have been archived by scholars such as Val Napoleon through her work with the Gitksan Nation in B.C. (Napoleon, 2001).

While there is consensus within Indigenous communities as to what the laws governing internal interactions are, there is little consensus among Indigenous nations. According to Napoleon (2007) in Canada “there is no one legal order or set of aboriginal laws”. Each Indigenous Nation had a different set of laws that were specific to their communities cultural needs. The difference in Indigenous laws occurs as Indigenous laws and traditions are generally derived from experience with nature and passed down from generation to generation by members of the community with acquired wisdom from a lifetime of experiences (Ghostkeeper, 2004, p. 163). The way Indigenous law have been developed and maintained varies across Canada. For example, the legal relationship developed by the Potlatch on the West Coast differ from that of the Sundance on the Prairies, the stories developed and told in the Bighouse of the Salish communities were profoundly different from the teepees of the Assinaboine. These, in turn, are different from Indigenous communities located in other areas of the country (Borrows, 2002, p. 4).

The Anishinabek teach their legal traditions through stories of a character called Nanabush, the Trickster. The Trickster provides altruistic and self-interested insights allowing listeners to learn both through the Teacher’s mistakes as well as the Teacher’s virtues (Borrows, 2002, p. 56). The teachings of the Trickster are designed to, “encourage an awakening of understanding because listeners are compelled to confront and reconcile the notion their ideas may be partial and their viewpoints limited” (Borrows, 2002, p. 56). Anishinaabe legal narratives also contain Heroes, Monsters and Caretakers. Each character has a purpose in the narrative: Heroes are characters that brought us to where we are; Monsters are responsible for destruction and dissolution; and Caretakers “encourage, mend, heal, reconcile, and make whole” (Borrows, 2016, p. 825-826). According to Val Napoleon, tricksters can be seen as the original Indigenous lawyers: in stories tricksters question and transform legal principles further and unsettle the recognized order (Ulrich and Gill, 2016, p. 982). These stories are generally passed down from elders considered the knowledge keepers of Indigenous communities.

Elders or persons with natural authority are usually the keepers of traditional laws and knowledge and responsible for passing down the knowledge to younger generations as well as implementing laws. Although the majority of Indigenous laws and traditions were kept orally, in some cases they were explicitly written down by Elders, Chiefs, Tribal Councils, Clan Mothers, Indigenous lawyers and others (Borrows, 2006a, p. 13). In most cases Indigenous laws are “non-prescriptive, non—adversarial and non-punitive [and] generally promote values such as respect, restoration and consensus” (Borrows & Law Commission of Canada, 2006, p. 3). Indigenous laws are derived from the “political, economic, spiritual, and societal values expressed through teachings and behaviors of knowledgeable and respected individuals and elders” (Borrows, 2002, p. 13). While in the modern day context, to practice law requires receiving many years of schooling; this is not the same within Indigenous communities, which place a greater value on person’s long experience and wisdom, their deep understanding of their community and the values and customs that community holds (Webber, 2004, p. 151). Elders hold this respected position, as it is through their years of experience that they have gained wisdom, understand their community, and appreciate the importance of using traditional Indigenous laws in overseeing justice in their community.

The aim of Indigenous laws and DR mechanisms is to restore peace within the community and amongst the affected parties. This is done by involving the community in determining the punishment and ensuring that communities concerns are taken into account, allowing for peace to be maintained (Webber, 2004, p. 151). Indigenous law emphasizes collaborative deliberation and including the community in applying the laws that govern the specific community. Borrows argues that to correctly understand Indigenous laws, one needs to understand how each story links with other stories. Developing a full understanding of Indigenous laws and principles of governance requires knowledge of other stories of the particular culture and interpretations of these stories by their people (Borrows, 2002, p. 18). Napoleon further states that “law is culturally bound” (Napoleon, 2007, p. 3). To understand the laws of an Indigenous community one must understand the culture as well as how they are intrinsically linked. When laws are applied, emphasis is put on helping develop the institutions of the community and promoting healing and reconciliation in the community.

Laws are not solely focused on punishing the perpetrator of a crime or injustice to the community; they also have a restorative aspect (Webber, 2004, p. 152). Justice within Indigenous communities does not emphasize punishment of the perpetrator of injustice. Rather justice centers upon the family and greater community in general. Justice is obtained by taking into account “the role of elders, the role of family, family ties, and community connections, teaching; and spirituality” (LeBaron, 2004, p. 21). Indigenous justice and the application of Indigenous laws take a holistic approach that seeks to maintain the structure and stability of the community and facilitating restitution to those harmed and maintaining important community ties including the offending individual’s ties to their family and the community.

Indigenous Laws are not static and evolve overtime to address the current needs of the community. Indigenous Laws are not focused on punishing the perpetrator of a crime or injustice against a person or community. They are focused on re-establishing broken relationships and focusing on maintaining peace within the larger community. Indigenous laws seek to mend the relationship between offender and victim and establish a path forward for all parties involved. A number of these principles can also be found in IDR processes as outlined below.

4.2 Indigenous Dispute Resolution

Indigenous communities have long used dispute resolution mechanisms to resolve conflicts. IDR mechanisms are congruent with many elements of Indigenous law. Both emphasize the role of elders, community involvement and maintaining the harmony of the community. Indigenous communities have long used DR mechanisms to address conflicts among community members, with other Indigenous communities, and with non-Indigenous communities (Osi, 2008, p. 194). The tenets of IDR are focused on “traditional teachings, respect, relationships, interconnectedness, spirituality, prayers, storytelling, saving face, recounting facts, and emotions” (Osi, 2008, p. 194).

IDR seeks to obtain group consensus and maintain good relations and solidarity with other community members (Osi, 2008, p. 194). Maintaining community relationships is a key aspect found in many IDR processes. According to Ginty, Indigenous conflict⁹ resolution is based on consensus decision-making, a restoration of the human balance and ensuring that there is an on-going harmonious relationship between groups (2008, p. 149). Genon and Hille further depict IDR as balancing the needs and interests of the involved parties as well as ensuring the relationship of those parties is re-established (2013, p. 349). In general, Indigenous methods of DR emphasize ensuring the quality of the relationship is repaired and can continue to be maintained. Maintaining the relationship can also include the greater community if the dispute has the potential to impact the community in question (Genon and Hille, 2013, p. 354).

By using traditional stories, participants in DR processes can draw their own meaning and conclusions, which provides an important guide to participants (Genon and Hille, 2013, p. 354). Just as in Indigenous laws, storytelling plays an important role in IDR mechanisms. Traditional stories guide the process and allow participants to derive their own meaning that allows them to move through the process and come to a resolution. Additionally, IDR is “characterized by flexibility, utilization of cyclical time, qualitative measurement of success and people-oriented” (Osi, 2008, p.194). IDR needs to be flexible enough to address different cases. No one method will resolve all disputes; the process needs to be shaped by the people involved to address their needs, the needs of the community and others affected by an issue. In this respect, the differences between Indigenous communities needs to be recognized as one form of IDR may work for one community but be ineffective for another due to cultural needs and differences (Grose, 1995, p. 334).

Southern Coast Salish Indigenous communities have well-established principles of dispute resolution based on “the centrality of families; the importance of elder; the role of leaders; the importance of gatherings, ceremonies, and meetings; spiritual practices; social patterns including direct social control; and resource and annual subsistence cycle” (Price and Dunningan, 1995, p. 18). For Coast Salish communities the process must be holistic and not prescriptive to address the needs of all those involved. As with Indigenous laws, elders have a major role to play as a respected voice and knowledge keepers of the community. Coast Salish elders, in combination with the greater community, play a role in shaping the DR process. Other communities place greater emphasis on the role of elders and less on the community’s role.

There are several examples of Indigenous DR methods. One is the *sentencing circle*. Burrows (2002, p. 23) describes sentencing circles as consisting of a group of individuals interested in resolving the dispute. These individuals usually include the offender, their family and friends, the victim and other individuals either impacted or with information, interest or skills that may be applied to restore harmony between the victim, offender and community (2002, p. 23). Participants gather in a circle to “symbolize a connection to the order of the non-human world and to confirm the equality of all the participants” (Burrows, 2002, p. 23). The conversation travels in one direction with only one person speaking at a time, the participants speak of what

⁹ The term ‘conflict resolution’ is used interchangeably with the term ‘dispute resolution’.

can be done to help the victim, the offender and the community (Burrows, 2002, p. 23). Rather than focusing on punishing the perpetrator, IDR seeks to aide both the perpetrator and the victim to reestablish the impacted relationship. Moreover, it seeks to ensure the greater community relationship is also addressed and mended. A second method of can be found along the Northwest Coast of B.C., based on the formation of *kinship ties* through adoption and intermarriage (Sterritt, 1998, p. 7). Through intermarriage and adoption, one community would gain access to the resources of another community and vice versa. When a member of a community married into a neighboring community, some access to resources of their new community was granted. Absent these kinship ties, war was also commonly used to resolve disputes over territories; wars were generally followed by peace ceremonies to reestablish relationships (Sterritt, 1998, p. 7).

Just as with Indigenous laws, IDR varies due to the different cultural setting, which shape IDR processes. While these were the main forms of DR used along the Northwest Coast of B.C., the Navajo used a vastly different method. Yazzie describes Navajo DR as involving prayer to ensure a serious and respectful discussion, a recounting of actual and perceived facts, teaching of traditional methods to resolving the problem, identifying plans for future actions, and obtaining a consensus decision by the group through discussion led by civil leaders of *naat'aanii* (Yazzie, 2004, p. 108). Navajo approaches arise out of the traditional Navajo concepts of solidarity, mutuality and reciprocal obligations (Yazzie, 2004, p. 108). The Navajo emphasize establishing a consensus on what should be done and how the community can move forward together, this is important for maintaining peace in the community. All views are taken into account and a plan for moving forward is made jointly.

Disputes involving territorial boundaries between Indigenous groups were addressed through the practice of permission granting. This process involves members of one Indigenous community consulting with and requesting permission from another Indigenous community before crossing their traditional territories to access resources (Larsen, 2006, p. 316). This limited the potential for conflict as communities would be aware of which Indigenous group was crossing into their territories and for what purpose. Gift giving was also commonplace to maintain harmonious relationships between groups and ensure reciprocal relations where in one group may access another's territory and vice versa (Ginty, 2008, p. 149).

Within many IDR systems, elders would take a more interventionist approach and promote traditional values to resolve disputes rather than allowing affected parties to come to solutions for themselves (Bell, 2004, p. 255). Instead of affected parties crafting their own solutions, elders would intervene and use their experiences and knowledge to craft a solution. In certain cases a council of Elders would become involved in resolving disputes when the parties are unable to resolve them on their own. Elders maintain a general authority over the proceedings and ensure that the IDR process is conducted in a peaceful manner to maintain harmonious relationships (King, 2001, p. 2). This is due to the elder's respected position in the community. The parties will follow the teaching of elders and use their recommended method of DR to come to a solution that satisfies those involved.

A possible mechanism for incorporating aspects of traditional Indigenous laws and DR mechanisms discussed above in combination with current legal principles was explored through the *Indigenous Legal Lodge* (ILL). The ILL seeks to “re-introduce core elements of traditional institutions to resolve contemporary conflicts, [though] it is not exclusively based on them” (Dickson, 2011, p. 7). The ILL takes the approach that each dispute has its own unique circumstances and allows for flexibility to explore a number of DR mechanisms such as “exploring relationships created through marriage, kinship, trade, etc.” (Dickson, 2011, p. 7) as possible ways to resolve overlaps. While the ILL allows traditional methods of DR to be incorporated into the resolution process there is also room to bring in western legal principles if the parties choose to do so and bring in experts in Canadian law to assist in the development of the overall legal framework (Dickson, 2011, p. 8). The ILL provides the flexibility necessary to address the cultural needs of the communities involved in the dispute and provides for a combination of methods to be explored in addressing overlaps.

