Université de Montréal

Addressing Overlapping Land Claim Conflicts: An (Alter)Native Approach

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Résumé

Le présent mémoire est consacré à l'étude des chevauchements entre revendications territoriales autochtones. On s'y interroge sur l'origine et l'évolution de ces chevauchements ainsi que sur les mécanismes qui pourraient être employés pour trouver des solutions acceptables pour toutes les parties. Notre étude retrace d'abord l'évolution du critère d'exclusivité élaboré par les politiques et décisions judiciaires canadiennes relativement à l'octroi du titre autochtone, concluant que ce critère d'exclusivité est devenu un enjeu déterminant dans l'élaboration d'une solution relative aux chevauchements entre revendications territoriales. En observant la manière dont les différents paliers de gouvernement ont échoué dans leurs tentatives de solutionner les enjeux de chevauchement, nous constatons que les traditions juridiques autochtones doivent être intégrées à la résolution des conflits et à l'interprétation du critère d'exclusivité. Ceci exige de percevoir l'institution juridique de la résolution de conflits selon une certaine vision du droit. Nous utilisons ici celle de Lon Fuller, qui présente une approche permettant de réconcilier plusieurs traditions juridiques. Notre étude nous conduit à proposer le système du *Indigenous Legal Lodge* comme mécanisme de résolution de conflit permettant aux autochtones de faire appel à leurs traditions juridiques dans la résolution des chevauchements, permettant ainsi de réconcilier ces traditions diverses.

Mots-clés: autochtones, revendication territoriale, chevauchement, exclusivité, théorie du droit, Fuller, non-dérogation, traditions juridiques autochtones, mécanisme de résolution de conflit, Indigenous Legal Lodge.

Abstract

This thesis is dedicated to the study of overlapping aboriginal land claims. We question the origin and evolution of these overlaps and study the mechanisms which could be used in order to determine a solution acceptable to all parties. Our study first discusses the evolution of the exclusivity criterion developed in Canadian policy and case law relating to the granting of an aboriginal title, concluding that the criterion of exclusivity has become a defining issue in the development of a solution to overlaps between land claims. By observing the failures of the various levels of government in their attempts to develop solutions to overlapping claims, we find that Aboriginal legal traditions must be integrated into conflict resolution and be used when interpreting the exclusivity criterion. This requires us to perceive conflict resolution, as a legal institution, according to a certain understanding of the law. We use Lon Fuller's vision, who presents an approach for reconciling various legal traditions. Our study brings us to propose the Indigenous Legal Lodge as a conflict resolution mechanism enabling Aboriginal groups to call upon their own legal traditions in resolving overlaps and to reconcile their differing traditions.

Keywords: Aboriginal, land claims, overlap, exclusivity, legal theory, Fuller, non-derogation, Aboriginal legal traditions, conflict resolution mechanisms, Indigenous Legal Lodge.

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Introduction

Several challenges exist in the modern land claim resolution process. Whether these land claims are addressed within negotiation processes or before Canadian courts, there will surely be hurdles along the way. These challenges become increasingly complex in a landscape which includes overlapping land claims. Such a situation occurs when an Aboriginal group's land claim overlaps with that of one or more Aboriginal groups' land claim or confirmed territory. Such claims have proven to be very problematic, whether they are raised during treaty negotiations or, as often happens, after a treaty is concluded. In many cases, they culminate in litigation before the courts.

Until now, the federal, provincial and territorial governments have adopted a *laissez-faire* attitude towards the resolution of these overlapping claims: "First Nations resolve issues related to overlapping traditional territories among themselves"[1] is the principle which has been repeated time and time again by all levels of government with regard to the resolution of overlapping claims. Yet, this seemingly simple requirement is not without complex consequences raising questions of colonization, Aboriginal epistemology, morality, power struggles and other practical considerations.

The purpose of this thesis is to address some of these implications, while suggesting a new intellectual approach to the issue of resolving Aboriginal land claims. As will be demonstrated, the issue of overlapping claims has deeply rooted ties in colonization and the imposition of Western values on Aboriginal societies. The overlapping claim

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[1]British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force* (1991).

phenomenon is therefore "more than a 'problem' looking for a 'solution', more than a mechanical issue of 'resolving' contested boundary locations"[2], it is indicative of a competing understanding, between Aboriginal peoples and Western society, of the legal and social traditions by which we should consider issues relating to territory.

This paper will explore the issue of overlapping claims and argue that, when approaching the resolution of such overlapping claims, it is crucial that the analysis employed be integrated into a larger framework which includes an Aboriginal[3] legal perspective. In order to be successful, our approach must reframe overlapping claims as more than a physical issue of conciliating boundaries. Resolving overlapping claims must be perceived as the possibility to articulate, harmonize and communicate about Aboriginal territorial relations[4]. It must also be accepted that not all territorial relations will fit into the requirement of mutual exclusivity and therefore, that some answers will not meet the current Supreme Court requirements. We propose that these requirements be reformed and that we to look further than the current state of normative law in order to achieve a viable solution.

We argue that one of the important pieces in solving this puzzle rests on the recognition of Aboriginal conflict mechanisms to address overlapping claim situations. In fact,

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[2]RG Christopher Turner, *"Overlap": Causes and Implications of Contested Indigenous Claims to Territory in the Context of the BC Treaty Process* (Master of Arts in Natural Resources and Environmental Studies (Geography), University of Northern British Columbia, 2011) [unpublished] at 1.

[3]In this section, the term "First Nation" will be used as the documentation and principles exposed are specific to the First Nations of British Columbia and do not refer to other Aboriginal groups.

[4]Christopher Turner & Gail Fondahl, "'Overlapping claims' to territory confronting treaty making in British Columbia: Causes and implications" doi: 10.1111/cag.12205 The Canadian Geographer, online: <http://onlinelibrary.wiley.com/doi/10.1111/cag.12205/epdf> at 12. See also Brian Thom, "Reframing Indigenous Territories: Private Property, Human Rights and Overlapping Claims" (2014) 38:4 American Indian Culture and Research Journal 3.

conflict exists within Aboriginal groups in large part because of the destruction of their conflict management systems and law[5]. In order to constructively deal with conflict, we must therefore re-examine Aboriginal conflict management systems within a legal framework that would allow such flexibility.

Chapter 1 will address the legal, judicial and political evolution of Aboriginal land claims in Canada, including the notion of Western exclusivity and how its introduction into Aboriginal land claim scenarios has caused tremendous conflict among Aboriginal groups with competing land claims. From there, we will examine the approaches and solutions currently used in order to address overlapping claims and their failure to functionally provide any kind of long lasting solution.

Chapter 2 provides an overview of the intellectual framework we are proposing, based on Lon L. Fuller's legal theory of perceiving law as a means of facilitating human interaction. The theory underlying this thesis is that it is possible, in Canadian law, to develop a legal framework which is flexible enough to allow Aboriginal peoples to resort to their own legal orders and norms and apply them to the resolution of overlapping land claim conflicts[6]. This approach could also strengthen what Fuller would call the "inner morality" of the dispute resolution practices which are currently used in overlapping situations. By highlighting elements offering insight into the existing conflict resolution

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[5]Val Napoleon, *Thinking About Indigenous Legal Orders* (National Centre for First Nations Governance, 2007) at 12.

[6]Val Napoleon, *supra* note 5.This framework was first developed by Val Napoleon. I will borrow her ideas and transform them into my own, allowing as she has, my framework to "reflect the legal orders and laws of decentralized Indigenous peoples" and "allow for the diverse way that each society's culture is reflected in their legal orders and laws", at 19.

mechanisms used by Aboriginal peoples, this paper aims at demonstrating that the system presently used to address overlapping land claims would be enhanced if it took into account Aboriginal perspectives, concepts and legal traditions. Elements of Aboriginal law and dispute resolution mechanisms will thus be examined which could be considered in the case of overlapping claims. This exercise will give a voice to these legal traditions in ensuring that they can be used to interpret complex territorial situations.

Recognizing Aboriginal legal traditions from a vantage point of Aboriginal legal culture and not only Western legal culture is paramount in order to respect the internal morality of the very dispute resolution rules which will be used to solve overlapping claims. Simply put: "Aboriginal law cannot be considered from European-based legal principles"[7]. The same can be said for Aboriginal groups around the world. For instance, some indigenous groups in Bolivia have argued for the recognition of their own legal criteria when defining land and territory, indicating that they are "distinct from dominant national ones"[8].

Finally, we will offer examples of some approaches offering promises of theoretical and practical successes, such as Val Napoleon's Indigenous Legal Lodge framework.

As for positioning myself within this endeavour, it is important to note that I am not Aboriginal and cannot call upon my own Aboriginal knowledge and epistemology.

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[7]Mark D. Walters, "The Morality of Aboriginal Law" (2005) 31 Queen's LJ 470 at 481.
[8]Denise Y Arnold & Juan de Dios Yapita, "Strands of indigenism in the Bolivian Andes: Competing juridical claims for the ownership and management of indigenous heritage sites in an emerging context of legal pluralism." (2005) 4 Public Archaeology 141 at 144.

However, I share the following intellectual posture with a fellow researcher, R.G. Christopher Turner, who eloquently explains what it is many Western researchers are trying to attempt: "to engage with the intellectual space *between* indigenous and non-indigenous perspectives, to improve understanding, and to seek out ways to bridge epistemological divides"[9].

[9]R.G. Christopher Turner, *supra* note 2 at 5.

Chapter 1 - Treatment of Overlapping Land Claims in Canada: History, Policies and Issues

1. The Notion of Exclusivity and the Issue of Overlapping Claims

The purpose of the present chapter is to provide an overview of the impact of Canadian legislation and policy on the evolution of Aboriginal land issues in Canada. Aboriginal land claims and the issue of exclusivity offer a complex and historical past which must be considered in order to begin comprehending the issue in the present. Exclusivity, as it is understood today, is a Western concept which has been imposed on Aboriginal peoples; first introduced through the creation of reserves, reinforced by strict interpretation in judicial decisions and eventually officially implemented in governmental policies.

1.1 Introducing the Exclusivity Requirement - Establishment of Reserves

References to exclusivity in land ownership can be found in early Western philosophy, such as in the ideas of John Locke who claims that if a man works upon a parcel of land, he alone should profit from it:

> "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at

least where there is enough, and as good, left in common for others."[10]

This Western philosophy of exclusive land ownership is reflected, for instance, in the Royal Proclamation of 1763 which provided that "Indian territories" should be reserved to said Indians and that they should not be "molested or disturbed" in their possession of these lands. The Royal Proclamation was also intended to protect the lands belonging to Indians, prohibiting any person from purchasing lands reserved for Indians:

> "And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement (...)"[11]

The Royal Proclamation's purpose was to restore peace between Aboriginal groups and the British, by forbidding private transactions over land between British citizens and Aboriginal peoples. Author J.R. Miller explains that the expression "great Frauds and Abuses" refers to "a favourite trick of colonial land companies and frontier entrepreneurs who by dubious means obtained a deed from some member or members of an Indian community (...) and then claimed that the document was sufficient title to the lands"[12].

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[10]John Locke, *Second treatise of government*, Cathedral classics (London: Aziloth Books, 2013) at 35–36.Inspiration from: Christopher Campbell-Duruflé, "La nécessité de prendre en compte les chevauchements des droits autochtones lors de la conclusion de traités au Canada" (2012) 71 Revue du Barreau 3 at 7.See also :Janet Ajzenstat, *The Canadian founding: John Locke and parliament*, McGill-Queen's studies in the history of ideas 44 (Montreal: McGill-Queen's University Press, 2007).

[11]*Royal Proclamation, 1763, R.S.C., 1985, App. II, No. 1.*

[12]J R Miller, *Compact, contract, covenant: Aboriginal treaty-making in Canada* (Toronto: University of Toronto Press, 2009) at 69–70.

The Royal Proclamation became "the single most important document in the history of treaty-making in Canada"[13] and eventually led to the practice of signing treaties for the surrender of Indian title, in exchange for "the establishment of reserves, guarantees as to hunting and fishing rights, annuities and certain social and economic undertakings"[14]. For instance, the numbered treaties in Northern British Columbia, Alberta, Manitoba, Saskatchewan and Ontario[15] provided reserve areas established within the area surrendered by the Aboriginal peoples[16].

At Confederation, jurisdiction over "Indian"[17] lands, and thus, reserves, was granted to the Parliament of Canada according to section 91(24) of the *Constitution Act, 1867*[18]. This section devolved to that said Parliament exclusive legislative authority over all elements related to "Indians, and Lands reserved for the Indians". The federal government wasted no time in adopting the first *Indian Act*[19]in 1876 which, although amended many times since then, still continues to govern reserve lands and to provide

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[13]*Ibid* at 66.
[14]Richard H Bartlett, "Indian Reserves on the Prairies" (1985) 23:2 Alberta Law Review 243 at 243.
[15]*Ibid*. These treaties were signed in the later part of the 19th century : Treaty 1 (1871), Treaty 2 (1871), Treaty 3 (1873), Treaty 4 (1874), Treaty 5 (1875), Treaty 6 (1876), Treaty 7 (1877), Treaty 8 (1899), Treaty 10 (1906).
[16]*Ibid*. The author explains that the reserves in treaties 1, 2 5 and 7 were established near specified lakes and rivers. Under treaties 3, 4 6, 8 and 10, it was provided that the location for the reserves would be determined by officers of the government who should "confer with the several bands, and pay due respect to lands actually cultivated by them" (at 244).
[17]At its adoption, the term "Indian" in section 91(24) encompassed only First Nations. It was later interpreted as including the Inuit: *In The Matter of a Reference as To Whether The Term "Indians" in Head 24 of Section 91 of The British North America Act, 1867, Includes Eskimo Inhabitants of The Province of Quebec*, [1939] SCR 104, 1939 CanLII 22 (SCC). On April 17, 2014, the Federal Court of Appeal, in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101, confirmed the judgment of the Federal Court extending the term "Indian" under 91(24) to Métis individuals in Canada. This case is currently on appeal before the Supreme Court.
[18]*The Constitution Act,* 1867 (UK), 30 & 31 Victoria, c. 3.
[19]*An Act to amend and consolidate the laws respecting Indians,* S.C. 1876, c. 18.

"protection" for "Indians" (as defined by the *Indian Act*), now more commonly known as the First Nations' peoples in Canada.

The origins of the first Indian Act can be found in the United Province of Canada's *Gradual Civilization Act*[20]of 1857 and the Federal *Gradual Enfranchisement Act*[21]of 1869. The purpose of these statutes was to assimilate Indian people by enfranchisement. Enfranchisement was perceived by the government to be a privilege and there was a penalty of imprisonment was provided in the case where an Indian represented himself as enfranchised when he was not[22]. Enfranchisement was only open to Indian men, over the age of 21, who wrote English or French and who were "reasonably well educated, free of debt, and of good moral character as determined by a commission of non-Indian examiners"[23]. If an Indian abandoned his Indian status, he was gifted with up to 50 acres of land within the reserve, not as his personal property, but as a life estate which could be passed down to his children[24]. The Royal Commission on Aboriginal Peoples reports that the voluntary enfranchisement was a failure as only one Indian was enfranchised in the nineteen years between the adoption of the *Gradual Civilization Act* and the adoption of the *Indian Act* in 1876[25].

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[20]*An Act to encourage the gradual Civilization of the Indian Tribes in this Province and to amend the Laws respecting Indians,* S.C. 1857, c. 26.
[21]*An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria*, *Chapter 42*, S.C. 1869, c. 6.
[22]Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking back* (Ottawa: The Royal Commission on Aboriginal Peoples, 1996) at 271.
[23]*Ibid*.
[24]*Ibid*.
[25]*Ibid*.

In response to this failure, Parliament adopted the *Gradual Enfranchisement Act* in 1869 establishing the band council system which is still applicable in today's *Indian Act*. The purpose of establishing such a system was to undermine traditional Indian governments which were identified as "a key impediment to achieving (...) policy goals"[26]. The jurisdiction of the band council established by the *Gradual Enfranchisement Act* was restricted to the territory of a single band within a limited reserve. There were no provisions for "traditional groupings going beyond the individual band level. In fact, the goal of the measures was specifically to undermine nation-level governance systems and the broader nation-level associations of Indians more generally"[27]. As we will see further in Chapter 2, this man-made restriction has had a long-lasting impact on Aboriginal claims and the overlap between them.

The reserve system entails not only the separation of Aboriginals from non-Aboriginals, but also a division between Aboriginal groups themselves. This system has contributed to the introduction, within Aboriginal communities, of a territorially delineated, exclusivist understanding of political culture[28] which can be characterized as differing with the way in which Aboriginal groups had organized their societies prior to European arrival and Confederation:

> "Celle-ci [la conception exclusiviste] opère une rupture avec divers types de relations dynamiques et superposées qui existaient auparavant sur le territoire canadien: confédérations politiques autochtones, réseaux commerciaux entre Autochtones et colons, cycles migratoires saisonniers

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[26] *Ibid* at 275.
[27] *Ibid*.
[28] Campbell-Duruflé, *supra* note 10 at 5.

> en vue de la chasse, la pêche, la récolte ou le piégeage, alliances familiales entre communautés, mariages entre colons et Autochtones, etc."[29]

The exclusivist tendencies have transcended all three branches of government: as we have seen above, the legislative branch integrated the tendencies into their policies and legislation. Let us now examine how the judicial branch of government has approached the notion of exclusivity. The executive branch's attitude will be examined later on in section 1.3.

1.2 Reinforcing the Exclusivity Requirement - Determining Aboriginal Rights and Title

(a) Aboriginal Rights

The exclusivist tendencies outlined above have also been applied by the judiciary when determining cases in which land questions were involved. This thesis argues that these exclusivist tendencies first developed by representatives of the Crown and reiterated by Parliament have caused courts and future governments to approach land questions on a basis that it is not inclusive or representative of Aboriginal traditions and culture. As we will see, courts have determined that Aboriginal claimants must establish exclusive land possession in order to be recognized as Aboriginal title holders, therefore creating a competitive notion of land tenure, and fuelling the issue of overlapping claims.

However, before turning to Aboriginal title, it is important to consider the presence of exclusivist tendencies in the determination of Aboriginal rights as well. The importance of exclusivity and distinction with regard to Aboriginal rights was set out in the landmark

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[29] *Ibid* at 10.

case of *R v. Van der Peet*[30], which established that the proof of an Aboriginal right required that the practice being alleged be distinct from European practices for it to be held as integral to this culture:

> "To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
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> This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1)."[31]

Aboriginal rights can therefore only be established by comparing Aboriginal and non-Aboriginal societies against each other and determining what practices were distinctive to each society, essentially isolating Aboriginal groups by an artificial requirement established under a different legal epistemology than that of Aboriginal societies.

Although the requirements of the Van der Peet case were severely criticized by Aboriginals and non-Aboriginals alike for creating a caricature of Aboriginal societies,

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[30] *R v Van der Peet*, [1996] 2 SCR 507.
[31] *Ibid,* paras 55–56.

and eventually softened by Justice Bastarache in *R v. Sappier*[32], it is nonetheless important to note that the highest court in Canada believed this to be the way in which important elements of Aboriginal culture should be determined[33]. In *R v. Sappier,* the Court moved from the expression "integral to the distinctive culture" towards the larger expression "integral elements of the way of life of (...) aboriginal societies"[34]. The court did so in order to move away from an approach which, in practice, tended to stereotype Aboriginal practices. Justice Bastarache demonstrates his sensitivity to this issue in his decision:

> "The use of the word 'distinctive' as a qualifier is meant to incorporate an element of aboriginal specificity. However, 'distinctive' does not mean 'distinct', and the notion of aboriginality must not be reduced to 'racialized' stereotypes of Aboriginal peoples" (J. Borrows and L. I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?"(1997), 36 Alta. L. Rev. 9, at p. 36).
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> In post-hearing submissions to the Court of Appeal in the *Sappier and Polchies* case, the Crown admitted that gathering birch bark for the construction of canoes or hemlock for basket-making were practices likely integral to the distinctive Maliseet culture (para. 94). But it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people's culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes."[35]

The criteria required for demonstrating an Aboriginal right differ from the criteria for demonstrating Aboriginal title which will be addressed later. These Aboriginal rights can, and do, overlap with each other as do claims to Aboriginal title. However, one

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[32]*R v Sappier*, [2006] 2 SCR 686.
[33]Campbell-Duruflé, *supra* note 10 at 11.
[34]*R. v. Sappier*, *supra* note 32, para 40. See also Jean Leclair & Michel Morin, "Peuples autochtones et droit constitutionnel" in *JurisClasseur Quebec*, Droit constitutionnel (Montreal: LexisNexis Canada, 2011) Fascicule 15, para 40.
[35]*R. v. Sappier*, *supra* note 32, paras 45–46.

essential difference of interest with regard to overlapping claims is the fact that aboriginal rights provide protection for *activities* and do not confer rights to the territory itself. Consequently, where an aboriginal right is concerned, an Aboriginal group does not have to prove exclusivity over a territory, as more than one Aboriginal group can practice an activity on the same territory.

Nonetheless, the determination of these rights must be considered in the study of overlapping claims, as many Aboriginal groups can claim the same Aboriginal right on the same territory. Moreover, the recognition of some Aboriginal rights[36] are sometimes referred to as being defined in "site-specific terms" and "limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact"[37]. This "site-specific" determination could be problematic in the case of overlapping claims as the presence of a site-specific Aboriginal right could constitute an obstacle to the claim for Aboriginal title by another group. The site-specific right could in fact negate the claim to Aboriginal title since the right would render difficult, if not impossible, the proof of exclusivity by a third party on this specific site.

For instance, the Huron of Wendake and the Innu of Mashteuiatsh came head-to-head in a serious debate about hunting rights on the Laurentian Wildlife Reserve, ongoing since 2004. In 2011, the Huron-Wendat Nation mandated retired Justice John Gomery to undertake an inquiry into the situation, which he qualified as being "intolerable and

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[36] *R. v. Van der Peet*, *supra* note 30. Aboriginal rights can also be "free-standing" and not site-specific.
[37] *R v Côté*, [1996] 3 SCR 139, para 39.

dangerous"[38]. In 2012, the Government of Quebec finally decided to name retired Justice Louise Otis to act as mediator and finalize an agreement between both parties. A one-year agreement was signed in August of 2012 splitting the hunting territory between the two groups. However, in 2013 the new chief of Mashteuiatsh reneged on the agreement, stating that he did not feel compelled to uphold an agreement signed by the previous chief[39]. In 2015, the Huron-Wendat Nation issued a press release indicating their desire to continue mediation with the Innu of Mashteuiatsh in order to find a compromise similar to that of 2012[40].

The above example is one of many situations in which Aboriginal rights can coexist, and in some cases, conflict, because of a lack of resources or a history of disagreement over a territory. In this case, the method which was successful, even if only for a short period of time, was mediation between the two parties. Conflict resolution of overlapping Aboriginal rights can be addressed in the same way which will be discussed for Aboriginal title. Overlapping Aboriginal rights must therefore be considered in the discussion of overlapping claims, as the steps to their resolution must also be inscribed within a framework including Aboriginal perspective and epistemology.

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[38]Annie Morin, "Réserve des Laurentides: situation explosive entre Hurons et Innus", *Le Soleil* (2012), online: <http://www.lapresse.ca/le-soleil/actualites/politique/201201/30/01-4490928-reserve-des-laurentides-situation-explosive-entre-hurons-et-innus.php?utm_categorieinterne=trafficdrivers&utm_contenuinterne=cyberpresse_vous_suggere_4569781_article_POS3>.

[39]"Chasse dans la réserve faunique des Laurentides : le conflit entre Innus et Hurons-Wendats refait surface", *Radio-Canada* (2013), online: <http://ici.radio-canada.ca/regions/saguenay-lac/2013/10/01/002-chasse-parc-laurentides-innus-hurons-wendat.shtml#commenter>.

[40]Conseil de la Nation huronne-wendat, "Chasse coutumière à l'orignal 2015 dans la réserve faunique des Laurentides : La Nation huronne-wendat respecte ses obligations et propose la médiation", (2015), online: <http://www.newswire.ca/fr/story/1478599/chasse-coutumiere-a-l-orignal-2015-dans-la-reserve-faunique-des-laurentides-la-nation-huronne-wendat-respecte-ses-obligations-et-propose-la-mediation>.

(b) Aboriginal Title

(i) The Evolution of "Aboriginal Perspective"

The 1973 *Calder*[41] decision held for the first time that Aboriginal title was occupancy-based and therefore existed at the time of the *Royal Proclamation of 1763*, independently of colonial law:

> "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal and usufructuary right".[42]

This decision opened the door for groups to present claims of Aboriginal title before Courts and for the government to enter into a settlement process of these comprehensive land claims. As we will see, the occupation related to an Aboriginal title must be demonstrated as being to the exclusion of other Aboriginal groups, therefore reinforcing the notion of cultural exclusivity created by Western philosophy and implanted into Aboriginal societies.