4.3 Summary of Literature Review Findings

Indigenous Laws and Indigenous DR mechanisms hold many of the same tenets that are applied to resolving disputes within Indigenous communities. Commonalities of both include:

- Involvement of Elders
- Use of storytelling, songs and ceremonies
- Maintenance of peace between the offender, victim and greater community
- Use of traditional teachings
- Adaptability to the situation at hand
- Involvement of the greater community

For disputes to be successfully resolved within and between Indigenous communities these tenets must be adhered to and implemented. Incorporating certain aspects of Indigenous laws and DR mechanisms into methods available to TAG-NW to assist First Nations in resolving overlap disputes may have beneficial implication

6.0 Jurisdictional Scan

British Columbia and Canada as a whole are not the only jurisdictions that face the issue of overlapping territorial disputes between First Nations. Australia provides a good comparative study as it has similar territorial overlaps among First Nations, a history of colonialism, and the use of Common Law. Moreover, Australia has a large number of Indigenous communities with differing languages, traditions and customs (King, 2001, p. 2). The second country that will be examined in is Nicaragua, where Indigenous communities have similar history of dispossession and resource exploitation on their traditional lands. In attempting to gain recognition of their rights and title to their traditional territories, Indigenous groups in Nicaragua addressed the issue of overlapping territories.

6.1 Australia

Before delving into the specific issue of overlaps, it is important to understand the history and context that has led to the problem of overlaps developing. When the British arrived in Australia they claimed the territory as 'terra nullius' even where Indigenous peoples inhabited the land (Armitage, 1995, p. 16). Indigenous people inhabiting the land did not appear to have settlements or established forms of government, but they did have a connection to the land and their territories, which they relied on to, sustain themselves and this connection featured in their religions and cultures (Armitage, 1995, p. 16). The British faced opposition from the Indigenous peoples as their traditional lands were taken without negotiation, compensation or recognition of Indigenous rights (Armitage, 1995, p. 16).

During the late 1800's and early 1900's the Australian government enacted laws that attempted to control all aspects of Indigenous peoples lives, including where they could live and work, what funds would be available to Indigenous peoples, and who was or was not an Indigenous person (Armitage, 1995, p. 18). These policies led to the creation of settlements, much like the reserve system in Canada. In moving Indigenous communities to settlements the Australian government had hoped that the Indigenous population would be reduced and eventually eliminated (Armitage, 1995, p. 18). When this did not succeed the Australian government pursued a policy of assimilation, seeking to absorb the Indigenous population into the European-Australian population. Children were removed from their homes and placed in institutions to facilitate their assimilation into Australian society (Armitage, 1995, p. 19). These assimilation policies were not successful and the Indigenous peoples of Australia maintain a strong presence in the country to this day. In the years after the policy of assimilation ended, Indigenous Australians have attempted to regain the right to their traditional territories, leading to the seminal court case and ruling of *Mabo v. Queensland* in 1993.

6.1.1 *Mabo v. Queensland*

*Mabo v. Queensland*¹⁰ centers on the claim made by the Miriam peoples located on the Murray Islands in the Torres Strait of Australia. This Indigenous group claimed that they were the rightful owners through their traditional use and occupation of the land located on the Murray Island in the Torres Strait (Speagle, 1989, p. 168). The Miriam challenged the claim that their Indigenous rights and title to the land had been extinguished by the State Act of 1985, and that the State Act was beyond the power of the State government (Speagle, 1989, p. 168). In a split decision of 4:3 the Justices presiding over the case ruled that the State Act “discriminated against the Murray Islanders vis-à-vis other persons with interests on the Island contrary to section 10(1) of the Racial Discrimination Act” (Cullen, 1990, p. 192). The case was appealed and heard by the High Court of Australia, which ruled in 1992 that “pre-existing land rights (‘native title’) survived the extension of British sovereignty over Australia and may still survive today provided (a) that the relevant Aboriginal or Torres Strait Islander people still maintain sufficient traditional ties to the land in question; and (b) that the title has not been extinguished as a consequence of valid governmental action” (Nettheim, 1993, p. 1).

Mabo v. Queensland led to the Native Title Act (NTA), which allowed indigenous peoples to make claims to unalienated Crown land. It also allowed for a validation of existing non-indigenous rights to the land, seen as a way to reconcile the differing interests of both parties (Corbett, 2006, p. 18). This decision determined that the Australian Common Law system would recognize the traditional use and relationship of Indigenous people to their traditional territories including lands and waters (French, 2003, p. 489).

The judgment determined that native title could be recognized by the government in areas where it had not been previously extinguished through legal acts of government, and where Indigenous groups could demonstrate continuing connection to the land along with a continued observance of traditional laws and customs which define their interests to the land (Corbett, 2006, p. 37). In essence, the decision recognized the pre-existing territorial interests of the Indigenous peoples of Australia in the form of Native Title (Behrendt, 2007, p. 13). *Mabo v. Queensland* opened the door for Indigenous group to pursue rulings on their rights and title to their traditional territories through the National Native Title Tribunal (NNTT).

6.1.2 *Native Title Act and the National Native Title Tribunal*

The NTA led to the establishment of the NNTT, which hears submissions by Indigenous groups attempting to prove their rights and title to traditional territories. The NNTT determines whether Native Title to an area exists or not based on the following principles:

- 1) The Tribunal must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way.
- 2) The Tribunal, in conducting inquiries, may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

¹⁰ This case was brought forward by Eddie Mabo, a Miriam man from Murray island located in the Torres Strait (Australian Institute of Aboriginal and Torres Strait Islanders Studies, 2017).

- 3) The Tribunal, in conducting an inquiry, is not bound by technicalities, legal forms or rules of evidence. (Corbett, 2006, p. 38).

While the implementation of the *Native Title Act* was seen positively Indigenous communities the systems that the Act created including the NNTT were not without flaws. The NNTT lacks empowerment to hear cases and make determinations about whether native title exists or not. Rather the NNTT provides for mediation of native title claims and to resolve future act matters through alternative dispute resolution mechanisms and arbitration (Ritter, 2009, p. 122). By being unable to make determinations of whether Native Title exists or not and only being able to mediate a solution major delays in Native Title being determined occur, as the average claim take six years to resolve (Calma, 2009, p. 6). Major delays in coming to a resolution as to who are the proper rights holders to a territory can have significant impacts on a community as in many cases elders of the community pass away before a resolution is reached (Calma, 2009, p. 6). Elders who are important to the community and a wealth of historical knowledge do not get to see the benefits of having their traditional territories recognized. This issue is also one that arises in the B.C. Treaty process as in many cases to date, concluding a Final Agreement has taken longer than twenty years having the same effects on communities as in Australia.

6.1.3 Addressing Overlaps

Under the Native Title system Indigenous communities are required to claim precise boundaries to their traditional areas (Vivan, 2009). When Indigenous groups have to submit a map or claim their traditional territories, it tends to cause a dispute amongst neighboring Indigenous groups. Disputes arise as Indigenous communities traditional territorial boundaries were frequently blurred and not distinct, as more than one Indigenous group may have occupied an area being claimed at any given time (Vivan, 2009). A further issue was whether 'title' is owned collectively by the larger community/nation or whether it is clan based (Vivan, 2009). These issues have caused a great deal of dispute within Indigenous communities throughout the Northern region of Australia, which the government has been attempting to address.

With the institution of the *NTA* as a formal way of recognizing Indigenous title and rights to traditional territories, the issue of overlaps has emerged in the Australian context. The *NTA* only allows for one determination of Native Title to be made in regards to one area of land or water, but multiple claims to this land can be made. When this occurs the parties that have made claims to the area enter into a negotiation process (Burnside, 2012, p. 4). Under the *NTA*, if overlaps exist on a claimed territory, the government and other involved parties will not participate in meditation to determine title to the land until these overlaps have been resolved (Burnside, 2012, p. 4).

Through the NNTT Indigenous groups can either mediate or litigate their title claims, but before litigation can be pursued mandatory mediation is invoked upon the parties in an attempt to resolve the overlap issue (Burnside, 2012, p. 7). Under this system issues have begun to emerge. A key problem is that it aggravates intra-Indigenous conflicts, as Indigenous groups must contend with one another for the limited amounts of available land (Burnside, 2012, p. 2). NNTT protocols requiring a declaration of title to disputed lands has led to Indigenous

communities becoming divided due to the Western understandings of land ownership and the priorities that Westerns place on the land (Burnside, 2012, p. 5).

The possible ways of resolving overlap claims by multiples Indigenous groups to one area of land or water under the NTA through the NNTT are:

- 1) Through mediation of the parties involved in the dispute
- 2) By one claimant applying under the *NTA* or *Federal Court Rules* to have the other parties claim struck out or dismissed by the Court
- 3) Or by proceeding to litigation (Burnside, 2012, p. 8)

If mediation fails the parties can proceed to a litigated process, having this as a secondary option allows groups to take harder stances in the mediation process, which lessens the chances of success. This approach is adversarial, directly pitting the claims of one Indigenous group against another to resolve their disputed territorial claims. Taking this approach to resolve overlaps between Indigenous communities does not take into account Indigenous laws and traditions, which place a greater emphasis on maintaining community relationships.

6.1.4 Proposed Solutions to Overlap Disputes

Several potential solutions have been proposed to the issue of overlaps between First Nations. One of the more intriguing proposals comes from Vivian (2009) in the context of the National Native Title Tribunal in Australia, which would lead to an Indigenous-led tribunal to hear disputes brought forward by the parties.

The first step in resolving the conflict between the Indigenous parties would be an attempted mediation led by an Indigenous mediator, elder or respected person or some combination of the above selected from a list of facilitators provided by the tribunal or outside of the tribunal if the parties wish (Vivian, 2009, p. 35). Under this system the facilitators would be people who had an in-depth understanding of Indigenous issues, history and territories. Vivian's proposed tribunal would not have a set process; rather, there would be room for flexibility and for the parties to choose their own path forward. This includes allowing input from sources outside of the tribunal and the parties to the dispute (Vivian, 2009, p. 36). If the facilitated process does not lead to a resolution to the dispute, the dispute would be referred to an arbitration panel. This panel would have binding authority over the parties and focus on coming to a flexible and responsive solution (Vivian, 2009, p. 36).

The composition of the arbitration panel would vary based on the substantive issues of the dispute and could be composed of Indigenous Elders, Senior Indigenous people or legal members. Perhaps the greatest strength of the panel would be the ability of the panel to be tailored to the needs of the disputants leading to a flexible way forward (Vivian, 2009, p. 36). These proposed solution by Vivian merit further discussion as possible resolutions to overlap disputes and their applicability to the Canadian context.

6.2 Nicaragua

Much like the history of Indigenous groups in Canada, Australia and other areas of the world the history of Indigenous groups in Nicaragua has been one of dispossession and exploitation. In Nicaragua this dispossession and marginalization began in 1894 with the invasion of traditional Indigenous territories. Indigenous communities in Nicaragua have experienced marginalization by the central government, the use of natural resources from their traditional territories with no benefit to Indigenous communities, and the destruction of traditional political institutions (Larson et al, 2016, p. 323). Indigenous communities in Nicaragua have been struggling to recover their territorial rights to achieve self-governance and control over their natural resources (Larson et al., 2016, p. 323).