One of the first cases to deal with a claim of Aboriginal title was *Hamlet of Baker Lake* v. *Minister of Indian Affairs*[43]. In this case, the Inuit of the Baker Lake area in the Northwest Territories were concerned with the activities of extractive companies and sought a declaration that the Baker Lake area was subject to an Inuit Aboriginal title to

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[41] *Calder v British Columbia (Attorney General)*, [1973] SCR 313.
[42] *Ibid* at 328, per Judson J.
[43] *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 (TD).

hunt and fish. Drawing on exclusivist notions of territory from past laws and policies, *Baker Lake* establishes the following requirements for proof of Aboriginal title:

> "1. That they [the plaintiffs, the Inuit] and their ancestors were members of an organized society.
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
> 3. That the occupation was to the exclusion of other organized societies.
> 4. That the occupation was an established fact at the time sovereignty was asserted by England."[44]
>
> [text added in original citation]

In the landmark case of *Delgamuukw* v. *British Columbia*[45], Chief Justice Lamer (as he then was) reformulated the *Baker Lake* test for proof of Aboriginal title as follows:

> "In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."[46]
>
> [emphasis added]

The criterion of interest to us is largely unchanged from the *Baker Lake* decision to the *Delgamuukw* decision: i.e. exclusive occupation of territory. The requirement of exclusivity is mirrored by the granting of an exclusive right to use and occupy the land covered by the Aboriginal title. This is why the Court stresses the importance of determining exclusivity of occupation, so as to not grant exclusive use and occupation rights on land which could have been occupied by others:

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[44] *Ibid* at 557–558.
[45] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.
[46] *Ibid,* para 143.

> "The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it."[47]

As we will see, Canada is in fact guilty of the absurdity evoked above, i.e. by resorting to the modern practice of non-derogation provisions when recognizing an Aboriginal title to the signatories of modern treaties or land settlements, it is in fact reneging on the exclusivity requirement which happens to be, according to the Court, the foundational criterion of proof of the existence of an Aboriginal title. We do not approve of the exclusivity principle. However, if the Court has made it a mandatory criterion, the Crown should not be allowed to ignore it when it suits its interests to do so[48]. More information on this practice is provided in Section 2 of Chapter 1.

The key element in the *Delgamuukw* case is the determination by Lamer C.J. that the establishment of exclusivity or non-exclusivity cannot be undertaken without considering the "aboriginal perspective", in addition to the common law perspective:

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[47] *Ibid,* para 155.

[48] See: Brian Thom, "Confusion sur les territoires autochtones au Canada" in Irène Bellier, ed, *Terres, Territoires, Ressources Politiques, pratiques et droits des peuples autochtones*, Collection Horizons Autochtones (Paris: L'Harmattan, 2014) 90. In some situations, the exclusivity requirement in the land claims process is used by the federal government in order to disqualify claims when they are faced with overlaps, claiming that these overlaps remove the exclusive aspect of a land claim. In other situations, the federal government accepts the land claim even though it is subject to overlaps, by including a non-derogation provision. The exclusivity requirement is therefore used as a malleable criterion when this is not what the Supreme Court teaches us in its judgments.

> "As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" (McNeil, Common Law Aboriginal Title, supra, at p. 204)."[49]
>
> [emphasis added]

Lamer C.J. uses the example of Aboriginal laws regarding trespass to demonstrate his determination that proof of exclusivity must take into account Aboriginal perspective:

> "Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, "[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control" (at p. 204).
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> A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission

[49] *Delgamuukw v. British Columbia*, *supra* note 45, para 156.

> were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective."[50]

Another interesting point made in *Delgamuukw* by Lamer C.J. was the determination that two or more Aboriginal groups could hold joint title if they demonstrated shared exclusivity over a territory[51]. Lamer C.J. bases this determination on the American case of *United States v. Santa Fe Pacific Railroad Co.*[52]

In this case, the United States, in its own right and as guardian of the Indians of the Walapai (Hualpai) Tribe, brought forward a suit asking the Court to stop the respondent, Santa Fe Pacific Railroad Co. from interfering with the possession and occupancy by the Indians of certain lands in North-western Arizona. Santa Fe Pacific Railroad Co. claimed that it had full title to the lands, by way of the *Act of July 27, 1866, 14 Stat. 292*. The government requested that Santa Fe's rights under the Act of 1866 be subject to the Walapai's right of occupancy. The Court determined that the Walapai had only relinquished their rights to a tribal claim for the lands located outside their reserve, when they requested the creation of the Walapai Indian Reservation in 1883, as this request and acceptance of reserve lands had amounted to a voluntary cession as provided under the Act of 1866. But no such cession applied to the lands located within the reservation. Speaking of the exclusivity of Walapai occupancy, the Court stated the following:

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[50] *Ibid,* paras 156–157.
[51] Chief Justice Lamer indicates that there may be cases in which "two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's". However, Lamer C.J. does not elaborate further on the concept of joint title, as the facts of the case did not justify it. He instead indicates that he will "leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands". That day has not yet come. On the possibility of joint title: see Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (2015) 48 University of British Columbia Law Review 821.
[52] *United States v Santa Fe Pacific Railroad Co*, [1941] 314 US 339.

> "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Indian title' which unless extinguished survived the railroad grant of 1866."[53]

Therefore, since the lands within the reservation were not extinguished, the Court essentially recognized title to both the Walapais and Santa Fe. Although this judgment did not oppose two Aboriginal groups, it is instructive as to the considerations to take into account when determining exclusivity and the practicalities of joint title.

Returning to *Delgamuukw*, it is unfortunate that Lamer C.J. did not elaborate further with regard to how a demonstration of shared exclusivity could be successful. We believe that the joint title would have to reflect the Aboriginal legal traditions of both groups involved. It is evident that Lamer C.J. drafted his judgment while considering the consequences on overlapping land claims. He emphasized the importance of considering overlapping land claims in relation to the requirement of exclusivity:

> "(...) many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitskan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an <u>exclusive</u> right to the use and occupation of land, i.e., to the <u>exclusion</u> of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.
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> Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not

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[53] *Ibid* at 345.

> necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in Sparrow, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed."[54]
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> [emphasis in original citation]

Another unfortunate element of Lamer C.J.'s ruling regarding Aboriginal perspective is that it was somewhat deconstructed by Chief Justice McLachlin's ruling in the case of *R. v. Marshall; R. v. Bernard*[55]. In this case, the Court was asked to determine if members of the Mi'kmaq people in Nova Scotia and New Brunswick could engage in commercial logging without authorization, by way of treaty rights or Aboriginal title[56]. When considering determination of Aboriginal title, the Chief Justice stated, as did Lamer C.J. in *Delgamuukw*, that "both aboriginal and European common law perspectives must be considered"[57]. However, it is in her manner of addressing the Aboriginal perspective that we respectfully find fault.

She elaborates on Aboriginal perspective by explaining that the perspective should be used to identify the aboriginal practice, but that it has no pertinence when time comes to translate that practice into a "modern legal right":

> "This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right

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[54] *Delgamuukw v. British Columbia*, *supra* note 45, paras 185–186.
[55] *R v Marshall; R v Bernard*, [2005] 2 SCR 220.
[56] *Ibid*. The claimants here explicitly refused to claim Aboriginal rights; only a claim of Aboriginal title was at stake.
[57] *Ibid,* para 223.

> at common law must be examined to determine whether a particular aboriginal practice fits it."[58]

McLachlin C.J. justifies her opinion as follows: "Thus, to insist that the pre-sovereignty practices correspond in some broad sense to the modern right claimed, is not to ignore the aboriginal perspective. The aboriginal perspective grounds the analysis and imbues its every step"[59]. However, Lamer C.J.'s decision in *Delgamuukw* provided that Aboriginal perspective could be found in Aboriginal law itself, without needing to refer to the common law[60]. McLachlin C.J. is of the opinion that the Aboriginal land practices must translate into exclusive occupation which could constitute title under common law: "[w]hile she stressed the importance of Aboriginal perspectives in evaluating Aboriginal practices, the Chief Justice did not explicitly consider Aboriginal law in her analysis"[61]. Lamer C.J.'s judgment on Aboriginal perspective went much further in its recognition of Aboriginal law than did the Chief Justice's: "as we have seen, for Lamer C.J. proof of *physical* occupation is only *one* way of establishing Aboriginal title; in addition, the requisite occupation can be proven through Aboriginal systems of law"[62].

As for proof of exclusivity, the Chief Justice explains that, in European-based systems, exclusivity is generally based on a right to control land and to exclude others from said land, and that it can be difficult to determine if this existed in Aboriginal societies[63]. Since groups may encounter difficulties proving their control, especially since "the

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[58] *Ibid*, para 243.
[59] *Ibid*, para 244.
[60] Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening" (2006) 69 Sask L Rev 281.
[61] *Ibid* at 298.
[62] *Ibid*.
[63] *R. v. Marshall; R. v. Bernard*, *supra* note 55, para 64.

people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion"[64], all that is required is "demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so"[65]. As author Kent McNeil aptly points out, the Chief Justice's opinion contrasts with Lamer C.J.'s opinion in *Delgamuukw* which argued that Aboriginal law could be used to prove exclusivity[66].

Respectfully, we do not agree with the method employed by the Chief Justice in her judgment of the *Marshall/Bernard* case[67]. In order to meet the requirements she outlined, Aboriginal rights would have to be shaped, broken down and defined into an idea which fits within "the legal realities that non-aboriginal legal principles and traditions represent"[68]. The stand-alone nature and independence of Aboriginal law was not fully considered by the Chief Justice. In his concurring judgment, Justice LeBel directed his thoughts on this lacking element:

> "The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so,

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[64] *Ibid*.
[65] *Ibid*, para 65.
[66] Kent McNeil, *supra* note 60 at 299.
[67] See: Nigel Bankes, "Marshall and Bernard: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120, at page 124: "By ignoring or downplaying the significance of indigenous legal systems, the judgment undermines the fundamental goal of reconciliation and calls into question the conceptual underpinnings of aboriginal title in Canadian law. By emphasizing the facts of possession rather than the recognition of a pre-existing system of laws, the judgment decontextualizes and trivializes the concept of aboriginal title. Finally, the judgment raises the spectre, hinted at in the separate concurring opinion of Justice LeBel, that the Court has revived a version of *terra nullius* doctrine".
[68] Mark D. Walters, *supra* note 7 at 502.

> there should be some way to bring to the decision-making process those laws that arise from the standards of the indigenous people before the court" (Borrows, at p. 173). In the Nova Scotia Court of Appeal, Cromwell J.A. tried to reflect on and develop the notion of occupation in order to reconcile aboriginal and common law perspectives on ownership: R. v. Marshall (2003), 218 N.S.R. (2d) 78, 2003 NSCA 105, at paras. 153-56."[69]

For instance, demonstration of effective control can be hard to determine in the case of an unchallenged territory[70]. If territory was unchallenged, Aboriginal groups may or may not, depending on their legal traditions, have felt the need to express an exclusive type of possession over a piece of land: "Euro-Canadian law is trying to draw a conceptual line which may be invisible from an Aboriginal perspective"[71].

The appeal level judgments in the *Marshall/Bernard* case included in-depth examinations of Aboriginal perspective over exclusivity. The Nova Scotia Court of Appeal decision in *R. v. Marshall*[72]examined three elements of Aboriginal perspective over exclusivity: polity, territoriality and land tenure and use[73]. Under polity, the Court reviewed the Mi'kmaq's political organization. On the topic of aboriginal perspective on territoriality, the Court explains that although the Mi'kmaq moved from place to place, "there was no evidence that any other aboriginal group challenged the Mi'kmaq claim to live in that

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[69]*R. v. Marshall; R. v. Bernard*, *supra* note 55, para 130., quoting from: John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill Law Journal 153 at 173.
[70]HW Roger Townshend, *Can Euro-Canadian law and Indigenous Law Find Common Ground?* (Presented to the Joint Study Institute, 2010).
[71]*Ibid*.
[72]*R v Marshall*, 2003 NSCA 105.
[73]*Ibid*, para 141.

territory"[74]. As for land tenure and use, the Court quotes evidence provided by Chief Augustine as to the lack of term in Mi'kmaq language referring to property:

> "The term that would best identify that would be a relationship to the land. That Iroquoian people had a relationship to the land. The Mi'kmaq had a relationship to the land. And whether they travelled into each other's territories, as long as they were not disrupting the way of life of those people that they would not run into any kind of problems. If they were to disrupt the way of life of the other people, then they would be dealt with according to how those individuals would deal with this kind of situation. And which was not always one rule or policy that that group would follow in terms of dealing with those individuals."[75]
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> [emphasis in original citation]

Taking into account the Aboriginal perspective, the Court decided to apply a standard of "occupation" in order to determine Aboriginal title. The Court based its decision on uncertain boundaries of the land in question and on the requirement under *Delgamuukw* that when making a determination regarding "sufficiency of occupation, one should take account of the aboriginal group's size, manner of life, material resources, technological abilities and the character of the lands claimed"[76]. Most importantly, the Court chose the standard of occupation because it was "compatible with the Mi'kmaq perspective regarding territoriality and ownership"[77]. As the Court explained, a more demanding standard would not be in line with the Mi'kmaq culture and practices, which led them to "frequent movement within the territory they considered theirs"[78].

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[74] *Ibid*, para 146.
[75] *Ibid*, para 148.
[76] *Ibid*, para 155. The Court referred to *Delgamuukw v. British Columbia*, *supra* note 45, para 149.
[77] *R. v. Marshall*, *supra* note 72, para 156.
[78] *Ibid*.

In *R. v. Bernard*[79], the Court of Appeal of New Brunswick similarly decided that the Miramichi Mi'kmaq had provided enough evidence to meet the requirement of exclusive occupation, as set out in the *Delgamuukw* case. The Court did indeed find that there was occupation by the Mi'kmaq, and, in considering the exclusive nature of the occupation, it resorted to Mi'kmaq practices and relationship to land.

(ii) Tsilhqot'in: Questioning the Need for "Classic" Exclusivity

The possibility of Aboriginal title in the case of semi-nomadic peoples was recently analyzed by the Supreme Court in the case of *Tsilhqot'in Nation v. British Columbia*[80]. The Tsilhqot'in Nation is a group of six bands sharing a common culture and history[81]. In 1983, the government of British Columbia granted a commercial logging license on a part of land that the Tsilhqot'in Nation considered as their own[82]. The case first went before the Supreme Court of British Columbia in 2002 and continued over a span of five years. Justice Vickers determined, in 2007, that the Tsilhqot'in people were "in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area"[83]. However, for procedural reasons, he denied the declaration of title. In 2012, The British Columbia Court of Appeal heard the appeal and held, based on a site-specific occupation test, that the Tsilhqot'in claim to title had not

[79] *R v Bernard*, [2003] NBCA 55.
[80] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.
[81] *Ibid* at 259.
[82] *Ibid*.
[83] *Ibid*, para 7.

been established[84].The case went before the Supreme Court of Canada in 2014 and resulted in a unanimous and historic judgment delivered by Chief Justice McLachlin.

The Chief Justice made the following comments on the exclusivity-portion of the Aboriginal title test:

> "Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.
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> As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society."[85]

This opinion expressed by the Chief Justice is in fact a return to Delgamuukw and to the equal role of perspectives set out by Lamer C.J.[86] Indeed, the opinion expressed by McLachlin C.J. in this case is different from the one which was put forward in the *Marshall/Bernard* case under which she held that Aboriginal rights had to be translated into modern legal rights. Instead, in *Tsilhqot'in* she stresses that the forcing of "ancestral

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[84]*Ibid*, para 8.
[85]*Ibid*, paras 48–49.
[86]Jonnette Watson Hamilton, "Establishing Aboriginal Title: A Return to Delgamuukw", (2 July 2014), online: *ABlawg*<http://ablawg.ca/wp-content/uploads/2014/07/Blog_JWH_Tsilhqotin_Nation_v_BC_Title_Issues_July-2014.pdf> at 1.

practices into the square boxes of common law concepts"[87] should be avoided because it would "frustrat[e] the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights"[88].

The Chief Justice focuses instead on the importance of the Aboriginal perspective stating that the question of sufficiency "must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land"[89]. As for occupation, she rejects the idea that only specific and intensive occupation can support Aboriginal title. Rather, she employs a control-based approach based on both the common law and Aboriginal perspectives, including the laws and practices of a said group[90]:

> "The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law."[91]

Despite the historical importance of this judgment, important questions remain unanswered, such as those related to exclusivity. The issue of exclusivity was not litigious in this case as the Tsilhqot'in was not faced with competing claims:

> "Isolated and sparsely inhabited, the land was not subject to overlapping Aboriginal claims, which characterize most claims for unceded land across British Columbia. The Tsilhqot'in made no claim to the portion of the land held by anyone other than the Crown, or to submerged land, or to

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[87] *Tsilhqot'in Nation v. British Columbia*, *supra* note 80, para 32.
[88] *Ibid*.
[89] *Ibid*, para 54.
[90] *Ibid*, para 56.
[91] *Ibid*, para 41.

> surface or ground waters, leaving each of these issues for potential future litigation. So on these facts, the court's use of exclusivity – whether the group 'has historically acted in a way that would communicate to third parties that it held the land for its own purposes' – as the prime criterion for occupation was comparatively readily met [...] future situations where Aboriginal title might be asserted will almost certainly present more complex facts – water rights, competing fee simple claimants, overlapping title with other Aboriginal groups, and so on."[92]
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> [emphasis added]

In the case of overlap, how will the courts reconcile the requirement of exclusivity where two groups or more fulfill the requirement of possession, based on regular use of the territory? We fear the solution may be to reject both claims for Aboriginal title for lack of exclusivity. This solution is nonsensical if we are to consider that semi-nomadic populations could very well have overlapped, based on particular practices.

The Canadian approach to exclusivity is severely flawed on a fundamental level as it grants a group an exclusive right to use and occupy the land without epistemological consideration of this group's territorial and legal realities and those of surrounding groups. Occupation of land by Aboriginal groups is a multifaceted issue, implicating a host of underlying considerations which surpass that of territorial presence. Authors Turner and Fondahl provide a brief yet comprehensive summary of these issues as follows:

> "1) the area in question was and often still is governed by nuanced Indigenous protocol that is not well represented by simple, mutually exclusive territorial boundaries; 2) different Indigenous groups have used different criteria to determine the extent of their territory; and 3) Indigenous territorial identities have shifted over time, not only with the

[92]Harry Swain & James Baillie, "Tsilhqot'in Nation v. British Columbia: Aboriginal Title and Section 35" (2015) 56:2 Canadian Business Law Journal 265 at 271–272.

> movement of peoples but also with the merging and division of groups and the forging of new identities, often as a result of colonial violence including the Indian Reserve system and other State interventions."[93]

It is our opinion that the Supreme Court should review its exclusivity requirement, in order to reconnect its approach with the normative power associated with Aboriginal use of land. What the Supreme Court seems to overlook in its decisions regarding overlapping claims, is that the determination of Aboriginal right and title is not a simple determination over the possession of a tract of land. Granting a right to a territory implies the granting of normative power over the given territory. The manner in which the exclusivity requirement is currently defined implies that the Supreme Court or the government representatives negotiating a treaty must ignore the fact that other groups may have used this territory, albeit in a non-exclusive manner, and must deny their rights on the same territory.

If, instead of exclusivity, the Supreme Court required that Aboriginal groups demonstrate control of land, the Court could grant a source of normative authority over the management of the land to various groups. If the Chief Justice had jettisoned the exclusivity principle, her ruling in *Tsilhqot'in*, based as it is on control rather than extensive occupation, might have opened the door to this approach. Aboriginal rights holders and Aboriginal title holders could then adopt norms and institutions which correspond to their legal realities in order to manage the rights of each group on the overlapping territory.

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[93]Christopher Turner & Gail Fondahl, *supra* note 4 at 12.

Before considering this aspect further, let us first examine how the federal and provincial governments have implemented the exclusivity requirement developed by the Courts.

1.3. Implementing the Exclusivity Requirement - Government Policy

The judicial recognition of Aboriginal rights and Aboriginal title in the late 1980's and 1990's created an obligation for the federal and provincial governments to adjust their policies and provide mechanisms to address and bring resolution to the comprehensive claims of Aboriginal groups. These policies had no choice but to integrate mechanisms and procedures addressing overlapping claims, as governments and Aboriginal groups alike realized that the claims being deposited covered areas overlapping one another.

This section will provide an overview of the various federal policies, as well as two provincial policies having been developed over past few decades to address comprehensive land claims. When applicable, a discussion is also included regarding the measures contained in these policies addressing overlapping claims.

(a) Federal Government Policy

Over the years, the federal government has adopted many policies relating to the Aboriginal peoples of Canada, including with regard to the issue of overlapping land claims. The political and legal development of Aboriginal rights has closely influenced the government's approach to overlapping land claims, providing Aboriginal groups with more independence in addressing these claims as their constitutional rights increased. The Government of Canada has recognized that "[t]he evolution and development of the federal government's land claims policy has been closely linked to court decisions,

particularly decisions of the Supreme Court of Canada"[94]. Having provided an overview of landmark decisions relating to Aboriginal rights, Aboriginal title, and more specifically on exclusivity and overlapping land claims, let us now examine how the teachings of these rulings have influenced political policy over the last few decades.

Our analysis will demonstrate that, unfortunately, the approach used by the federal government has failed to efficiently address the issue of overlapping land claims and has not provided Aboriginal groups or government officials with the appropriate baggage of cultural and theoretical knowledge required to consider the various epistemological approaches of Aboriginal groups towards conflict resolution and problem-solving.

(i) Prior Federal Policy

Since Confederation, Aboriginal groups have been considered as a "responsibility" of the federal government. As we have seen, in order to fulfill this responsibility, the government has historically adopted laws focussed on the protection of Aboriginal peoples through strict governance, fostering paternalistic tendencies within the Aboriginal government-relationship[95]. Aboriginal policy centers around the provisions provided in the *Indian Act*[96], which control all aspects of life on reserves. As Dale Turner

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[94]Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (Minister of Indian Affairs and Northern Development, 1993) at 2.
[95]Dale A Turner, *This is not a peace pipe: towards a critical indigenous philosophy* (Toronto: University of Toronto Press, 2006).
[96]*Indian Act, R.S.C., 1985, c. I-5*.

argues, "[i]t cannot be overemphasized that the Indian Act and its enforcer the Department of Indian Affairs, have always had a stranglehold over Indians"[97].

(1) White Paper Policy

Demands by Aboriginal groups for recognition of treaty rights and Aboriginal title would only be addressed more than a century after Confederation. The *1969 Statement of the Government of Canada on Indian Policy* (known as the "White Paper") represents the government's first official policy addressing Aboriginal rights and claims in Canada. The White Paper called for a removal of policies which "carry with them the seeds of disharmony and disunity (...)[98]" and which "perpetuate the separation of Canadians"[99]. The government believed that the most efficient way to ensure the unity between Aboriginals and non-Aboriginals was to repeal the *Indian Act* and shut down the Department of Indian Affairs, therefore erasing the special treatment of Aboriginal peoples: "The policy promises all Indian people a new opportunity to expand and develop their identity within the framework of a Canadian society which offers them the rewards and responsibilities of participation, the benefits of involvement and the pride of belonging"[100].

Canada blamed the *Indian Act*'s legal provisions and administrative regime for the discrimination faced by Aboriginal peoples, which in turn, created a sentiment of

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[97]Dale A. Turner, *supra* note 95 at 18.
[98]Minister of Indian Affairs and Northern Development, *1969 Statement of the Government of Canada on Indian Policy* at 5.
[99]*Ibid* at 6.
[100]*Ibid* at 7.

dependency and lack of confidence amongst Aboriginal groups. The White Paper went as far as to suggest that the removal of references to Aboriginal people in the Constitution would be "necessary to end the legal distinction between Indians and other Canadians"[101].

Unfortunately for the Canadian government, the Aboriginal peoples of Canada did not share Canada's enthusiasm for the White Paper. The policy was considered to be an affront to Aboriginal peoples' identity, ignoring not only the political differences between Aboriginal Canadians and other Canadians, but the historical and societal differences as well: "There was no need to discuss Indian understandings of treaty obligations, and fiduciary relationships, because such obligations did not matter as long as 'equality between individuals' drove basic understandings of justice"[102].

Another central theme of this policy was the transformation of Aboriginal lands into private property, treating and qualifying Aboriginal claims to land as "so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community"[103].

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[101] *Ibid* at 8.
[102] Dale A. Turner, *supra* note 95 at 22.
[103] Minister of Indian Affairs and Northern Development, *supra* note 98 at 11.

This said policy and program which was poised to end injustice to Aboriginal peoples was instead perceived as "cultural genocide"[104]. Aboriginal leaders across Canada argued that the policy ignored their grievances regarding land and treaty recognition and ignored their desire to participate in the creation of policies regarding Aboriginal issues[105]. For instance, a young Cree activist, Harold Cardinal stated that:

> "The new Indian policy promulgated by the Prime Minister Pierre Elliot Trudeau's government (...) is a thinly disguised programme of extermination through assimilation. For the Indians to survive, says the government in effect, he must become a good little brown white man."[106]

The White Paper is an example of a policy which did not reflect nor acknowledge Aboriginal philosophy. In fact, instead of embracing a different ideology and cultural references, the federal government attempted to use basic political values in Canadian society as the basis for a policy which would be applied to a minority group[107]. The policy represented a liberal ideology, emphasizing classical liberal values such as equality, responsibility and freedom[108]. Aboriginal leaders across Canada rejected the liberal ideology, disassociating themselves from the White Paper's recommendations and rejecting the idea that this policy responded in any way to their grievances, calling instead for a review and a renewal of historic treaties[109]. The White Paper, rather than providing a tool for reconciliation, became "the single most powerful catalyst of the

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[104]Andrea Gaye McCallum, "Dispute resolution mechanisms in the resolution of comprehensive Aboriginal claims: power imbalance between Aboriginal claimants and governments" (1995) 2:1 Murdoch Univ Electron J Law.
[105]Sally M Weaver, *Making Canadian Indian Policy. The Hidden Agenda 1968-1970.* (Toronto: University of Toronto Press, 1981) at 173.
[106]Harold Cardinal, *The Unjust Society* (Edmonton: M.G. Hurtig, 1969) at 1.
[107]Sally M. Weaver, *supra* note 105 at 4.
[108]*Ibid* at 55–56.
[109]Cardinal, *supra* note 106 at 166.