Indigenous land rights in Nicaragua were formally recognized in 1905 for the first time with the signing of the Arrison-Altamirano Treaty. The treaty focused on the recognition of rights to agricultural areas but the areas recognized by the Treaty were much smaller than those used by Indigenous communities (Larson and Mendoza, 2010, p. 182). Although the Treaty did not achieve all that the Indigenous people intended it to, it has been a critical piece in legitimizing land rights claim more recently (Larson and Mendoza, 2010, p. 182). While there are many key similarities between the circumstances faced by Indigenous groups in Canada and Australia, there a key difference for Indigenous groups in Nicaragua. Within the Nicaraguan state, several Indigenous groups are located within the two Semi-Autonomous regions of the country. These regions on Nicaragua's Atlantic coast were established in 1987 and meant to eliminate the oppressive relations between Nicaragua's larger national population and the Indigenous and Afro-descendant peoples of the country (Gonzalez, 2016, p. 307).

The creation of the North Atlantic Autonomous Region (RAAN) and the South Atlantic Autonomous Region (RAAS) intended to grant greater control to local Indigenous communities over the natural resources of the region (Larson and Mendoza, 2010, p. 183). However, this did not occur: resource exploitation continues without the consent of Indigenous communities in most instances. The continuing lack of control over resources led to Indigenous groups to stop the struggle for regional autonomy and shift their focus to the struggle for the recognition of rights to the traditional territories and the titling of their territorial lands. The crucial factor in this struggle was the case of the Mayagna Awas Tingni¹¹ community v. Nicaragua (Larson and Mendoza, 2010, p. 184).

6.2.1 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*

The struggle to attain self-governance for Indigenous communities in Nicaragua took a turning point when the Awas Tingni community filed a case in the Inter-American Commission of Human Rights (IACHR) against the Nicaraguan state. The Awas Tingni community was forced to take their case against the Nicaraguan government to the IACHR following a lack of progress by domestic courts, including the Nicaraguan Supreme Court dismissing the case of the Awas Tingni on a technicality. The case centered on the failure of the central government of Nicaragua to obtain the consent of the Awas Tignni community in granting forest rights to a

¹¹ The Mayanga (Sumo) Awas Tingni community will be referred to as Awas Tingni

Korean company on the communities traditional lands in 1995 (Larson and Mendoza, 2010, p. 184).

In 2001, the IACHR ruled in favor of the Awas Tingni community and ordered the Nicaraguan government to negotiate a settlement (Wainwright and Bryan, 2009, p. 157). This case opened the opportunity for Indigenous communities to achieve the recognition of rights and title to traditional territories (Larson et al., 2016, p. 323). Following this victory, Nicaragua brought into effect Law 445¹² in 2003, allowing for the recognition of collective land title to traditional Indigenous territories (Law 445, 2003). The titling process as of 2014 has led to 36,439 km² or 28% of the territory of Nicaragua being titled. At this rate and if the titling continues to progress approximately 30% of the national territory will be titled to Indigenous and afro-descendant communities (Conadeti, 2014).

Progress has been made in settling land claims in Nicaragua's semi-autonomous region, but it has had complications. As is the case in many countries, the issue of overlapping territories creates disputes amongst Indigenous communities. In the case of the Awas Tingni, overlap with the Tasba Raya Villages caused significant delays in the community receiving rights and title to traditional territories. The Nicaraguan government required that overlaps had to be resolved with the Tasba Raya Villages to receive rights and title to any land for the Awas Tingni (Wainwright and Bryan, 2009, p. 165). The Nicaraguan government has chosen to take the approach that boundary disputes arise out of competition by groups to attain valuable resources (Wainwright and Bryan, 2009, p. 165). This approach implies that the groups are expanding their territorial claims to maximize potential profits from resources rather than based on traditional use and creating overlaps in the process.

6.2.2 Addressing Overlaps

Under the law in Nicaragua overlap disputes are to be resolved with the neighbouring community and leaders of the territories in question through the use of "all efforts at dialogue and agreement necessary to resolve their conflict" (Larson, 2010, p. 1147). However, if the Indigenous groups in Nicaragua cannot come to a resolution amongst themselves, the dispute then proceeds through several stages in the Regional Council which makes the final decision (Larson, 2010, p. 1147).

Under Law 445 the Regional Council through the Demarcation Commission is responsible for resolving disputes between communities unable to arrive at an agreement and once all other direct options have been exhausted (Law 445, 2003). Under the process representatives of the communities involved in border disputes present arguments to members of the Demarcation Commission which is responsible for verifying the validity of the information presented. Once all the information has been presented, analyzed and verified, the Commission issues a Resolution about the disputed matter, which is presented to the Regional Council for ratification. If one of the parties to the resolution does not agree with the outcome it can be

¹² The official title of Law 445 is: *Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maiz*

appealed to the Regional Council's Board of Directors which will issue a final resolution on the matter. When the Regional Council issues a resolution this exhausts the administrative routes possible for settling a border dispute (Law 445, 2003).

This process played out in the overlap dispute involving the Awas Tingni and Tasba Raya Indigenous communities. On February 14, 2007 the Regional Council through Resolution #26 authorized the Awas Tingni community 20,000 hectares of land and the Tasba Raya community 21,000 hectares of land. Although the Regional Council intended the decision to resolve the dispute neither of the communities saw this decision as legitimate (Larson, 2010, p. 1148). In cases such as this, even though the Regional Council makes a decision on the overlap dispute some have viewed it as the Nicaraguan government took the approach of establishing arbitrary lines representing a compromise between the overlapping claims. In drawing this arbitrary line the Nicaraguan government has effectively split the Awas Tingni claim into two distinct areas separated by the land claim of the Tasba Raya (Wainwright and Bryan, 2009, p. 167).

While the Regional Council decision did not resolve the underlying issues between the two groups. It led to conflict between the two Indigenous communities that at one point turned violent and threatened the safety of the Awas Tingni villagers (Finley-Brook and Offen, 2009, p. 356). An underlying issue, and generally between any two groups with overlapping territories, is that winning for one group means losing for another (Finley-Brook and Offen, 2009, p. 356). By demarcating territorial lines between Indigenous groups when they have not agreed to or do not respect the decision, can spark conflict between the groups, putting into question the effectiveness of the resolution process.

Although Nicaragua has taken steps to address the issue of overlapping territories through Regional Council's making determinations on boundaries, this approach has not resolved conflict. The approach taken in the Nicaraguan context while not ideal does present another option that contrasts to that of Australia and Canada in resolving overlaps.

6.3 Summary of Jurisdictional Scan Findings

The approach taken to resolve overlaps and the settlement of rights and title issues varies from jurisdiction to jurisdiction, with no one prominent solution to the problem. What is clear is that top down approaches with little to no input from Indigenous groups has not had much success in resolving overlap disputes. In Australia the introduction of the Native Title Act has led to an increase in conflict between Indigenous groups as they seek title to lands. Overlaps must be resolved prior to title being established. Resolving overlaps is conducted through mediation and, if it is not successful, the dispute proceeds to litigation. There is little incentive to resolve overlaps in Australia stemming from the fear of losing access to limited resources and land available for titling. Suggestions for improving the current system have focused on the introduction of a Native Title Tribunal which would contain key aspects of:

- Mediation led by an Indigenous mediator, elder or respected person,
- A flexible approach designed by the parties, which would allow relationship building to occur,
- Escalation to an arbitration panel that varies in composition based on the dispute at hand but with a strong Indigenous influence and,
- An arbitration process tailored to the needs of the disputants allowing for further relationship building to take place.

In Nicaragua a structured process to resolve overlaps is followed (Law 445). The Nicaraguan government requires the resolution of overlaps as a precursor to land being titled. There is a view held by the government that Indigenous groups are claiming larger tracts of territory than they traditionally occupied in an attempt to attain valuable resources, but in the process are creating further overlaps between communities. Currently the government attempts to encourage relationship building between Indigenous groups that have competing claims to the same territory prior to the conflict being escalated to the Regional Council. The Regional Council and the Regional Council's Board of Directors act, as the de facto tribunal system in the Nicaraguan context. As there is little involvement from the Indigenous groups involved in the dispute in the make-up of these councils they tend to lack legitimacy in their eyes and have done little to quell disputes between Indigenous groups with overlaps.

7.0 Interview Findings

The purpose of the interviews with members and representatives of First Nations communities was to identify the key reasons as to why overlap disputes are difficult to resolve. The other reasons were to develop an understanding of traditional DR mechanism for to overlaps; investigate current methods of resolution; identify key barriers to resolution; and investigate what role the federal government should play in assisting First Nations resolve overlaps.

Participants interviewed for this project ranged from hereditary chiefs, chief negotiators, negotiators, counselors, consultants and legal counsel from and for various First Nation in British Columbia. Participants were identified through internet searches of First Nations communities and in consultation with negotiators from TAG-NW. Participants from Indigenous communities in Northern B.C., Vancouver Island, Coastal B.C. and from the interior of B.C. were involved in this study. Additionally, a federal government representative was interviewed to develop an understanding of Canada's role in overlap consultations and the duty to consult. The key themes that emerged from these interviews are outlined in the following section.

7.1 Relationship-Building

Interviewees indicated that a key way that overlaps can be resolved is through relationship-building between First Nations communities. One participant described how historically, chiefs would gather in mid-winter to decide resource distribution and extraction for the following year. This included establishing protocols for entering one another's territory and ensuring resources would remain strong for years to come. Participants noted that relationship-building was a long term process spanning years beginning this process earlier in treaty negotiations would be beneficial. Multiple participants identified that consultation with neighbouring First Nations needs to start at the beginning of treaty negotiations rather than as one participant put it, "not fifteen years after they start." Through the process of relationship building interviewees indicated that the focus should not be on the overlap issue, rather the focus should be on how the communities can benefit from working together. As one participant phrased it, "the issue should be instead of resolving overlaps we should be talking about how we are going to manage it and benefit from the overlap area together."

Participants noted that, through relationship-building moving from adversarial relations to more harmonious ones would become possible. They indicated that, relationship-building would allow the current narrative on around overlaps would move from one of needing to resolve the overlap one about co-management of the area from which both sides would benefit. One participant described the process his community went through in resolving an overlap with a neighbouring community as an exercise in relationship-building with numerous meetings over many years prior to an agreement. According to this participant, there was no specific reason that an overlap agreement was reached other than continuing to engage with one another and working on building a relationship that would allow for a mutually beneficial agreement to emerge.

Several participants noted that the creation of the B.C. Treaty process has had a negative impact on their relationship with their neighbours. A participant described the negative impacts as “throwing a monkey wrench into our system”. Prior to the establishment of the B.C. Treaty process First Nations knew where their boundaries were and respected them. A couple of participants observed that the process has forced Indigenous communities to create boundaries on maps, which was not the case historically and that this “European process” is the reason that conflict between communities has increased.

Participants mentioned that, as the BCTC did not use strength-of-claim assessments in assessing First Nations SOI boundaries. This has allowed for some First Nations to claim territories outside of their traditional boundaries. One participant noted that, “Long before the creation of the treaty commission there was a mutual understanding of where people’s territories where. There was a clear understanding and I think it still exists today, so in practice you still require permission particularly if you are going to access resources you require permission from the nation whose territory you are in.” While participants noted that the process has had a negative impact on the relationship between neighbouring communities, they were complimentary of the efforts put forward by the BCTC in attempting to assist in the resolution of overlaps.