Indian nationalist movement, launching it into a determined force for nativism – a reaffirmation of a unique cultural heritage and identity"[110].

(2) Late Twentieth Century Policies

The 1969 White Paper was officially withdrawn after the 1973 ruling by the Supreme Court of Canada in the case of *Calder v. British Columbia (Attorney General)*[111]. The government had no other choice but to review its White Paper policy and released a policy statement in 1973 indicating that it was willing to accept and negotiate settlement of land claims[112]. In order to do so, the government established the Office of Native Claims (ONC) to settle both comprehensive and specific claims via negotiation, rather than litigation[113]. Although the federal government backed down from the White Paper, "its underlying philosophy seemed to animate federal policy for years to come"[114].

The 1973 policy was reviewed during the following years culminating into the publication of a second policy in 1981[115]. The federal government indicated that it had considered various alternatives from other colonial territories such as Australia, the United States and New Zealand. Specifically, the government considered whether a different alternative should be sought to resolve comprehensive land claims, such as mediation or arbitration, but chose instead to remain with its adopted strategy of

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[110]Sally M. Weaver, *supra* note 105 at 171.
[111]*Calder v. British Columbia (Attorney General)*, *supra* note 41. See text accompanying note 39.
[112]Established in 1973, this policy is detailed in: Government of Canada, *In All Fairness. A Native Claims Policy* (Ottawa: Minister of Indian Affairs and Northern Development, 1981).
[113]*Ibid* at 11.
[114]Royal Commission on Aboriginal Peoples, *supra* note 22 at 203.
[115]Government of Canada, *supra* note 112.

negotiation, insisting that this format "permits Natives not only to express their opinions and state their grievances, but it further allows them to participate in the formulation of the terms of their own settlement"[116].

Neither the 1973 policy nor the 1981 policy addressed overlapping claims of Aboriginal groups. In 1982, after the adoption of the *Constitution Act, 1982*[117], the government went to work developing a renewed comprehensive claims policy which would recognize the recent protections offered by Section 35 of the *Constitution Act, 1982* and address issues of slow negotiations and "growing inconsistency between comprehensive land claims policy and other federal policy initiatives"[118]. Aboriginal groups were particularly unhappy with the requirement that their aboriginal rights be first extinguished in order to receive benefits provided in a settlement agreement[119]. They considered that this requirement was not harmonious with Section 35 recognitions. In 1985, the task force to review comprehensive claims policy published its findings in the report commonly known as the Coolican report. This report identified a deep-seated problem within the federal government approach:

> "The federal government has sought to extinguish rights and to achieve a once-and-for-all settlement of historical claims. The aboriginal peoples, on the other hand, have sought to affirm the aboriginal rights and to guarantee their unique place in Canadian society for generations to come."[120]

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[116] *Ibid* at 11.
[117] *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11* [*The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11*].
[118] Government of Canada, *Comprehensive Land Claims Policy* (Minister of Indian Affairs and Northern Development, 1986) at 6.
[119] *Ibid*.
[120] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements - Report of the Task Force* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 30.

The Coolican report called for recognition of Aboriginal rights rather than surrender of these rights. However, the government's response to the Coolican report was not satisfactory to Aboriginal groups and their supporters.

The federal government responded to the Coolican report in 1986 by producing its third comprehensive land claims policy entitled *Comprehensive Land Claims Policy*[121]. As the Royal Commission on Aboriginal Peoples explains, the alternative to extinguishment of rights offered by the policy was "more illusory than real: self-government negotiations, if they resulted in an agreement, would receive no constitutional protection or independent monitoring authority"[122]. This policy is the first to address the question of overlapping land claims, stating that "[w]here more than one claimant group utilizes common areas of land and resources, and the claimants cannot agree on boundaries, resource access or land-sharing arrangements, no lands will be granted to any group in the contested area until the dispute is resolved"[123]. Therefore, the government's first approach was one characterized by hope for conciliation between Aboriginal groups through negotiation and framework agreements, barring treaty negotiations until common ground could be achieved.

During the decade following the adoption of the *Constitution Act, 1982*, the Supreme Court of Canada and lower Canadian courts continued to render important judgments with regard to Aboriginal rights and title in Canada. In keeping with its tradition of

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[121]Government of Canada, *supra* note 118.
[122]Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume 2: Restructuring the Relationship* (Ottawa: The Royal Commission on Aboriginal Peoples, 1996) at 540.
[123]Government of Canada, *supra* note 118 at 12.

aligning the judicial with the political, Canada readied itself for the development of a new comprehensive claims policy, and in 1993, published a document entitled *Federal Policy for the Settlement of Native Claims*[124] which provided an update on the progress made regarding settlement of claims. This 1993 document outlined the elements which must be demonstrated in order to make a claim for Aboriginal title. The document essentially repeated the requirements set out by Justice Mahoney in *Baker Lake*. As discussed in section 1.2(b) of this chapter, of most relevance to our study of overlapping claims is the criterion of demonstrating exclusive occupation. By including the requirement of exclusivity in their 1993 policy, the federal government essentially removed the 1986 requirement providing that the conclusion of treaties was postponed until overlapping claims were resolved. According to the terms of the 1993 policy document, a group facing an overlapping claim could encounter some difficulty in demonstrating exclusive occupation.

In 1996, the Royal Commission on Aboriginal Peoples ("RCAP") Report reviewed these land claim policies and characterized the land claim process as a "dilatory and frustrating one for all concerned"[125]. The RCAP identified various elements as frustration sources, such as the fact that the burden of proof of the existence of a claim rests upon the Aboriginal group claiming the land, that the government can unilaterally decide if the claim if valid, that within this acceptance of negotiation, the government can pick and

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[124]Indian and Northern Affairs Canada, *supra* note 94.
[125]Royal Commission on Aboriginal Peoples, *supra* note 122 at 535.

choose what it will negotiate or not negotiate and that it has sole determination of the basis for compensation[126].

A decade after the 1993 policy document, the federal government released a document entitled *Resolving Aboriginal Claims - A Practical Guide to Canadian Experiences*[127]. Although this document was not a comprehensive policy on Aboriginal rights or claims, it contained updates on many elements of Canada's approach to determining Aboriginal rights and title. The government indicated that its primary objective in releasing this document was "to share the Government of Canada's domestic experience of these issues [Aboriginal rights and title] with other nations interested in initiating and implementing similar processes with the goal of resolving Aboriginal claims to lands, resources and self-government"[128].

In it, the government details a six-step process for the resolution of comprehensive land claims. The first step is the submission of a claim: in order for the comprehensive land claims submission to be accepted, proof must be made of various elements, including the fact that the Aboriginal group occupied a specific territory over which it asserts Aboriginal title from time immemorial and that the occupation of this territory was largely to the exclusion of other organized societies (i.e. largely exclusive occupation), the same criterion developed by the Federal Court in the *Baker Lake* decision and

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[126] *Ibid* at 534–535.
[127] Indian and Northern Affairs Canada, *Resolving Aboriginal Claims. A Practical Guide to Canadian Experiences*. (Ottawa: Minister of Indian Affairs and Northern Development, 2003).
[128] *Ibid* at 1.

repeated by the Supreme Court in the *Delgamuukw* case[129] and previously included in the 1993 federal government policy.

The 2003 information document also provided a renewed approach to the resolution of overlapping conflicts resulting from multiple Aboriginal land claims. This approach did not explicitly mention approaching the issue from an Aboriginal philosophy, but it did provide, as a general rule, that "Aboriginal groups favour the resolution of the dispute through negotiation committees comprised of a combination of community leaders and elders"[130]. The document explained that if two or more Aboriginal groups were unable to reach an agreement, the federal government could become involved if its intervention is welcomed and favoured. In this case, the government would "engage in overlap discussion at the invitation of the groups in question"[131]. The approach also provided a secondary role in which the government would be responsible for providing financial assistance for neutral mediation or facilitation services[132]. The 2011 *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* also provided that the active role in an overlapping claims negotiation belonged to the Aboriginal groups. In fact, these guidelines indicated that the Crown may "reasonably expect Aboriginal groups to (...)

[129]See previous notes in section 1.2 of Chapter 1.
[130]Indian and Northern Affairs Canada, *supra* note 127 at 19.
[131]*Ibid*.
[132]*Ibid*.

attempt to resolve any issues with any other Aboriginal groups with overlapping claims and interests"[133].

The only innovation provided in the 2003 document was the possibility to add non-derogation language to settlement agreements if all attempts at resolving overlaps have failed. The resolution of overlapping claims was therefore considered as non-compulsory before the conclusion of an agreement between the federal government and an Aboriginal group, contrary to what had been provided in 1986.

This is in itself contradictory, as the government requires the demonstration of exclusive occupation, but then allows non-derogation language in the case of an overlap. The non-derogation language added to a settlement agreement generally implies that the agreements are without prejudice to the rights of groups with overlapping claims, therefore giving another Aboriginal group an opportunity to negotiate its own settlement agreement. In practice, this solution does not address the issue of overlapping claims; it simply relegates it to be considered at a later time. Non-derogation language provisions are analyzed in further detail in section 2.2(b) of Chapter 1, below.

It appears that the federal government recognized the weakness of its approach to overlapping claims in the 2003 information document, indicating at that moment, that

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[133]Government of Canada, *Aboriginal Consultation and Accommodation. Updated Guidelines for Federal Officials to Fulfill the Duty to Consult.* (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011) at 18.

"Aboriginal groups are exploring additional approaches to solve land disputes among themselves that are acceptable to the federal/provincial/territorial governments"[134].

(ii) Current Federal Policy

In September 2014, the federal government released an interim policy[135] setting out the government's "current position at a high level as a **starting point for discussions with partners**"[136] (emphasis in original document) with regard to a new comprehensive land claims policy, replacing the last published policy in 1986[137].

The bulk of this policy concentrates on land issues and mentions the recognition of Aboriginal perspectives as having an influence on the conduct of treaty negotiations. Although this is a step in the right direction, as we will demonstrate, the government must take one step further recognizing not only Aboriginal perspectives but the existence of Aboriginal legal orders which can and do provide "a conceptual and legal framework for examining territorial claims"[138].

With regard to the issue of overlapping claims and shared territories, the interim policy recognizes the need for action, stating that if these issues are left unresolved, "shared territory and overlap issues can harm both the process or reconciliation between Canada and Aboriginal groups and the relationships among Aboriginal groups"[139]. The

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[134]Indian and Northern Affairs Canada, *supra* note 127 at 19.
[135]Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (2014).
[136]*Ibid* at 4.
[137]It appears that the government does not consider the 1993 Federal Policy for the Settlement of Native Claims to be a standalone document.
[138]R.G. Christopher Turner, *supra* note 2 at 33.
[139]Aboriginal Affairs and Northern Development Canada, *supra* note 135 at 13.

government stresses that the resolution of overlaps "is a key interest for all parties"[140]. The policy reiterates the sentiment expressed in the 2003 information document that Aboriginal groups are "best placed to resolved shared territory and overlap disputes between themselves"[141]. Canada continues to give itself a secondary role, indicating that it can "consider options" which would help encourage Aboriginal groups to come to a solution relating to their dispute[142]. The language used is patently vague and reflects the fact that the federal government together with the Aboriginal groups have yet to develop a successful approach to overlapping claims.

Although the federal government's policy has a national application, some provinces have also chosen to adopt their own policies, as their particular situations do not necessarily correspond to the one-size-fits-all approach outlined by the federal government in its policies.

(b) Provincial policies

The following section will examine both the policy from British Columbia and the policy from Newfoundland-and-Labrador. Focus is put on these two policies as they are the most comprehensive available provincial policies concerning overlapping claims. This may be explained by the fact that both these provinces did not sign, for the majority of their territory, historical treaties with Aboriginal groups living within their borders. Moreover, while these policies have some points in common, they also present

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[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*

interesting differences which provide elements for consideration in our development of a new framework to address overlapping claims.

(i) British Columbia Treaty Commission Policies

In British Columbia, provincial and Aboriginal leaders have chosen to take a different approach with regard to Aboriginal issues, including those related to the settlement of land claims and overlaps. British Columbia must cope with an enormous amount of overlaps which affect almost all treaty negotiations between First Nations and the government. As Grand Chief Stewart Philip from Okanagan Nation Alliance has stated, "[t]he overlap issue is the cancer of the B.C. treaty process"[143].

In 1990, British Columbia created the British Columbia Claims Task Force (the "Task Force") by an agreement between representatives of First Nations in British Columbia, the provincial government and the federal government. In 1991, the Task Force delivered a report outlining a six-stage treaty process specific to British Columbia[144]. This report provides two key elements relating to the issue of overlapping claims. First, the report reiterates previous federal policy which provided that solutions should be determined by First Nations themselves: "First Nations resolve issues related to overlapping traditional territories among themselves"[145] (Recommendation 8).