7.2 Incentives

Several participants noted that a major barrier in resolving overlap disputes is a lack of incentive for communities. In referring to First Nations not involved in the B.C. Treaty process, one participants stated that, “maybe a nation seems to believe that there is not a lot at stake if they’re not in the process they don’t have a lot of fear in opposing treaties because right now they don’t have a lot at stake they’re not going to lose land.” According to participants, under the current process it is easier to avoid resolving the overlap than to resolve it. Unless a First Nation can be shown a reason to resolve the overlap they are unlikely to do so. Another participant held much the same view point indicating that, “there is no incentive to resolve overlaps under the current process...First Nations will only resolve overlaps if they are incentivized to do so. In our case economic incentives are why overlaps have been resolved.”

Participants further noted that First Nations with large traditional territories have less incentive to resolve their overlaps and negotiate modern treaties. These First Nations feel as though without resolution they have access to a larger portion of their traditional territories than they would under a treaty. Participants in many cases tied incentives to the role that the federal government could play in helping First Nations resolve overlaps. While every participant in the research study indicated that there is no incentive to resolve overlaps for those who are not in the treaty process, the method of proposed incentive varied from participant to participant.

All participants identified the key role that the federal government could play in helping resolve overlap dispute amongst First Nations is by providing incentives tied to successful resolutions. One participant suggested that, “what Canada might do to assist, I’ve been mulling that over since talking and one real thing that can be done is with finances – not just more money for another process but as incentive to treaty making to get it done. Offer loan forgiveness as

progress/agreements are reached... For non-treaty nations with overlap issues, perhaps a different form of cash incentive or other accommodation methodology could be considered.”

Another participant proposed that overlap disputes could be resolved by allowing for a larger amount of Treaty Settlement Land (TSL) to become available, as an incentive for resolving the overlap in question. Tied to this idea was that the federal and provincial governments should make land available for potential TSL in overlap areas as a form of incentive to bring First Nations to the table. The participant who brought this idea to the table provided an example using his community: “in my territory we have a slight overlap with another First Nation if it was clearly shown that those lands are in fact on the table for a potential land package there’s a reason and a cause to actually reaching a mutual understanding with their neighbors. But those lands were not identified for any potential land package and land settlement there would be no urgency for the Nations to resolve it.”

An alternative incentive advanced by another participant had to do with shared-governance over the overlap area. Even though the overlap First Nation may not be involved in their own treaty negotiations, allowing for shared-governance in the overlap area would let that First Nation to have a say in the application of decisions made in regards to land use within that area.

7.3 Education through Community Engagement

In addition to identifying providing incentives as a role for the federal government to play, participants in the study identified education as another area that the federal government should be involved. Participants indicated that Canada through TAG-NW should become more involved in providing education to both communities who are participating in the treaty process and those that are not. Several of interviewees felt that there was a misunderstanding in the neighbouring communities about the potential impacts of a treaty on their community. Additionally, participants pointed to a lack of knowledge inside their own community¹³ about the impact the treaty will have. One participant framed the issue as: “I think that for those outside of the process, we need to show them and demonstrate why there is a need to resolve, not always say it’s up to you guys go resolve it and never explain why.”

Another key aspect of further education on treaties, concerns the difference between rights¹⁴ and title¹⁵. As one participant phrased it, it is really important to, “distinguish between title and

¹³ In this instance the community in question was actively participating in negotiations of a modern day treaty.

¹⁴ “Aboriginal rights refer to practices, traditions and customs that distinguish the unique culture of each First Nation and were practiced prior to European contact. These are rights that some Aboriginal peoples of Canada hold as a result of their ancestors' longstanding use and occupancy of the land. The rights of certain peoples to hunt, trap and fish on ancestral lands are examples of Aboriginal rights. Aboriginal rights vary from group to group depending on the customs, practices and traditions that have formed part of their distinctive cultures. Aboriginal rights are protected under s.35 of the *Constitution Act, 1982*” (INAC, 2010b).

¹⁵ Aboriginal Title was defined in the 1997 the Supreme Court of Canada decision in the *Delgamuukw* case, “Aboriginal title is a property right to the land itself - not just the right to hunt, fish and gather. Aboriginal title is a communal right; an individual cannot hold Aboriginal title. Aboriginal title to the land is based on an Aboriginal

rights and as it relates to the overlap... In the context of title you could still address it as it relates to exercising rights because those will continue irrespective of a treaty being negotiated". One participant noted that First Nations not involved in the treaty process are arguing on the basis of aboriginal title when the real underlying interest has to do with aboriginal rights and the ability to exercise those rights.

7.4 Political Will

Participants identified the need for sufficient political will as a key ingredient in resolving overlaps. Participants indicated that there is a need for political will to exist both internally within their communities and externally within governments. Interviewees noted that, if there is a lack of political will from within the community, then it is unlikely the overlap will be resolved. According to participants, leadership on all sides needs to be motivated to resolve overlap issues. When political will exists on all sides, the overlap issue becomes easier to resolve as there is motivation to resolve it. Participants indicated that, when political will is lacking, there is little motivation to resolve the overlap and it is likely to linger as an issue.

7.5 Potential of Tribunals

While all participants agree that there is a need for new ways to resolve overlap disputes, they were also unanimous in their hesitation to create a tribunal to rule on overlap disputes. One participant stated in reference to tribunals that, "I think that would be your last resort, I think what you want to say is still live under the principle it's up to [First Nations to resolve it amongst themselves] but by the way here's a tool we want you guys to look at... I think a tribunal should come only as your very last resort but under the current structure we don't give them any tools." Participants further expressed that they could only support tribunals if their membership was to be composed in a specific way. Participants stated that for a Tribunal to be effective and have legitimacy within Indigenous communities the groups involved in the dispute would have to have a direct say in its composition. Several participants expressed concerns that membership in the tribunal from First Nations outside of the area in dispute would be a cause for concern, as they may not have an in-depth understanding of cultural requirements of the communities involved in the overlap dispute.

Other participants expressed that they could only support the use of a tribunal if it involved broader participation from community members and was not limited to just elders and Chiefs. Participants felt that for a Tribunal to be successful there would need to be a way to involve the larger community. Most participants indicated that, if a tribunal was structured properly then they would be willing to consider it as a method of resolving overlap disputes, but it would not be their preferred method.

group's traditional use and occupancy of an area. Proof of Aboriginal title requires an examination of an Aboriginal group's traditional use and occupation of an area and is site and fact specific" (INAC, 2010c).

7.6 Summary of Interview Findings

The interviews revealed important information on how First Nations have traditionally resolved overlaps, how overlaps are currently resolved, the barriers that exist to resolving overlaps and the potential role the federal government should play. Through a thematic analysis of the interviews several themes emerged with implications for resolving overlaps. Relationship building and education through community engagement emerged as two key way Indigenous methods of DR can be integrated into processes for overlap resolution. Moreover, a lack of incentives to resolve overlaps particularly for First Nations not involved in the treaty process was identified as a key barrier.

While a lack of incentives was identified as a key barrier to the resolution of overlap disputes, it was also identified as a key role that the federal government could play. In addition, participants identified education on the treaty process and its impacts as an additional role for government. Although there has been uptake for the potential of tribunals in other jurisdictions, concerns were expressed by participants in supporting tribunals in the context of the B.C. treaty process.

8.0 Discussion: Findings, Themes and Strategic Implications

This section seeks to review the findings from the literature review, jurisdictional scan and interviews to identify commonalities and differences that arose between the three methods employed for this research study. The first part of this section will summarize the findings. The second section provides a synopsis of the common themes arising from the findings. The third section examines the strategic implications of the findings.

8.1 Summary of Findings

The literature review provided a base line understanding of the key principles of Indigenous laws and DR mechanisms including examples of the applicability of these methods. It demonstrated that the key tenets of Indigenous laws are based on the law being performative, dynamic and constantly evolving based on the everyday experiences of Indigenous communities; this is to say that the law is lived and not a formal process. As laws are constantly evolving they are kept orally and passed down through the generations, additionally laws should be administered community members who are known and respected (Manley-Casimir, 2012, p. 236-237). Many of these same tenets are found in IDR processes. The literature review revealed that IDR processes are centered on a holistic approach intended to maintain harmony between the offender, victim and greater community. When IDR mechanisms are invoked by communities the focus is on, “traditional teachings, respect, relationships, interconnectedness, spirituality, prayers, storytelling, saving face, recounting facts, and emotions” (Osi, 2008, p. 194). The rest of the literature review examined what role elders, story-telling and the greater community play in Indigenous law and IDR processes.

The jurisdictional scan provided insights into how other countries are handling the resolution of outstanding land claims and the resolution of overlaps between Indigenous communities. The Australian context revealed that due to the limited amount of land available to be titled, Indigenous groups do not see a reason to resolve overlaps as one community’s gain is seen as another community’s loss (Burnside, 2012, p. 2). Further, the current mediation structure in place has not been successful and disputes that have proceeded to litigation under the Native Title Act. The current process causes major delays with disputes taking years even decades to resolve. While the current system in Australia has not been effective, there have been proposals for change centered on an Indigenous led and tailored tribunal or panel that would have authority to resolve disputes.

In the context of Nicaragua the jurisdictional scan discovered that processes with limited involvement from Indigenous groups or, applying a top-down approach, lack legitimacy within Indigenous communities. The imposition of a resolution to an overlap is unlikely to resolve the underlying conflicts between Indigenous groups (Larson, 2010, p. 1148). A common theme emerging from the Australian and Nicaraguan contexts was that, while both countries subscribe to the tenet that Indigenous communities should resolve disputes amongst themselves, little in the way of support is offered by the governments to promote relationship building.

The interviews offered additional insights into the challenges that are faced by First Nations in B.C. attempting to resolve overlaps. Interview participants provided insights into traditional and current methods of resolving overlaps while indicating what they believe the role of the federal government should be. Findings from the interviews mirrored the data collected from the literature review and jurisdictional scan. For example, interviewees also felt that the approach to overlap resolution should be flexible to meet the specific needs of the communities involved. Interviewees additionally expressed the need for further education about the treaty process and the impacts on rights and title that arises out of a modern day treaty. While a number of themes aligned, interview participants placed greater emphasis on political will, while de-emphasizing the role that elders should play in the resolution process, as compared to the findings of the literature review and jurisdictional scan.

8.2 Themes Across Methods

When considered together, the findings from the methods of inquiry present several key themes. The themes presented across the literature review, jurisdictional scan and interviews include the need for flexible approaches, incentives to bring the disputing parties to the table, the need for greater community involvement and what the role of elders should be. What follows considers each in turn.

8.3 Flexible Approaches: Communities should shape dispute resolution processes

Across all lines of evidence what became clear is that, whatever the mechanism applied to resolve overlap disputes between Indigenous communities it must be developed and led by the Indigenous groups involved in the dispute. The findings support the need for flexible approaches in resolving overlaps. The Eyford Report came to a similar conclusion, recommending that the federal government implement innovative resolutions created by Indigenous communities even if those resolutions went outside of the treaty mandate of the government (Eyford, 2015, p. 69). Both Australia and Nicaragua have processes established to resolve overlap disputes, but those processes are government-led with little Indigenous input. To date these processes have had limited success in resolving overlaps, with Indigenous communities challenging the legitimacy of the resolution imposed upon them. Proposals focused on improving the process for resolving overlaps have stressed the need for flexibility such as the ILL examined by Dickson (2011).

When interview participants discussed what they viewed as possible mechanisms for resolving overlaps, all participants made it clear that the process needs to have significant involvement from First Nations. There was little interest in having an established province-wide tribunal, as participants believed that it was necessary to have the process shaped directly by groups involved. Without having the First Nations directly involved in shaping the dispute resolution process, there could be a lack of cultural sensitivity. This sentiment was supported by the literature review. The literature review revealed that while Indigenous laws and DR mechanisms had broad similarities between First Nations communities, each community had its own specific cultural variations which need to be addressed if processes are to be successful. By

engaging First Nations involved in the dispute to shape the process, relationship-building can occur at the outset of the process and continue throughout.

This does not mean that the process has to be solely based on Indigenous laws and DR mechanisms, though several interview participants stated that they would like any agreement they reach with a neighbour to be legally binding. The participants indicated this was the case as they did not want to face legal challenges to their treaty at a later date. In this sense a combination of an Indigenous-led method that produces a legally binding agreement could address the concerns of most parties.

8.4 Incentives: First Nations communities need to have a reason to resolve overlaps

A major issue in resolving overlap disputes between Indigenous communities from the jurisdictional scan and interviews was the lack of incentive to resolve overlaps. This is not a new issue and a key finding of both the Eyford Report and Multilateral Engagement Report. The Eyford Report found that since there is no legal obligation on Indigenous groups to discuss another group's proposed treaty, there is little incentive to meet and discuss the overlap and competing claims to the territory (Eyford, 2015, p. 67). This sentiment was echoed in the Multilateral Engagement Report which found that governments should consider mechanisms that allow for incentives to be provided to Indigenous groups who engage in overlap discussions (Government of Canada, Government of British Columbia and the First Nations Summit, 2016, p. 16).

Interview participants also identified a lack of incentive for Indigenous groups not participating in the treaty process as a key barrier. Participants indicated that the lack of certainty around the territory in dispute benefits non treaty groups as they can continue with the status quo, rather than having their rights potentially impacted. A key reason why First Nations prefer uncertainty to resolution when it comes to overlaps is the "first-past-the-post" connotation treaties have linked to them. The Multilateral Engagement report found that Indigenous groups not involved in the treaty process feel as though Indigenous communities which complete treaties secure benefits and rights in overlapping areas at the expense of overlaps groups (Government of Canada, Government of British Columbia and the First Nations Summit, 2016, p. 16). This was echoed both in interviews and the jurisdictional scan. Interviewees noted that this is especially the case if the overlapping group in question has a particularly large traditional territory; by maintaining uncertainty in the overlap area their rights to that territory are not affected. While a treaty does contain non-derogation provisions, which provide assurances that "that nothing in a treaty will affect the section 35(1) rights of groups who are not parties to the agreement" (Eyford, 2015, p. 66) there is still uneasiness about what the potential impacts may be to the rights of overlap group if that treaty is completed.

The potential impact of a treaty on the overlapping group's rights has also been a key factor in the reluctance to resolve overlaps Australia and Nicaragua. In both jurisdictions there is a belief that treaties create winners and losers in relation to the overlap area (Finley-Brook and Offen, 2009, p. 356). The belief that there will be winners and losers also indicates that overlap groups

are afraid of losing access to limited resources. The current uncertainty is a way of ensuring the resource remain available to both groups rather than solely to the group that negotiates a treaty.

8.5 Increasing Community Engagement: Reaching beyond the leadership

Another common theme that emerged is the need for more community involvement in resolving overlaps. Community involvement is a key feature of both Indigenous laws and DR mechanisms. When disputes arise in Indigenous communities the whole community plays a role in resolving it, since maintaining community relations is essential. In this regard the larger community can be another source of information in overlap disputes and can provide a perspective that may have not been explored by leaders of communities. IDR mechanisms place an emphasis on obtaining group consensus and ensuring that harmony is contained within the larger community (Ginty, 2008, p. 149). Greater community involvement was additionally identified in the interview process.

Participants identified that the larger community and not just leaders have a role to play. This was especially so when participants spoke about the use of a potential tribunal: they strongly believed this should involve more than just Chief and Council of the communities involved. This would grant greater legitimacy to the process, as there would be a higher level of community buy in and therefore greater validity to any resolution achieved.

The lack of legitimacy to overlap resolutions was raised in the jurisdictional scan. In the case of Nicaragua the imposition of a resolution to an overlap lacked legitimacy with the communities in question, and failed to resolve the dispute. As there was no community involvement in coming to the resolution, the community saw the agreement as being invalid since these top-down approaches do not address the need for relationship-building to take place between the communities involved in the dispute. By involving the community, the likelihood situations such as this would be reduced and agreements would have support of the broader community.

As a part of community engagement, those interviewed saw education on the impacts of treaties as critical for removing potential misunderstandings. Participants identified the lack of understanding around what a treaty is and does, as one of the major barriers to the effective resolution of overlap disputes. This lack of understanding is an issue both internally to the Indigenous community negotiating a treaty and externally to those not participating in the treaty process. As mentioned previously, in relation to an overlap area there is a misunderstanding as it relates to the impact on the rights and title of one Indigenous group over another. Education on the difference between rights and title and the implications for the overlap area would assist in reducing tensions. Additionally, engaging the communities involved in the disputed matter would further relationship-building since potential misconceptions on the impacts of treaties and overlaps would be reduced.

8.6 Role of Elders: How involved should elders be in the resolution process?

The importance of involving elders in the DR process was emphasized in the findings from the literature review and jurisdictional scan. In Indigenous laws and DR processes elders have a key role to play, as they are respected members of the community with a wealth of knowledge. Elders promote traditional values in resolving disputes and in the context of overlaps can provide insights into traditional methods of resolution. Involving Elders in the resolution process allows them to share relevant legal principles and expertise on the dispute while ensuring a holistic approach is taken (Manely-Casimir, 2012, p. 242-243). In certain communities a council of Elders would be used to resolve disputes (Grose, 1995, p. 334) ensuring that harmony was maintained within the community.

In examining current and proposed resolutions to overlaps in Australia and Nicaragua, the importance of elders in the process was clear. Vivian (2009) in her work on proposed methods of resolving overlaps in Australia strongly emphasizes on the role that elders could play. Elders could potentially have the role of mediators between two disputing Indigenous communities, or be members of arbitration panels that would issue binding rulings on the overlap area. Their wealth of traditional knowledge would play a central role in resolving the overlap through traditional means. Additionally elders would be able to promote traditional methods of relationship building between communities which might further long-term improvement in relations and might reduce conflict. In Nicaragua the lack of involvement of elders in the resolution process defined by Law 445 led to decisions that were not followed by communities. By involving elders in making decisions on overlaps the outcome has a better chance of having legitimacy of the implicated communities.

8.7 Strategic Implications and Revised Analytic Framework

The findings above illustrate the strategic implication for TAG-NW as it seeks to assist First Nations in resolving overlaps and thereby removing a key barrier to the conclusion of treaties and other forms of self-government agreements. Figure 2 provides a visual summary and presents the options and recommendations presented in Section 9.

The client should examine how to foster relationship building between First Nations. The findings indicate that long-term relationship building between First Nations is one possible avenue that could have positive effects in resolving overlaps. Strategies should consider how to engage with First Nations prior to any decisions being made that has an adverse effect on the overlap groups occurs. TAG-NW should seek to understand what roles it can play in supporting First Nations improve relationships between themselves and what approaches could be effective. Considerations will need to be given to the resource requirements and costs of bringing First Nations to the table to discuss overlaps. Additional consideration should be granted to how distinctions between rights and title can be better communicated to First Nations both inside and outside the treaty process.

The findings outlined above confirm one of the key tenets of how overlaps are currently resolved; overlaps should be resolved between First Nations. Although this was reinforced, the

findings indicated that additional tools should be developed to better assist First Nations. In considering these finding strategies need to consider the level of involvement of First Nations in developing new approaches and what aspects of Indigenous laws and DR mechanisms they would like to see incorporated into new approaches for resolving overlaps. New approaches will need to address the need for flexibility in overlap resolution to ensure that the requirements of communities are met. Considerations additionally need to be given to the mandate restrictions of the organization and whether those mandates can be adjusted.

Finally, the findings indicated that unless First Nations have a reason to resolve overlaps they are unlikely to do so, which supports the observations of the Multilateral Engagement Report. The findings suggest that First Nations outside of the treaty process need to be incentivized to resolve their overlaps, as the current system does not provide them with a reason to do so. Considerations should be given to the type of incentives that should be made available to First Nations. Prior to determining forms of incentives, thought should be given to on how to engage with and which stakeholder should be engaged, and what role each stakeholder will play. Additionally, consultation with First Nations should occur to determine what method of incentive would motivate them to resolve their overlap. The findings suggest that there needs to be approaches developed to allow First Nations to see overlap resolution as a win-win situation and not as one benefiting while the other loses. All stakeholders need to be invested in the outcome of the resolution and the distribution of resource requirement between stakeholders will need to be given weight.

Revised Analytic Framework

Current State

Challenges

- Lack of incentive to resolve overlaps
- Lack of scrutiny for Statement of Intent Areas
- First-past-the-post mentality
- Concerns surrounding the impact of a treaty on the overlap area

Stakeholders

- Government of Canada and implicated departments
- Government of British Columbia and implicated departments
- British Columbia Treaty Commission
- Individual First Nations
- First Nation Summit

Role of Stakeholders

- Government of Canada has a Duty to Consult with First Nations
- Government of B.C. has its own Duty to Consult with First Nations
- First Nations have agreed to resolve overlaps amongst themselves under the B.C. Treaty Process

Key Findings

- ✚ Approaches that consider how to promote relationship-building between First Nations communities could help in the resolution of overlaps.
- ✚ Under the current structure First Nations not involved in the treaty process have little to no incentive to resolve their overlaps.
- ✚ Engaging with the larger community could provide for new methods of overlap resolution while also granting greater legitimacy to resolution that are reached.
- ✚ Approaches to resolving overlaps need to be flexible to meet the needs of the communities involved in the dispute.

Strategic Options (see Section 9)

Future State

Desired Outcome

- Improved relationships between First Nations
- Improved methods for overlap resolution that meet the needs of First Nations
- Resolution of overlaps
- Removal of barriers to completion of modern treaties
- Legitimacy for any resolution reached

Figure 2: Revised Analytic Framework

9.0 Options and Recommendations

This section presents four options for TAG-NW to take under consideration as a way to move forward in regards to the role the federal government plays in assisting First Nations resolve overlaps. While these options are presented separately, they can work jointly as well. These options are based on the themes derived from the literature review, jurisdictional scan and interviews. The options are as follows:

1. Begin the consultation process at the outset of negotiations.
2. Adhere to the principle that First Nations will resolve overlap disputes between themselves; the resolution needs to be an Indigenous led process.
3. In conjunction with British Columbia and the British Columbia Treaty Commission, develop and implement an incentive structure for overlap resolution.
4. Increase funding available for community engagement activities that focus on the education of what a treaty is and does, both within communities participating in treaty and those outside of treaty.

Following the description of the proposed options, they will be evaluated based on the criteria of costs, impact on workload, effectiveness and prospects of implementation. Once the options have been evaluated a recommendation will be provided.

9.1 Option 1: *Begin Consultation at the Outset of Negotiations*

This option is based on a key theme, relationship-building, prevalent through the methods of inquiry. The Government of Canada is required to consult with First Nations when they contemplate an action that may adversely impact the rights of that First Nation under the *Duty to Consult* policy. However, consultation in relation to a treaty begins when a Land and Cash Offer is being contemplated during the AiP stage of negotiations. The Land and Cash Offers usually occur after many years of negotiations. This option would alter the timeframe for the commencement of consultations from the contemplation of a Land and Cash Offer to the outset of negotiations. By sending consultation letters to overlap groups at the outset of negotiations, relationship-building begins from a neutral starting point rather than when decisions on potential Treaty Settlement Lands¹⁶ have been made. By beginning consultations at the outset, overlap groups are aware that negotiations are occurring and that there may be an eventual Land Offer that could have impacts on them and their asserted rights and title.