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[143]The Canadian Press, "First Nations alliance launches court challenge of B.C. Treaty process", (12 August 2014), online: <http://www.cbc.ca/news/aboriginal/first-nations-alliance-launches-court-challenge-of-b-c-treaty-process-1.2734282>.
[144]British Columbia Claims Task Force, *supra* note 1.
[145]*Ibid*.

Second, the report also provides that the BC Treaty Commission ("BCTC"), a tripartite organization appointed by the First Nations and the federal and provincial governments, shall have a secondary role, including providing advice on dispute resolution services available to resolve overlap issues, when requested by First Nations, and providing funding to carry out the necessary studies to assist in resolving overlaps[146].

The BCTC requires that First Nations provide a statement of intent in order to negotiate a treaty with Canada and British Columbia. Within such statement of intent, the First Nation must provide a description of its traditional territory, and must also identify any overlaps with other First Nations. It has been said that this exercise reduces complex territorial concepts, existing under an independent legal framework, into two-dimensional maps which must be moulded into a Western legal framework: "First Nation Territories are not simply lines of a map. Traditionally, the territories were defined by a complex interaction of history, laws, place names, language, different activities, family and clan relations, different seasons and time periods, etc."[147] The result has been some confusion amongst First Nations as to what should be included or excluded on these statements of intent maps. Some First Nations submitted only their core territory, while other submitted larger portions of land where their ancestors fished, hunted and gathered[148]. As some First Nations began adding more territory, so the trend grew and competition and tension between territories was unnaturally created between First

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[146] *Ibid*.
[147] Murray Browne, *Negotiating Protocol: Agreements for Treaty Overlap Areas* (CBA National Aboriginal Law Conference, 2009) at 12.
[148] *Ibid*.

Nations[149]. In fact, the BCTC process is different from the federal process in that it does not require proof of exclusivity or prior occupation, making it more prone to overlapping claims.

In order to address issues emerging from the land claim process, the BCTC produces an Annual Report outlining both achievements and issues to be addressed. Year after year, the BCTC has reflected upon the existence of overlapping claims and their impact on negotiations with Aboriginal groups. In its 2008 Annual Report, the BCTC underlined the importance of overlapping land claims, indicating that certain measures would be taken to help solve this issue, such as an intensification of dialogue on overlapping and shared territories, focussing on instances where negotiations have progressed to the final stage[150]. In an update to that 2008 Report, the BCTC also recognized that agreements among overlapping First Nations can "provide a solid foundation for their relationships with each other"[151].

In 2010, the BCTC's annual report indicated that the current territorial situation is "more pressing than the parties previously appreciated and that action is necessary now"[152]. Moreover, the BCTC indicates having "developed an action plan to support First Nations in resolving overlapping/shared territory issues, build capacity in First Nations to

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[149] *Ibid*.
[150] British Columbia Treaty Commission, *BC Treaty Commission Annual Report 2008* (2008).
[151] British Columbia Treaty Commission, *Treaty Commission Update, Summer 2008* (2008) at 3.
[152] British Columbia Treaty Commission, *BC Treaty Commission Annual Report 2010* (2010) at 8.

successfully address these difficult issues, and encourage the early resolution of overlap disputes"[153].

However, a 2012 Report of the Standing Senate Committee on Aboriginal Peoples brought new issues to light in the approach to solve overlapping claims. In this report entitled *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process*[154], the Senate Committee indicated that it was concerned with "the lack of resources and institutional supports for First Nations in the negotiation of overlapping claims"[155]. The Senate Committee recognized that disputes related to overlapping claims "have caused, and may continue to cause, delays impeding the conclusion of treaties"[156]. It also considered the importance of Aboriginal understanding and Aboriginal participation in addressing the complex issues surrounding overlapping claims.

Following the Senate Report, the 2013 BCTC Annual Report again identified overlapping claims as one of the principal "barriers to change" and was attributed a qualification as "central" to the concerns within the BC treaty negotiation process[157]. It appears that the BCTC truly took note of the Senate's concerns in 2014 as it chose to concentrate the entirety of its 2014 Annual Report on the Task Force's 1991 Report, more specifically on Recommendation 8 providing that First Nations resolve issues related to overlapping territories among themselves. The Chief Commissioner again identified the

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[153] *Ibid*.
[154] Report of the Standing Senate Committee on Aboriginal Peoples, *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process* (2012).
[155] *Ibid* at 10.
[156] *Ibid*.
[157] British Columbia Treaty Commission, *BC Treaty Commission Annual Report 2013* (2013) at 28.

issue of overlapping claims as "one of the biggest challenges that a First Nation, reaching Final Agreement, must overcome"[158].

Current Chief Commissioner Sophie Pierre explored the idea of employing an Aboriginal paradigm in conflict-resolution addressing overlapping claims:

> "Our role is to support those communities in being able to bring back their own cultural dispute resolution as opposed to the communities running off to the courts, spending millions of dollars on lawyers who really do not have an understanding of what it is that needs to be done."[159]

Steven Point, Chief Commissioner from 2005-2007 echoed the argument advanced in this thesis: that resolving overlapping disputes is more theoretically complex than it seems at first glance, underlining the importance of using a traditional understanding of property[160].

(ii) Newfoundland-and-Labrador Policy

In December 1987, the Government of Newfoundland and Labrador adopted a land claims policy in order to outline a distinct position than the one provided in the federal government's 1986 land claim policy. The issue of overlapping land claims is found as the last issue addressed in the Newfoundland and Labrador policy. The latter provides the following regarding overlapping land claims:

> "All legitimate overlapping claims between native groups resident in Labrador should first be discussed by the native groups concerned. The province will not enter into a final settlement concerning lands within the

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[158]British Columbia Treaty Commission, *BC Treaty Commission Annual Report 2014* (2014) at 1.
[159]*Ibid* at 13.
[160]*Ibid* at 10.

> area of claim overlap until the native parties have reached a satisfactory mutual agreement.
>
> Crossboundary claims by native groups that are not residents of Labrador may be addressed only after the settlement of all claims to that specific area by the resident Labrador natives."[161]

It appears that the Government of Newfoundland and Labrador has respected this policy. The Government of Newfoundland and Labrador only negotiates with Innu Nation as a whole (which incorporates two Aboriginal groups in Newfoundland and Labrador) and has also demonstrated political willingness by including amendments to the Labrador Inuit Land Claims Agreement. These amendments incorporate an Overlap Agreement reached in November 2005 between the Labrador Inuit and Nunavik (Quebec) Inuit addressing and resolving their overlapping land claims in northern Labrador and offshore areas adjacent to northern Labrador and northern Quebec. However, there are some complaints issuing from the Labrador Métis Nation which argues that its land claims have been entirely ignored.

(c) Conclusion of Section 1

The various policies outlined above have certain elements in common. All three policies provide that Aboriginal groups should resolve arguments among themselves and all three policies provide that agreements should not be concluded unless there is an overlap agreement or if best efforts have been used to resolve conflicts with other Aboriginal groups with an interest in the overlap area. Although this may appear reasonable at first

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[161]Government of Newfoundland and Labrador, *Land Claims Policy* (1987) at 11.

glance, as we will see, non-indigenous governments have not provided sufficient support to Aboriginal methods of conflict resolution.

No policy provides a veto right permitting an Aboriginal group to halt the negotiation process by claiming an overlap with another group negotiating an agreement. Mark E.W. East, Counsel to the Department of Justice, explains that there are three situations in which Canada will move forward with a treaty despite being faced with an overlapping situation. The first situation is when an Aboriginal group has made "reasonable and good faith efforts to resolve overlap issues"[162] with the group claiming an overlap. The second situation is when "measures taken to resolve the outstanding overlap issues have proven to be unsuccessful"[163], and the third is when there is presence of non-derogation provisions in the treaty.

In reality, despite the Supreme Court's *Delgamuukw* decision relating to demonstration of exclusive occupation, Aboriginal groups are not required to demonstrate that they have exclusivity over a certain territory in order to sign an agreement on land claims with the federal or provincial governments, since the governments admit that this signing can take place despite the existence of overlapping claims. We reiterate that the Supreme Court should take note of this refusal and should, instead of requiring the demonstration of exclusivity, require a demonstration of use of land, therefore granting a source of normative authority over the management of the land to various groups, allowing Aboriginal rights holders and Aboriginal title holders to develop a conflict resolution

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[162]Mark EW East, *Addressing Overlapping Claims in the British Columbia Treaty Process: A Federal Perspective* (2009) at 3.
[163]*Ibid*.

system reflecting their legal orders to manage the rights of each group on the overlapping territory.

As will be demonstrated in Section 2 both the legal and political approaches are flawed and do nothing to address the substance of the overlapping issue. Not only do they postpone the opportunity to address overlapping claims but they also forego the possibility for both Aboriginal groups to benefit from an equal negotiating power. The signing of a treaty with one group unquestionably provides the latter with greater bargaining power than that possessed by the group claiming an overlap, and, in our opinion, it thus makes resolution between the two groups close to impossible.

2. Practical Applications of Government Policy in Overlapping Claim Situations

Having reviewed the theoretical approach elaborated by the federal government and the British Columbia and Newfoundland-and-Labrador governments, the following section will provide concrete examples of the manner in which these policies are applied.

Practically speaking, issues relating to overlapping claims generally come to light in one of two situations: (i) when a group petitions a court for recognition of Aboriginal title over a parcel of land subject to an overlapping claim, and (ii) when a group is finalizing negotiation, with the federal or provincial government, of an agreement which would have an effect on a piece of land affected by the overlapping claim. In both cases, resorting to the courts to achieve resolution of the conflict presents various shortcomings.

2.1 Overlapping Claims before the Courts: Shedding Light on a Forum Issue

The resolution of overlapping aboriginal land claims can be considered as what Lon L. Fuller referred to as a "polycentric" issue[164]. Jean Leclair defines these issues as "issues involving many affected parties, not all of them represented before the court, and whose complex ramifications make it difficult to measure the repercussion a particular award could have on the political dynamics between different Indigenous nations and between these and the Crown"[165]. Although Leclair was discussing treaty implementation, we believe that his definition of polycentric issues corresponds exactly to the situation of overlapping land claims in Canada.

The Courts have indeed begun to emit reservations about ruling on such complex issues of normative concern. In *Tsilhqot'in Nation v. British Columbia*[166], Justice Vickers expressed his dissatisfaction with the use of courts to address Aboriginal issues. Hoping to "shine new light on the path of reconciliation that lies ahead"[167], he said in part: "This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process"[168]. A parallel can be drawn with competing interests between Aboriginal nations. They must be

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[164]Kenneth Winston, *The Principles of Social Order. Selected Essays of Lon L. Fuller*, Revised edition ed (Portland: Hart Publishing, 2001). See also Jean Leclair, *Nanabush, Lon Fuller and Historical Treaties: The Potentialities and Limits of Adjudication, presentation at Peace, Friendship & Respect: A Critical Examination of the Honour of the Crown on the 250th Anniversary of the Royal Proclamation and the Treaty of Niagara* (Rama, Ontario, 2013).
[165]Jean Leclair, *supra* note 164 at 12.
[166]*Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.
[167]*Ibid*, para 7.
[168]*Ibid*, para 1357.

expressed in a more flexible manner. Litigation can also generate more litigious questions, one lawsuit leading to another, entailing enormous expense[169]. Other issues relating to litigation include long delays, contradictory decisions from the courts and the lack of competence and understanding of some lawyers regarding Aboriginal culture[170].

As authors Dwight Newman and Danielle Schweitzer have rightly expressed, choosing one group over another aboriginal group to be the property rights holder is hardly in line with the idea of "balancing Aboriginal interests (...) While it may fall to the Court to consider the implications of finding for one group over the other, it could further be argued that perhaps a decision on such matters falls or should fall beyond the scope of the Court's powers"[171].

(a) Applicable Case Law

Below are four examples of how the courts have addressed overlapping land claim situations.

(i) *Ahousaht Indian Band v. AG of Canada*

In some cases, judicial decisions run contrary to Aboriginal traditions and Aboriginal epistemology, and fail to consider Aboriginal perspective.

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[169]Carlo Osi, "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation" (2008) 10 Cardozo J Conflict Resol 163.
[170]*Ibid*.
[171]Dwight G Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: Tsilhqot'in Nation v. British Columbia" (2008) 41 UBCL Rev 249 at 266.

For instance, in the case of *Ahousaht Indian Band v. AG of Canada*[172], eleven First Nations from the Nuu-chah-nulth linguistic group of Aboriginal peoples contended, in their *Formal Notice Application* that they had "[A]boriginal rights to harvest and sell all species of fishery resources available to the Nuu-chah-nulth First Nation within the territories described as the Fishing Territories in the statement of claim"[173].

The Attorney General of Canada brought two applications before the Supreme Court of British Columbia. The first order requested to compel the plaintiffs, constituted by eleven Aboriginal groups, to provide the boundaries of each plaintiff's claim area. The second application asked the Court to disqualify the plaintiffs' counsel from acting on behalf of the eleven plaintiff first nations by reason of the "conflicting aboriginal title claim of the individual first nations as to their adjoining boundaries"[174]. The plaintiffs objected to the removal of their counsel indicating that, in recognizing the existence of an Aboriginal title, the Court could refrain from addressing the overlap issue, that is, it could simply declare that one or more of the plaintiffs had title, without deciding which plaintiff. These plaintiffs had been attempting to resolve their conflicting claims for many years but had limited their claims to Aboriginal title in order to avoid conflict, leaving aside issues relating to Aboriginal rights. The plaintiffs stated that "they were not asking the court to resolve the overlapping claims, as this would require each of the eleven plaintiff bands to be represented separately in this proceeding or in separate proceedings"[175]. The Aboriginal groups held that it would be "unjust to require further precision with respect

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[172] *Ahousaht Indian Band v AG of Canada*, 2007 BCSC 1162.
[173] *Ibid*, para 21.
[174] *Ibid*, para 1.
[175] *Ibid*, para 13.

to the claims in areas of overlap, when such precision would likely result in fracturing the litigation owing to the financial burden of pursuing matters independently" and could ultimately, "result in many or all of the plaintiffs being unable to move forward with their claim"[176]. The judge disagreed and indicated instead that the "areas of overlap create a serious problem for the plaintiffs and finding a solution is necessary to go forward in the litigation"[177].

The Court ultimately decided to proceed with another option. The judge ruled that the trial would move forward on a test case basis in which only one Aboriginal group would be represented and the determination of the presence or absence of Aboriginal rights relating to fishing would be made relating to that group only. The determination of proof of Aboriginal title in the overlap areas would be heard at a later phase of the trial. The other groups could join as defendants to determine boundaries, rights and title in the overlap areas.

(ii) *Chief Allan Apsassin et al. v. Attorney General (Canada) et al.*

The issue of overlapping claims is simply not progressing in the judicial system and this reality has been recognized by judges such as Justice R.D. Wilson who expressed disbelief in the case of *Chief Allan Apsassin et al. v. Attorney General (Canada) et al*.[178], at the advancement of treaty negotiations without prior consultation of groups with overlapping land claims:

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[176] *Ibid*, para 16.
[177] *Ibid*, para 35.
[178] *Chief Allan Apsassin et al v Attorney General (Canada) et al*, 2007 BCSC 492.

> "Given the recommendations in the report of the British Columbia Claims Task Force of 28 June 1991, and the policies and procedures of the B.C. Treaty Commission of 11 April 1997, addressing the problem of overlapping claims, it is astonishing that this matter has been allowed to come this far without resolution. But it has."[179]

In this case, six First Nations with Treaty 8 rights asked the Court for an injunction preventing the LheidliT'enneh First Nation from going forward with the community ratification vote for the LheidliT'enneh Final Agreement by reason of overlapping land claims between the territory provided in Treaty 8 and the territory provided in the proposed agreement. The point of contention was the provision of wildlife harvesting rights in an area also covered by Treaty 8. The judge ultimately refused to rule in favour of the plaintiffs, indicating that neither party would suffer irreparable harm, and characterizing the plaintiffs' arguments as compelling but not dispositive[180].

(iii) *Luuxhon v. Canada*[181]

In this case, the plaintiffs, hereditary chiefs of the Gitanyow First Nation, were seeking declarations with respect to the failure of the federal and British Columbia governments to negotiate in good faith with the Gitanyow, because of the Agreement-in-Principle with the Nisga'a First Nation, a neighbouring First Nation, which provided that: "[t]he rights of the Nisga'a Nation set forth in the Final Agreement will not be affected by any treaties with other First Nations"[182]. The Gitanyow argued that this provision in the Nisga'a Agreement had removed good faith from the negotiations between the Gitanyow and the federal and British Columbia governments since it barred the government from

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[179] *Ibid*, para 37.
[180] *Ibid*, para 36.
[181] *Luuxhon v Canada*, [1998] 4 CNLR 47 ((BC SC)) at 265–266.
[182] *Ibid*, para 27.

concluding an agreement with the Gitanyow which would be inconsistent with its terms[183].

Canada and British Columbia brought a motion to strike all or part of the plaintiffs' statement of claim on the ground that the pleadings disclosed no reasonable cause of action, amongst others. Ultimately, the Court sided with the defendants, explaining that the Court may not make declarations regarding right violations which may occur in the future[184]. The Court struck the paragraph which asked for a declaration that the Crown may not conclude a treaty with the Nisga'a without the consent of the Gitanyow. Justice Williamson did not agree with the plaintiffs that section 35(1) provides a veto to one Aboriginal group which can be used over agreements reached between another group and the Crown[185]. He also struck the paragraph seeking a declaration that the Crown was in breach of a duty to the Gitanyow[186]. Justice Williamson did however show that he was sensitive to the issue of overlapping claims, stating that "myriad Court applications seem inevitable unless the treaty negotiation process deals with overlapping claims"[187].

Justice Williamson ended his judgment by eloquently summarizing the problem which can arise when resorting to judges to address overlapping claims: "I think it inevitable that if the parties fail to deal with the conspicuous problem of overlapping claims, they

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[183] *Ibid*, para 7.
[184] *Ibid*, para 30.
[185] *Ibid*, para 33.
[186] *Ibid*, para 37.
[187] *Ibid*, para 41.

may well face Court imposed settlements which are less likely to be acceptable to them than negotiated solutions"[188].

(iv) *Huron-Wendat Nation of Wendake v. Canada*

In May 2014, the Huron Nation of Wendake went before a Federal court judge in order to challenge the validity and the legality of the 2004 *Entente de principe d'ordre général* entered into between the Innus of Pessamit, Essipit, Mashteuiatsh and Nutashkuan, the Quebec government and federal government. It asked the court to prevent the signing of a final treaty, claiming that a portion of its territory, the Nionwentsio, overlapped the territory provided in the *Entente de principe d'ordre général*.

While Justice de Montigny refused to deliver an order prohibiting the signing of a final treaty[189], he did agree with the plaintiffs with regard to the important social consequences which can materialize when one Aboriginal group has signed an agreement relating to a piece of land subject to overlapping claims. Such signing can change the behaviour of a group, such as providing them with more confidence, and that must be taken into account, even if these changes are an indirect consequence of the agreement[190].

(b) Overlapping Claims and the Duty to Consult

A common issue within overlap cases is the Crown's fulfillment of the duty to consult a group claiming an overlap. For instance, Justice de Montigny adopted an interesting perspective when ruling on the Huron overlapping claim case. Rather than imposing a

[188] *Ibid*.
[189] *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154 (CanLII).
[190] *Ibid*, para 105.

restriction on the signing of a final agreement, Justice de Montigny focussed his ruling on the importance of the Crown's duty to consult in the case of overlapping claims.

The duty to consult is derived from the honour of the Crown which cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof"[191]. The Crown must consult Aboriginal groups if their treaty rights or Aboriginal rights may be adversely affected by a decision or action of the Crown. The duty is more than simply procedural, it "is not fulfilled simply by providing a process within which to exchange and discuss information"[192]. The consultation must be meaningful and have "the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue"[193].

In the case of the Huron Nation, the judge ruled that the Crown had the obligation to consult and accommodate the Huron Nation before the signing of the EPOG with the Innus of Quebec and was therefore in breach of its duty[194]. As Justice de Montigny states, "the inevitable impact that the conclusion of an agreement-in-principle between Canada and the interveners will have on ongoing negotiations between Canada and the applicant is one of many circumstances to be considered in determining the degree of the duty to consult"[195]. He explains that the duty to consult will increase in importance as the

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[191] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, para 27.
[192] *Wii'litswx v British Columbia (Minister of Forests)*, 4 CNLR 315 (2008), para 178.
[193] *Delgamuukw v. British Columbia*, *supra* note 45, para 168.
[194] *Huron-Wendat Nation of Wendake v. Canada*, *supra* note 189, para 106.
[195] *Ibid*.

negotiations with the Innus of Quebec progress towards a final agreement and the adverse effects on the Huron Nation become increasingly substantial.

The duty to consult was also invoked by Justice Mactavish in the case *SambaaK'e Dene Band* v. *Duncan*[196]. Justice Mactavish granted the application for judicial review filed by the SambaaK'e Dene Band ("SKDB") and the Nahanni Butte Dene Band ("NBDB") against the decision of the Minister of Indian Affairs and Northern Development which chose to postpone consultations with the SKDB and NBDB until Canada reached an agreement in principle with the Acho Dene Koe First Nation ("ADKFN") in relation to the ongoing comprehensive land claims negotiations between Canada and the ADKFN. This ruling recognized that Canada had breached its duty to consult and set aside the Minister's decision to postpone consultations.

In a situation where negotiations take place relating to land subject to overlapping land claims, the Supreme Court has provided that these negotiations should be inclusive of "other aboriginal nations which have a stake in the territory claimed", citing the Crown's "moral, if not (...) legal, duty to enter into and conduct those negotiations in good faith"[197]. In light of the foregoing case law, it is apparent that the Crown has begun to understand the complexities of overlapping claims, but that this "has not prevented the Crown from exercising its legislative power to settle treaties in contested areas"[198].

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[196] *SambaaK'e Dene First Nation v Duncan*, 2012 FC 204.
[197] *Delgamuukw v. British Columbia*, *supra* note 45, para 186.
[198] R.G. Christopher Turner, *supra* note 2 at 79.

In 2009, the federal government indicated that its duty to consult is "not necessarily triggered as soon as the Crown has knowledge of potentially overlapping territory claimed by another aboriginal group (...)"[199]. This approach is flawed. The consultation process should include these groups as soon as they make themselves known, in order to avoid future litigation and complexities: "where different First Nations communities have competing claims, the result will also be increased complexity to the design of consultation processes"[200].

Although much more can be said about the duty to consult, this is not the purpose of our thesis. Our hope is that the recent case law will modify the governments' perception of their role when confronted with an overlapping land claim scenario, encouraging them to take a more active role in helping Aboriginal groups use mechanisms addressing their normative realities to find solutions.

2.2 Overlapping Claims and Treaty Negotiations: Unequal Treatment of Competing Groups

This section provides a brief overview of three comprehensive land claim negotiations which have taken place between Aboriginal groups and governments regarding settlement of claims which included issues of overlapping claims. This section will also illustrate the deficiencies in government policy by demonstrating that no permanent solutions are brought forward by the application of said policies.

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[199]Mark E.W. East, *supra* note 162 at 16.
[200]Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Limited, 2014) at 94.

(a) Concrete Applications of Overlapping Claims

The following four agreements constitute recent examples of how the signing of an agreement or treaty can create important legal and practical consequences for groups claiming overlapping territories.

(i) James Bay and Northern Quebec Agreement

The James Bay and Northern Quebec Agreement ("JBNQA") and the Northeastern Quebec Agreement ("NEQA") (hereinafter collectively referred to as the "JBNQA") was negotiated and signed in the 1970's and represents the first modern treaty in Canada, covering more than 60% of Quebec's territory and settling the land claims of Cree, Inuit and Naskapi Aboriginal groups in Quebec. However, the JBNQA does not solely concern the Crees, Inuit and Naskapi. The agreement has a tremendous and decisive effect on all other existing and unsettled overlapping claims in the JBNQA territory. In fact, section 2.6 of the JBNQA provides the following:

> "The federal legislation approving, giving effect to and declaring valid the Agreement shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory and the native claims, rights, title and interests of the Inuit of Port Burwell in Canada, whatever they may be."[201]

The federal legislation in question was passed in 1977 via the *James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32*. Section 3(3) of that enactment

[201] *James Bay and Northern Quebec Agreement*, s 2.6.

provides that all Aboriginal claims on the JBNQA territory will be considered as extinguished:

> "All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as those resulting from the *Indian Act,* where applicable, and from other legislation applicable to them from time to time."[202]

In practice, the combination of these two sections has the effect of extinguishing all competing claims on the territory, namely claims made by Innu groups, Innu Nation, Atikamekw Nation and some Anicinabek communities, without these groups ever having been involved in negotiations relating to the JBNQA. On November 14, 2014, these groups announced the creation of the Innu Anicinabek Atikamekw Political Coalition, in order to combine their efforts to defend their Aboriginal rights and title, in particular, on the JBNQA territory. The chiefs who founded the Coalition have spoken out against the extinguishment clause, calling it unconstitutional, illegal and against international standards, vowing to "use every means necessary to put an end to this serious injustice"[203]. Chief Bruno Kistabish, of the Abitibiwinni First Nation, explains that he believes Aboriginal peoples can come to a solution together:

> "For thousands of years, our people have shared territories without borders. Today, we are embarking on a process aimed at settling the

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[202] *James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32* [*James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32*], s 3.3.