This option increases the time frame available to First Nations to come to an amicable resolution on the overlap area. Furthermore, it allows the federal government the ability to place more pressure on First Nations to resolve overlap disputes by directly tying the Land and Cash offer to visible progress on the resolution of overlaps. The aim of this option is to allow

¹⁶ Although Agreement-in-Principles are not legally binding, by selecting Treaty Settlement Land prior to conducting consultations it creates an adversarial atmosphere in the consultation process.

time for the relationship between overlap groups to develop without decision having been made in regards to land selection. It further allows the underlying interest to be addressed before contemplating a legalistic approach as occurs when SOC assessments are used in determining claims to an overlap area. As was clear through the methods of inquiry, the resolution of overlaps is a time-consuming process, requiring numerous meetings to address the underlying issues at play.

9.2 Option 2: Presume First Nations will resolve overlaps amongst themselves

The B.C. Claims Task Force listed a number of recommendations that should be followed by the three parties (B.C, Canada and the First Nations Summit). Recommendation 8 of the BCCTF sets out that First Nations will resolve overlaps between themselves. Canada and B.C. have adhered to this principle since then. This option recommends that Canada continue to adhere to this principle, while providing reasonably requested support for the First Nations involved in the dispute. This recommendation arises out of the need for any resolution reached on an overlap to be done so through an Indigenous-led process¹⁷ to garner community support and legitimacy. Additionally, this option seeks to address the need for flexible approaches to overlap resolution. This option leaves the door open for government involvement if the First Nations request it but the main role of government in this option should be to provide requested support such as:

- Funding for mediation services;
- Templates of co-management agreements;
- Funding for leadership meetings on the issue of overlaps; and
- Flexibility in acknowledging agreements reached even if they are outside of current mandates.¹⁸

Under this option TAG-NW would need to work in conjunction with the BCTC and the province of B.C. to develop templates for co-management agreements that would be provided to First Nations as a guide for a potential method of resolving the overlap. The template would not be prescriptive and would need to be flexible to have the ability to adjust to the needs of the First Nations engaged in resolving their overlap. The template could possibly contain a step-by-step guide on how to achieve a co-management agreement and the different areas that could be covered under co-management. This option seeks to move the dispute away from a legal perspective to an interest-based one, where First Nations can come to agreements that benefit both sides. While a template could be provided if requested, TAG-NW would also need to examine areas that might require adjustments to current mandates so that agreements between First Nations can be recognized.

¹⁷ The use of “process” throughout the description of this option refers to the selected mechanism the parties choose to employ in resolving their overlaps.

¹⁸ This recommendation builds on one of the recommendations of the Eyford Report (2015, p. 68).

This option is intended to respect Indigenous laws and provide flexibility to First Nations in the way they resolve overlaps and not to provide a prescriptive approach.

To assist First Nations in the resolution of overlaps without taking over the process, there is a need to have flexible funding available to First Nations to engage with one another. While funding is available for both mediation services and engagement between communities, it has strict requirements that dictate how monies can and cannot be spent. This option recommends that these funding restrictions be loosened and funding be provided in a flexible manner to meet the needs of the chosen process. Such flexibility recognizes that different First Nations have different customs, cultural practices and laws in place that need to be acknowledged and respected throughout the process. Having the process be led by the First Nations with the overlaps is a key requirement of this option. This option may be most effective when combined with the other options explored in this section.

9.3 Option 3: Develop an Incentive Structure

This option would see the Government of Canada work with the Government of British Columbia, the First Nations Summit and the B.C. Treaty Commission to develop an incentive structure directly linked to progress in resolving overlaps. A major theme prevalent through the various lines of research concerns the lack of incentives to resolve overlaps particularly for First Nations not involved in the treaty process. While this option would work best if done with the other parties, the option could be effective with incentives solely provided by the Government of Canada. The form the incentive structure takes can vary widely based on the nature of the overlap dispute and the needs and preferences of the parties involved. Under this option there would need to be an increased use in Strength of Claim (SOC) assessments. The use of SOC assessments would be directly tied to the type of incentives that would be available to the First Nations communities with overlaps. If a First Nation has a high SOC to rights and title in the overlap area, the incentives provided for resolving the overlap would be greater. Conversely, if the SOC found a low claim to rights and title in the overlap area, the incentives provided for resolving the overlap would be less.

Prior to implementing this option the parties would have to come to a common understanding of what types of incentives would be provided for each level of claim to an overlap area. Incentives would be directly tied to progress made on resolving an overlap with firm timelines and reporting requirements in place. Incentives could take the form of:

- *Economic opportunities:* Providing additional economic opportunities to First Nations that reach agreements on overlaps would help incentivize those not in the treaty process¹⁹ to come to the table and discuss the overlap. Potential economic opportunities could be along the lines of additional access to forestry tenures,²⁰ additional access to commercial fisheries opportunities, funding for the development

¹⁹ This approach is not solely for non-treaty First Nations; it is equally applicable for First Nations involved in the treaty process.

²⁰ This would require the involvement of the province.

economic business opportunities, etc. While this is just a few of the potential economic opportunities that could be offered as an incentive for resolving overlaps, there are many different avenues incentives could take based on the needs and preferences of the parties involved.

- *Loan forgiveness:* Using loan forgiveness as an incentive for resolving overlaps would be applicable to those First Nations directly involved in treaty negotiations or previously involved in treaty negotiations. As First Nations take on loans to negotiate treaties, allowing for a mechanism to reduce their loan burden would provide a potential incentive to resolve overlaps. Under this scenario the amount of loan forgiveness would be tied to the progress made on resolving overlaps with pre-determined amounts linked to specific achievements.
- *Meaningful co-management of the area:* What meaningful co-management means will need to be determined by the First Nations with overlapping territory, since meaningful co-management will mean different things to different First Nations. Generally speaking additional governance opportunities within the overlap area over resources would be a starting point. This may require the government to go outside its current mandates to recognize the agreement reached by First Nations. This incentive is meant to move the parties from focusing on legal arguments to focusing on interests.
- *Additional Treaty Settlement Land:* This incentive would see additional TSL made available to First Nations who have resolved their overlaps. The amount of additional TSL made available would be contingent on the type of resolution reached as well as the number of neighboring communities agreements have been reached with.²¹ This incentive would require the direct involvement of the provincial government.

Involvement of the provincial government is key to making sure an incentive structure achieves its full potential. While the potential incentives listed above are possibilities, they are by no means an exhaustive list. The proper incentive structure is one that meets the needs of all three parties involved in negotiations and has the potential to take many shapes.

9.4 Option 4: Increase Funds Available for Community Engagement

This option would increase community engagement projects. Participants identified that there is a misunderstanding of treaties in First Nations communities and the impact they have on rights and title. This option seeks to provide additional funding to First Nations to conduct community engagement projects focused on what a treaty is and what a treaty does, with special emphasis on the impacts treaties have on overlap areas. Funding for community engagement projects could come from the Treaty Related Measures (TRM) program. Community engagement processes are funded through the TRM program, so this option seeks

²¹ As most First Nations in B.C. have more than one neighboring First Nation with overlapping territory the more resolutions that are reached the more TSL is made available.

to either increase funding available for community engagement programs through the TRM program or through other funding sources.

This proposal also seeks to make funding more flexible by increasing the types of fundable activities while reducing reporting requirements. TAG-NW's role in this option would be to provide educational materials and work in collaboration with First Nations to develop and present community workshops on treaties. This option would seek to develop a mechanism to conduct community engagement sessions with First Nations not currently in the treaty process but have an overlap that requires resolution. The focus of this option is to involve the greater community in understanding what impacts a treaty will have on their overlap area, potential resolution mechanisms available, and determine how the larger community would like to see the overlap resolved. Additionally, this option seeks to supplement potential ways to build relationships both internally in communities attempting to resolve overlaps and between communities engaged in disputes.

9.5 Comparing Options

Each option is listed below and evaluated against the criteria of: costs, impact on workload, effectiveness²² and prospect of implementation. The evaluation of the options is not definitive as there are certain unknowns such as mandate restrictions; rather the evaluation is based on the researcher's knowledge of the client organization and current approaches and tools available for resolving overlaps. Table 1 below summarizes the evaluation criteria applied to each of the aforementioned options.

9.5.1 - Option 1- Begin Consultations at outset of Negotiations

Option 1 ranks low on costs, as there would be very few costs associated with commencing consultations at an earlier stage of the negotiations. Potential costs incurred would be due to travel to attend consultation meetings. This option would increase the workload of TAG-NW staff, as additional consultation letters would need to be drafted and approved prior to being sent out to First Nations with overlapping territories. Additionally, there would be a potential increase in workload if First Nations chose to engage in consultation meetings as a result of these letters. The potential effectiveness of this option is low to medium; because while it will help promote relationship building, it does not incentivize participants to come to a resolution on the overlap area.

9.5.2 - Option 2 - Presume that First Nations will resolve overlaps between themselves

Option 2 ranks low to medium on costs, as it would continue the status quo unless First Nations requested the involvement of the government in resolving overlaps. The costs would increase based on the type of support requested. This is the same when it comes to impacts on workload, based on the type of support requested the workload for TAG-NW staff could increase substantially. If new templates for co-management were to be implemented the workload would increase to medium, as it would likely be a time-intensive process. Additional

²² Effectiveness is based on how likely the option is to lead to a resolution of the overlap dispute.

increases to workload and costs could occur if it becomes necessary to seek new mandates to implement aspects of this option. The main impacts of this option on workload would be communicating effectively with First Nations the possible mechanisms the government is willing to support in assisting First Nations resolve overlaps. As with the other two criteria the effectiveness of this option will depend on First Nation uptake in the mechanisms described above (mediation funding, seek new mandates, funding for meetings, developing a template, etc.).

9.5.3 – Option 3 - Develop an Incentive Structure

Option 3 has the potential to incur high costs to TAG-NW due to the associated financial implications of creating an incentive structure to promote the resolution of overlaps. In addition, the initial increase in workload for TAG-NW will be significant due to the need to negotiate an incentive structure with B.C., the BCTC and the First Nations Summit. Once the structure is in place there will be a need to monitor and evaluate the progress made by First Nations choosing to work on resolving their overlaps. Costs and increase in workload are major factors to consider under this option. This option has the highest likelihood of success, as a lack of incentive was identified as a major barrier to resolve overlaps. By incentivizing the process it is more likely that First Nations will engage with one another to resolve their overlap disputes, as they will both benefit from doing so.

9.5.4 – Option 4 - Increase Funds Available for Community Engagement

If Option 4 were to be implemented there would be low to medium costs associated, based on the mechanism for delivery. An increase in educational tools and community engagement funding could flow through the TRM program. The workload for TAG-NW staff would increase due to the need to develop these educational tools, the workload increase would not be permanent as once the tools are developed they can be used with minimal change to address the specific situation. Additionally the workload for staff would increase due to the need to present these tools to First Nations upon their request. This may lead to additional travel costs for TAG-NW. The aim of this tool is to gain further community involvement in the resolution of overlaps and help develop a better understanding of the impacts of treaty within the community. Used as a solitary method of addressing overlaps, the effectiveness of this option is low to medium based on the receptiveness of First Nations to engage.

Addressing Overlapping Territorial Disputes Amongst First Nations

Evaluating the four options against the criteria of costs, impact on workloads, effectiveness, Likelihood of implementation by TAG-NW				
Option	Costs	Impact on Workload	Effectiveness	Prospect of Implementation
1 – Begin Consultations at outset of Negotiations	Low Minimal additional costs are associated with this option.	Medium A medium impact on workload is expected due to the need to draft additional consultation letters/attend consultation meetings.	Low-Medium Address a key theme identified throughout the methods of inquiry.	Medium-High There would be little impact on TAG-NW if they were to begin the consultation process earlier.
2 – Adhere to the Principle First Nations Will resolve overlaps between themselves	Low-Medium Costs associated with this option vary based on the level of involvement/support First Nations would request from TAG-NW.	Low-Medium Workload will vary based on the level of involvement/support First Nation would request from TAG-NW.	Low-Medium Effectiveness varies based on the uptake of First Nations to allow the Federal Government to assist in the resolution of overlaps.	Medium-High TAG-NW currently adheres to the principle in this option; additional support to FN has a chance of being implemented.
3 – Develop an Incentive Structure	High Costs associated with implementing an incentive structure would be high as most incentives have a financial component attached.	Medium-High The increase in workload for TAG-NW would be high initially as there would need to be the development of an incentive structure including development of new mandates and negotiations with other parties to determine their potential participation in the incentive structure.	High High likelihood of effectiveness, lack of incentives to resolve overlap has been identified as a key barrier.	Low It is unlikely this option would be implemented in the near future and would require significant work to sort out potential complexities.
4 – Increase Community Engagement	Medium Costs associated with this option would be medium as, funding for community Engagement would need to be increased from current levels be provided to First Nation both inside and outside the treaty process.	Medium TAG-NW staff workload would increase during the development of educational tools and when asked to participate in community engagement activities.	Low-Medium Effectiveness varies based on the uptake of First Nations to use potential tools and engage the broader community.	Medium This option has the potential to be implemented based on how receptive FN's are and availability of funding

Table 1. Evaluation of Options.

9.6 Recommendation

Throughout this paper relationship-building and having flexible Indigenous led processes have been identified as two potential ways that overlaps can be resolved more efficiently. In this regard and based on the analysis of the options garnered from the research and the likelihood of implementation by TAG-NW, a combination of Option 1: Beginning consultations at the outset of negotiations and Option 2²³: Presume that First Nations will resolve overlaps between themselves while offering requested support, would begin the process of assisting First Nations in resolving their overlaps. These two options combined address a number of the key barriers to resolving overlaps identified through the literature review, jurisdictional scan and interviews.

By implementing Option 1, beginning consultation at the outset of negotiations, allows First Nations to engage one another prior to any meaningful decisions being taken. Engaging with overlap First Nations early on reduces the potential for adversarial discussions to take place. By moving the time frame for consultations to the outset of negotiations, relationship-building between neighboring communities would have a neutral starting point. Further, this option allows the government to tie a Land Cash offer to progress being made on the issue of overlaps. Option 1 allows TAG-NW to communicate with First Nations the tools that will become available under Option 2 in the early consultation letters. Additionally Option 2, Presume that First Nations will resolve overlaps between themselves while offering requested support, addresses the need for the resolution of overlaps to come from an Indigenous-led process. This does not mean that the Federal government through TAG-NW has no role to play in the resolution of overlaps. Under Option 2 the role of the Federal government is to offer support through mechanisms such as mediation funding,²⁴ templates of potential co-management agreements,²⁵ additional funding for community engagement²⁶ and offer support for agreements reached by First Nations even if it requires seeking a new mandate to implement the agreement. This option will allow TAG-NW to become more receptive to various methods of resolution chosen by First Nations and it will allow First Nations to come to creative flexible solutions to overlaps.

While a combination of Option 1 and 2 are recommended Option 3 would have the highest chances of success in leading to overlaps being resolved. However, its drawbacks stem from high degree of complexity and costs associated with implementing it and the need for participation from B.C. Implementing Option 3 would likely require significant mandate changes for both the federal and provincial governments. While it would address the major barrier to resolving overlaps, it is unlikely that implementation would occur in the near term if at all.

²³ Parts of these recommendations build on both the Eyford Report and Multilateral Engagement report.

²⁴ While mediation funding is currently available through the federal government, there are number of restrictions in place that make the process less appealing.

²⁵ Templates would need to be developed by TAG-NW staff as a starting point and not a rigid process that needs to be followed.

²⁶ This can be through the current Treaty Related Measures program or through a different funding mechanism.

9.7 Implementation Plan

Table 2 below sets out a two-phase implementation plan for the recommend options. Some ambiguity arises since, if with changes in mandates, the timelines must be extended. The first phase focuses on Option 1, beginning consultations earlier in the negotiation process, while, Phase 2 focuses on implementing supporting tools to assist First Nations in resolving overlaps between themselves. The implementation of Options 1 and 2 overlap in this timeframe.

Discussion <ul style="list-style-type: none"> Discuss findings of report Consult with stakeholders to gain a better understanding of their needs and requirements Determine which option to move forward with 	February 2018 3-4 months 1 month
*The rest of the implementation plan is based on moving forward with a combination of option 1 and 2	
Consultation <ul style="list-style-type: none"> Inform employees of recommend option Gather employee input on recommended option and concerns about implementation Refine recommend option based on input and concerns of employees 	2-3 months
Phase 1	
<ul style="list-style-type: none"> Meet with negotiating teams to determine opportunities to begin early consultation with First Nations actively involved in negotiations Work with other stakeholders (Province of B.C.) to determine their level of participation in the consultation process Draft either unilateral or bi-lateral early consultation letters to overlap first Nations Letters would contain updates on treaty negotiations, what stage the negotiations are at, potential dates for significant milestones and would encourage First Nations to engage with one another to resolve overlaps. 	1 month Ongoing 1-2 months Ongoing
Phase 2	
*Phase 2 assumes several options for assisting First Nations to resolve overlaps will be explored	
<ul style="list-style-type: none"> Begin work to determine level of support that TAG-NW is willing to offer to First Nations seeking to resolve overlaps Work with appropriate stakeholders (B.C. and BCTC) to develop template co-management agreements that can be shared with First Nations If necessary conduct a review of current mandates to determine what flexibility is available to recognize agreements reached between First Nations <ul style="list-style-type: none"> If new mandates are necessary to have more flexibility, begin work on requesting new mandates Explore opportunities to increase funding and flexibility for both mediation services and funding for meetings between First Nations <ul style="list-style-type: none"> Seek mandate adjustments if necessary to increase available funding and ease reporting requirements Once the scope of support to be offered to First Nations is established, determine the best way to communicate new methods of support 	2 months 5-6 months 9-12 months 3-4 months 9-12 months 2-3 months
Phase 3	
<ul style="list-style-type: none"> Communicate with First Nations on new methods to support the resolution of overlaps Communicating these methods via consultation letters or some other mechanism 	Ongoing

Table 2 – Implementation Plan

10.0 Concluding Remarks

This project has endeavored to determine how overlaps disputes between First Nations can be resolved in a more effective manner and in doing so remove a key barrier to the conclusion of modern treaties and self-government agreements. In attempting to address this question the project sought to explore how Indigenous laws and DR mechanisms could be applied to the resolution of overlaps, how overlaps have been traditionally and are currently resolved, and what role the federal government through TAG-NW should play in assisting First Nations resolve overlaps. The major themes that arose throughout the research were that:

- Relationship building between First Nations is key if overlaps are to be resolved
- The process chosen to resolve overlaps needs to be flexible led by the Indigenous communities with the overlap.
- Currently there is no incentive for First Nations to resolve overlaps, especially for those not involved in the treaty process
- Community engagement and involvement of the larger community can assist in the resolution of overlaps.

The literature review examined key tenets of traditional Indigenous laws and DR mechanisms. It revealed the importance of involving the community in resolving disputes, the importance of repairing relationships between the offender, perpetrator and community, and the involvement of elders. The jurisdictional scan showed that while Australia and Nicaragua have established process for resolving overlap disputes, these processes have not been efficient and need greater involvement of the Indigenous communities involved to structure the process to their needs. Moreover, the jurisdictional scan displayed that the lack of incentive to resolve overlaps is a major barrier to resolutions being reached. The interviews pointed to the need for relationship building, community engagement, incentives, and an Indigenous led process as being potential methods for greater success in resolving overlaps.

The options presented arose out of the key themes arising from the literature review, jurisdictional scan and interviews. The four options presented were: (1) Begin consultations at the outset of negotiations; (2) Presume First Nations will resolve overlaps amongst themselves while offering the necessary support; (3) Create an incentive structure for resolving overlaps, and (4) Increase options for community engagement to occur.

A combination of Options 1 and 2 was recommended as a way TAG-NW could assist First Nations in resolving overlaps. A combination of these two options increases the likelihood of success and implementation by the organization.

What has become clear throughout this project is that whatever the process for resolving overlaps is it must be an Indigenous-led process, shaped by the communities involved in the dispute. The government should provide support and attempt to accommodate resolutions reached by First Nations even if it requires changes to their mandates.

11.0 References

- Armitage, A. (1995;2014;). *Comparing the policy of Aboriginal assimilation: Australia, Canada, and New Zealand*. Vancouver: UBC Press.
- Australian Institute of Aboriginal and Torres Strait Islander Studies (2017). *Eddie Koiki Mabo*. Retrieved from: <https://aiatsis.gov.au/explore/articles/eddie-koiki-mabo>
- Behrendt, J. (2007). Changes to native title since Mabo. *Indigenous Law Bulletin*, 6(26), 13-14.
- Borrows, J. (2016). Heroes, tricksters, monsters, and caretakers: Indigenous law and legal education. *McGill Law Journal*, 61(4), 820
- Borrows, J. (2006a). *Indigenous legal traditions in canada*. S.l.: Law Commission of Canada.
- Borrows, J., 1963. (2002). *Recovering canada: The resurgence of indigenous law*. Toronto: University of Toronto Press.
- Borrows, J., & Law Commission of Canada. (2006). *Justice within: Indigenous legal traditions : Discussion paper*. Ottawa: Law Commission of Canada.
- Bell, C. (2004). Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada. In C. Bell & D. Kahane. (Eds.), *Intercultural dispute resolution in aboriginal contexts*. Vancouver: UBC Press. (241-280). Vancouver: UBC Press.
- British Columbia Claims Task Force. (1991). *The Report of the British Columbia Claims Task Force*. Retrieved from http://www.fns.bc.ca/pdf/BC_Claims_Task_Force_Report_1991.pdf
- British Columbia Treaty Commission. (2016). *Negotiations, Treaties, Reconciliation, UN Declaration*. Vancouver, BC: BCTC.
- British Columbia Treaty Commission. (2015). *Negotiations update*. Retrieved from <http://www.bctreaty.ca/negotiation-update>
- British Columbia Treaty Commission. (2009a). *Stage 1: Criteria*. Retrieved from <http://www.bctreaty.ca/policies/stage-1-criteria>
- British Columbia Treaty Commission. (2009b). *Stage 2: Preparing for Negotiations and Assessing Readiness*. Retrieved from <http://www.bctreaty.ca/policies/stage-2-preparing-negotiations-and-assessing-readiness>

Addressing Overlapping Territorial Disputes Amongst First Nations

- British Columbia Treaty Commission. (2009c). *Stage 3: Framework Agreement Negotiations*. Retrieved from <http://www.bctreaty.ca/policies/framework-agreement-negotiations>
- British Columbia Treaty Commission. (2009d). *Stage 4: Agreement in Principle Negotiations*. Retrieved from <http://www.bctreaty.ca/policies/agreement-principle-negotiations>
- British Columbia Treaty Commission. (2009e). *Six Stage Treaty Process: Policies and Procedures*. Retrieved from <http://www.bctreaty.net/files/sixstages.php>
- British Columbia Treaty Commission. (2009f). *Policies and Procedures: Monitoring by the Commission*. Retrieved from <http://www.bctreaty.ca/policies/monitoring-commission-0>
- Burnside, S. (2012). Outcomes for all? overlapping claims and intra-Indigenous conflict under the native title act. *Australian Indigenous Law Review*, 16(1), 2-14.
- Calma, T. (2009). Native title in Australia : Good intentions, a failing framework? *Reform*, (93), 6-9.
- Clarke, V., & Braun, V. (2017). Thematic analysis. *The Journal of Positive Psychology*, 12(3), 297-298. doi:10.1080/17439760.2016.126261.
- Conadeti (2014) *Informe Ejecutivo Conadeti y Cid*. CONADETI: Nicaragua.
- The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 [Constitution Act, 1982].
- Corbett, T. (2006). The national native title tribunal's facade of Indigenous advocacy [paper in: Governance. Eddy, Elizabeth (ed).]. *Social Alternatives*, 25(2), 37-42.
- Cullen, R. (1990). *Mabo v Queensland*. *University of Western Australia Law Review*, 20(1), 190.
- Dacks, G. (2002). British columbia after the delgamuukw decision: Land claims and other processes. *Canadian Public Policy / Analyse De Politiques*, 28(2), 239-255. doi:10.2307/3552327.
- Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 [Delgamuukw].
- Department of Indigenous and Northern Affairs Canada. (2010b). *Aboriginal Rights* <https://www.aadnc-aandc.gc.ca/eng/1100100028605/1100100028606>
- Department of Indigenous and Northern Affairs Canada (2010c). *Aboriginal Title* <https://www.aadnc-aandc.gc.ca/eng/1100100028608/1100100028609>

Addressing Overlapping Territorial Disputes Amongst First Nations

- Department of Indigenous and Northern Affairs Canada (2015). *Acts, Agreements, Treaties and Land Claims*. Retrieved from <https://www.aadnc-aandc.gc.ca/eng/1100100028568/1100100028572>
- Department of Indigenous and Northern Affairs Canada (2013). *Government of Canada and the duty to consult*. Retrieved from <https://www.aadnc-aandc.gc.ca/eng/1331832510888/1331832636303>
- Department of Indigenous and Northern Affairs Canada (2010). *Treaty Guide to Treaty No.8 (1899)*. Retrieved from <http://www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807>
- Department of Indigenous and Northern Affairs Canada (2010a). *Why is Canada Negotiating Treaties in BC?* Retrieved from <https://www.aadnc-aandc.gc.ca/eng/1100100022836/1100100022837>
- Department of Indigenous and Northern Affairs Canada (2013a). *Treaty Texts – Douglas Treaties*. Retrieved from <http://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053>
- Devlin, C. & Thielmann, T. (2009). Overlapping Claims: In Search of ‘A Solid Constitutional Base’. In Canadian Bar Association (Eds.), *Overlapping Territorial Claims: Models for Dispute Resolution, Proceedings of the 2009 National Aboriginal Law Conference*, 12 -13 June 2009, Victoria. Canadian Bar Association: Ottawa.
- Dickson, J. (2011). *Addressing disputes between first nations: An exploration of the indigenous legal lodge*.
- Dyck, L. E. 1., St. Germain, G., Canada. Parliament. Senate. Standing Committee on Aboriginal Peoples, & Canadian Electronic Library (Firm). (2012). *A commitment worth preserving: Reviving the british columbia treaty process*. Ottawa, Ont.: Canada Senate.
- Erasmus, G., Dussault, R., & Canada. Royal Commission on Aboriginal Peoples. (1996). *Report of the royal commission on aboriginal peoples*. Ottawa: The Commission.
- Eyford, D. (2015). Renewing the Federal Comprehensive Land Claims Policy. Retrieved from: <http://www.aadnc-aandc.gc.ca/eng/1405693409911/1405693617207>
- Finley-Brook, M., & Offen, K. (2009). Bounding the commons: Land demarcation in northeastern Nicaragua. *Bulletin of Latin American Research*, 28(3), 343-363. doi:10.1111/j.1470-9856.2009.00302.x.
- French, R. (2003). A moment of change : Personal reflections on the national native title tribunal 1994-98. *Melbourne University Law Review*, 27(2), 488-522.

- Gill, D., & Ulrich, L. (2016). The tricksters speak: Klooscap and wesakechak, indigenous law, and the new brunswick land use negotiation. *McGill Law Journal*, 61(4), 979-1014. doi:10.7202/1038494ar.
- Genon, R., & Hille, C. (2013). Conflict resolution practices of arctic aboriginal peoples. *Conflict Resolution Quarterly*, 30(3), 347-367. doi:10.1002/crq.21069.
- Ghostkeeper, E. (2004). *Weche Teachings: Aboriginal Wisdom and Dispute Resolution*. In C. Bell & D. Kahane. (Eds.), *Intercultural dispute resolution in aboriginal contexts*. Vancouver: UBC Press. (161-175). Vancouver: UBC Press.
- Gonzalez, M. (2016). The unmaking of Self-Determination: Twenty-Five Years of regional autonomy in Nicaragua. *Bulletin of Latin American Research*, 35(3), 306-321. doi:10.1111/blar.12487
- Ginty, R. (2008). Indigenous peace-making versus the liberal peace. *Cooperation and Conflict*, 43(2), 139-163. doi:10.1177/0010836708089080.
- Government of British Columbia. *Building Relationship with First Nations Respecting Rights and Doing Good Business*. 1-24. Retrieved from: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/building_relationships_with_first_nations_english.pdf
- Government of Canada (2011). *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. 1-67. Retrieved from: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf
- Government of Canada (1996). *Highlights from the Royal commission on aboriginal peoples*. Retrieved from: <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>
- Government of Canada, Government of British Columbia and the First Nations Summit (2016). *Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia*. Retrieved from: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/bc_multiprop_1465303885525_eng.pdf
- Government of Nicaragua (2003). *Law 445: Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maiz*. Retrieved from: <http://www.calpi-nicaragua.org/wp-content/uploads/2014/12/Law-445.Chpt-1-to-5.pdf>
- Grassy Narrows First Nation v. Ontario* (Natural Resources) [2014] S.C.R 447 [Grassy Narrows].

Grose, P. R. (1995). An indigenous imperative : The rationale for the recognition of aboriginal dispute resolution mechanisms. *Mediation Quarterly*, 12(4), 327.

Guest, G., MacQueen, K., & Namey, E. (2012). Introduction to applied thematic analysis. (pp. 3). Thousand Oaks: SAGE Publications, Inc. doi:10.4135/9781483384436.n1

Haida Nation v. British Columbia (Minister of Forests) [2004] S.C.R 511 [Haida Nation].

Indian Act, RSC, 1985, c I-5

King, K. (2001). Indigenous dispute resolution. *Legaldate*, 13(2), 1-4.

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations) [2017] S.C.R. 54 [Ktunaxa Nation].

Larsen, S. C. (2006). The future's past: Politics of time and territory among dakelh first nations in british columbia. *Geografiska Annaler. Series B, Human Geography*, 88(3), 311-321. doi:10.1111/j.1468-0459.2006.00224.x.

Larson, A. M. (2010). Making the 'rules of the game': Constituting territory and authority in Nicaragua's Indigenous communities. *Land use Policy*, 27(4), 1143-1152. doi:10.1016/j.landusepol.2010.03.004.

Larson, A. M., Soto, F., Mairena, D., Moreno, E., Mairena, E., & Mendoza-Lewis, J. (2016). The challenge of 'Territory': Weaving the social fabric of Indigenous communities in Nicaragua's northern Caribbean autonomous region. *Bulletin of Latin American Research*, 35(3), 322-337. doi:10.1111/blar.12365.

Larson, A. M., & Lewis-Mendoza, J. (2012). Decentralisation and devolution in Nicaragua's North Atlantic autonomous region: Natural resources and Indigenous peoples' rights. *International Journal of the Commons*, 6(2), 179-199. doi:10.18352/ijc.315.

LeBaron M. (2004). Learning New Dances: Finding Effective Ways to Address Intercultural Disputes. . In C. Bell & D. Kahane. (Eds.), *Intercultural dispute resolution in aboriginal contexts*. Vancouver: UBC Press. (11-28). Vancouver: UBC Press.

McCue, D. (2014). Tsilhqot'in land ruling was a game changer for B.C. *CBC News*. Retrieved from: <http://www.cbc.ca/news/indigenous/tsilhqot-in-land-ruling-was-a-game-changer-for-b-c-1.2875262>

Napoleon, V. (2007). *Indigenous laws: Some issues, considerations and experiences: An opinion paper prepared for the centre for indigenous environmental resources (CIER)*. S.l.: Centre for Indigenous Environmental Resources.

Addressing Overlapping Territorial Disputes Amongst First Nations

- Napoleon, V., National Centre for First Nations Governance, & Canadian Electronic Library (Firm). (2007). *Thinking about indigenous legal orders*. West Vancouver, B.C: National Centre for First Nations Governance.
- Napoleon, V., 1956, University of Victoria (B.C.), & University of Victoria (B.C.). Faculty of Law. (2009). *Ayook: Gitksan legal order, law, and legal theory*.
- Nettheim, G. (1993). Judicial revolution or cautious correction?: Mabo v Queensland. *University of New South Wales Law Journal*, the, 16(1), 1-26.
- Osi, Carlo (2008), Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution. *Cardozo Journal of Conflict Resolution*, Vol. 10, p. 163, Fall 2008. Available at SSRN: <https://ssrn.com/abstract=1473449>
- Point, S. (2014). In *The BC Treaty Commission Annual Report*. Vancouver, BC: BCTC.
- Ritter, D. L., 1971, & Ebooks Corporation. (2009). *Contesting native title: From controversy to consensus in the struggle over indigenous land rights*. Crows Nest, N.S.W: Allen & Unwin.
- Speagle, D. (1989). Mabo v. Queensland. *Melbourne University Law Review*, 17(1), 168.
- Sterritt, N. J. (1998;1999;). *Tribal boundaries in the nass watershed*. Vancouver: UBC Press.
- The First Nation Summit (2018) *First Nation Summit*. Retrieved from: <http://fns.bc.ca/>
- Thom, B. (2009). The paradox of boundaries in coast salish territories. *Cultural Geographies*, 16(2), 179-205. doi:10.1177/1474474008101516
- Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 257 [Tsilhqot'in].
- Turner, C., & Fondahl, G. (2015). "Overlapping claims" to territory confronting treaty-making in british columbia: Causes and implications: Overlapping territorial "claims". *The Canadian Geographer / Le Géographe Canadien*, 59(4), 474-488. doi:10.1111/cag.12205.
- Trudeau, Justin (2017) Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter. Retrieved from: <http://www.pm.gc.ca/eng/minister-crown-indigenous-relations-and-northern-affairs-mandate-letter>
- Vivian, A. (2009). Conflict management in the native title system : A proposal for an indigenous dispute resolution tribunal. *Reform*, (93), 33-36.

Addressing Overlapping Territorial Disputes Amongst First Nations

Wainwright, J., & Bryan, J. (2009). Cartography, territory, property: Postcolonial reflections on indigenous counter-mapping in nicaragua and belize. *Cultural Geographies*, 16(2), 153-178. doi:10.1177/1474474008101515.

Webber, J. (2004). Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights. In C. Bell & D. Kahane. (Eds.), *Intercultural dispute resolution in aboriginal contexts*. Vancouver: UBC Press. (149-159). Vancouver: UBC Press.

Yazzie R. (2004). Navajo Peacemaking and Intercultural Dispute Resolution. In C. Bell & D. Kahane. (Eds.), *Intercultural dispute resolution in aboriginal contexts*. Vancouver: UBC Press. (107-116). Vancouver: UBC Press.