[203] "Anicinabek, Atikamekw and Innu First Nations Join Forces to Defend Ancestral Rights and Titles", *CNW Telbec* (13 November 2014), online: <http://www.newswire.ca/en/story/1445633/anicinabek-atikamekw-and-innu-first-nations-join-forces-to-defend-their-anscestral-rights-and-titles>.

> sharing of territory and the full recognition of our ancestral rights. We will find a satisfactory solution that the governments of Canada and Quebec will have to recognize."[204]

It is not the first time that these Aboriginal groups have spoken out against the 1977 statute, having previously asked the international community for its involvement[205].

(ii) Agreement-in-Principle of General Nature between the First Nations of Mamuitun and Nutashkuan, the Government of Quebec and the Government of Canada ("EPOG")

In 2004, four Quebec Innu groups[206] signed an Agreement-in-Principle referred to in French as the *Entente de principe d'ordre general* ("EPOG") (better known as the "Approche commune" or "Joint Approach") with the federal and provincial government. The EPOG is the last step before a final treaty is to be signed between these groups and the federal and provincial governments. However, a portion of the territory covered by the EPOG is also claimed by the Huron Nation of Wendake, a separate Aboriginal group which claims that its land, the *Nionwentsio*, was recognized by the government in 1760 in the context of the Anglo-Huron Treaty of 1760. This treaty was officially recognized in 1990 by the Supreme Court of Canada in its ruling in *R. v.* Sioui[207]. The Supreme Court confirmed the validity of the content of the treaty which assured the Huron members the freedom to exercise their religion and customs. This case did not involve a territorial claim as such, and therefore did not settle the land issue in a definite manner. The Supreme Court held that the rights guaranteed by the treaty could be carried out on

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[204] *Ibid*.
[205] "L'ONU se penche sur les relations entre Ottawa, Quebec et les autochtones", *Le Devoir* (2005), online: <www.ledevoir.com/politique/canada/87642/l-onu-se-penche-sur-les-relations-entre-ottawa-quebec-et-les-autochtones>.
[206] The four groups are the *Betsiamites First Nation, Essipit First Nation, Mashteuiatsh First Nation and Nutashkuan First Nation*.
[207] *R v Sioui*, [1990] 1 SCR 1025.

the territory frequented by the Hurons at the time of the treaty, as long as the carrying out of these rights was not incompatible with the Crown's use of the territory. However, a specifically delineated territory was not defined[208].

This situation concerned the Huron Nation since the final EPOG treaty overlaps on the northern portion of the *Nionwentsio*. The EPOG territory overlaps over 80% of the *Nionwentsio*'s northern territory, but the overlap only accounts for 8% of the entire EPOG territory. In July of 2004, the Huron Nation wrote to the Minister of Indian Affairs and Northern Development to express concern about the impact of the EPOG on their territory[209]. The Minister responded by referring to section 3.4.2 of the EPOG which provided that "the status of the south-west part should be determined before the treaty is signed" and added that Canada "has a policy of concluding final agreements only if the agreement provides that the rights of other First Nations will not be affected"[210]. In 2008, the Grand Chief of the Huron Nation wrote to the Chiefs of the Innu First Nations and federal and provincial representatives indicating that the southern portion of the Nitassinan overlaps on the ancestral territory of the Huron Nation. The Grand Chief asked the parties to refrain from making any decisions on the disputed land[211]. The federal minister answered by indicating that the government "is aware of its duty to consult on matters of Aboriginal rights and claims" and that it would "assess the Huron-

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[208] *Ibid* at 1066–1073.
[209] *Huron-Wendat Nation of Wendake v. Canada*, *supra* note 189, para 28.
[210] *Ibid*.
[211] *Ibid*, para 29.

Wendat Nation's claim on the territory between the Saint-Maurice and Saguenay Rivers once it is submitted, in accordance with the *Comprehensive Land Claims Policy"*[212].

These responses were unsatisfactory for the Huron Nation representatives, and in April 2009, the Huron Nation chose to institute legal proceedings in Federal Court. The Huron Nation asked the Court to suspend the conclusion of a final treaty which would overlap the northern portion of the *Nionwentsio* without the Huron Nation's consent[213]. It also requisitioned the Court to force Canada to respect its constitutional obligations, and to obtain an undertaking by Canada to the effect that it agrees to negotiate with the Huron Nation regarding an update of the Anglo-Huron Treaty[214].

In 2010, in order to alleviate legal tensions and to better delineate the Huron territory, the Court agreed to suspend the hearing in order for the parties to come to an agreeable settlement. In 2011, the government of Canada and the Huron Wendat Nation signed a Memorandum of Understanding establishing the Discussion Table of the Anglo-Huron Treaty of 1760. The provincial government also established a discussion table to this effect. The purpose of these discussion tables was to discuss unsolved issues relating to the treaty, specifically those related to the overlapping portion of the *Nionwentsio* (northern portion) within the EPOG territory (south-west portion). The discussion tables included government representatives with experience in Aboriginal issues and could have constituted an interesting exercise in the use of Aboriginal forms of dispute resolution.

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[212] *Ibid*.
[213] *The Huron-Wendat Nation of Wendake v. The Crown in Right of Canada et al*., Application for Judicial Review, T-699-09. Decision rendered: *Huron-Wendat Nation of Wendake v. Canada*, *supra* note 189. See section 2.1(iv) of Chapter 1.
[214] *Ibid*.

Over twenty meetings were held from the period of July 2011 to December 2012[215]. Unfortunately, the result from the discussion tables was not as expected by the Huron Nation members and the Huron Nation indicated in 2012 that it planned to renew their application for judicial review. In 2013, the Department of Aboriginal Affairs and Northern Development indicated that it was "ready to support and facilitate the possible continuation of discussions" between the Huron-Wendat and the Innu of Mashteuiatsh "in order to settle the issues regarding overlapping territory"[216]. The Huron-Wendat nation replied favourably to this offer, but the discussions never took place. Again in 2013, Canada offered to meet with the representatives of the Innu and Huron nations to discuss the consultation process regarding the EPOG. The Grand Chief of the Huron Nation put an end to these discussions by indicating that "he felt 'betrayed' by [Canada's] decision to not try to obtain a formal mandate to negotiate the renewal of the Treaty of 1760 and added that it was difficult not to conclude that Canada's objective when it agreed to join the Discussion Table was to delay or avoid legal proceedings and an assessment by the courts of the federal Crown's conduct, rather than to find real and mutually satisfactory solutions"[217]. On September 25, 2013, the Huron Nation renewed their application for judicial review.

There is also a second overlap resulting from the signing of the EPOG. This overlap is between the proposed Nitassinan (Aboriginal territory) belonging to the Innus of Pessamit and the territory recognized as belonging to the Crees in the JBNQA. Section

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[215] *Ibid*, para 35.
[216] *Ibid*, para 41.
[217] *Ibid*, para 43.

3.4.2 of the EPOG provides that the issue must be resolved before the signing of the final treaty. However, treaty negotiations have yet to begin, more than ten years after the conclusion of the EPOG. Although both parties indicated willingness to negotiate in late 2013[218], the treaty negotiations appear to have stalled during the last decade and do not currently seem feasible.

(iii) New Dawn Agreements

A third area of contention regarding overlapping claims is along the Quebec-Labrador border and within the Labrador region of Newfoundland-and-Labrador. The Innu of Labrador, who refer to themselves as Innu Nation, are comprised of two distinct communities called Natuashish and Sheshatshiu. In 2011, Innu Nation finalized the signing of various agreements with the provincial and federal governments relating to an important hydroelectric project in the region. Among these agreements referred to as the *TshashPetapen Agreements* (or "New Dawn" Agreements) is the *Land Claim and Self-Government Agreement-in-Principle* (the "Agreement-in-Principle") setting out rights, benefits and limitations for the Labrador Innu communities within specific geographically-defined lands. Among these lands is a category of land referred to as the "Labrador Innu Lands", comprised of 5,000 square miles which would be under the

[218]Isabelle Tremblay, "Quebec est prêt à faire avancer le dossier", (2013), online: *La Presse*<http://www.lapresse.ca/le-quotidien/actualites/201312/05/01-4717844-quebec-est-pret-a-faire-avancer-le-dossier.php>.

administration and control of the Labrador Innu government following the signing of a final agreement[219].

The signing of this Agreement-in-Principle caused strong reactions within Aboriginal communities who also claim lands covered by the provisions of the Agreement-in-Principle. In 2013, the Innus of Uashat mak Mani-Utenam, the Innus of Matimekush-Lac John, the Innus of Ekuanitshit, the Innus of Unamen Shipu and the Innus of Pakua Shipi instituted legal proceedings in Federal Court against the federal government regarding the conclusion of this Agreement-in-Principle[220]. They are asking that their rights in the region covered by the Agreement-in-Principle be recognized, that the Agreement-in-Principle be deemed unconstitutional and illegal, and that an injunction be issued preventing the government from entering into a final treaty with Innu Nation and forcing them to respect their constitutional obligations towards the Quebec Innu groups. In May of 2015, the Federal Court ruled that it did not have jurisdiction over the plaintiffs' claims since the essence of the action, i.e. the determination of Aboriginal rights and the dispute on territory in Newfoundland-and-Labrador, should be heard before the Supreme Court of Newfoundland-and-Labrador[221].

(b) Non-Derogation Clauses: "The Easy Way Out"

A device often used to appease fears in overlapping claim situations is the introduction of a non-derogation clause in a final treaty agreement with an Aboriginal group. Non-

[219]Government of Newfoundland and Labrador, *Backgrounder. Highlights: Land Claims and Self-Government Agreement-in-Principle with the Innu of Labrador* (2011).
[220]*Instance par représentation, Cour fédérale, T-503-13*.
[221]*Innu of Uashat mak Manu-Utenam v Canada*, 2015 FC 687.

derogation clauses have been hailed by some as a "complete answer"[222] to the possible infringement of competing Aboriginal rights and title in a situation of overlapping claims. These clauses essentially provide that a treaty or an agreement with one Aboriginal group will not affect the rights (whether treaty rights or Aboriginal rights) of another Aboriginal group[223]. Canadian case law appears to have accepted the use of non-derogation clauses as acceptable in order to preserve the rights of other Aboriginal groups[224].

In *Cook v. The Minister of Aboriginal Relations and Reconciliation*[225], the Minister's position was that non-derogation provisions could be used in order to ensure that a treaty would not infringe on the rights of competing overlapping groups. Respectfully, we agree with the petitioners who claimed that the non-derogation provisions did not protect their rights. In fact, non-derogation provisions raise many difficult issues.

For instance, several non-derogation provisions, such as those present in this case, entail that a group will have to pursue litigation before the courts as the clause may require a court determination that their rights, as defined under section 35, are adversely affected by a provision of the treaty[226] :

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[222] *Tseshaht First Nation v Huu-ay-aht First Nation*, [2007] BCSC 1141, para 25.
[223] Mark E.W. East, *supra* note 162 at 11.
[224] *Fond du Lac Band v. Canada (Minister of Indian and Northern Affairs)* 1992 CanLII 2404 (FC), *Paul v. Canada,* 2002 FCT 615 (CanLII), 2002 FCT 615, 219 F.T.R, and *Tremblay v. Pessamit First Nation,* 2008 QCCS 1536 (CanLII), [2008] 4 C.N.L.R. 240) the Court found that the non-derogation provisions of the implicated agreements were satisfactory in providing protection to Aboriginal groups who were not named parties in the said agreements.
[225] *Cook v The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722.
[226] Moreover, in order to do so, Aboriginal groups must make the demonstration of specific impacts on their asserted Aboriginal rights.

> "In other words, the petitioners say that while their title and rights claim may take years to proceed through the complex process of litigating aboriginal rights and title in the courts, the subject matter of their aboriginal rights may be lost owing to the exercise by the TFN of conflicting rights granted to TFN in the meantime."[227]

Justice Garson ultimately ruled that the signing of a final treaty in this case did not cause irreparable harm to the petitioners because there was time for the petitioners, British Columbia and Canada to engage in consultations before the implementation of the treaty in question. She also indicated that the potential infringements on rights and title had not been clearly articulated and therefore did not constitute persuasive evidence[228].Justice Garson did however agree with the petitioner's theory that "the Crown cannot run roughshod over one group's potential and claimed aboriginal rights in favour of reaching a treaty with another"[229].

Another problem raised by non-derogation clauses is that the protection offered by them is often artificial, at best. For instance, in the famous Nisga'a treaty, a neighbouring Aboriginal group, the Gitanyow attempted various legal recourses to stop the coming into force of the treaty, arguing that the non-derogation provisions would not ensure the continued and uninterrupted practice of their traditional activities in the treaty territory. In the *Huron* case, the hereditary chief of the Gitanyow, Glen Williams provided a detailed affidavit in which he discusses such non-derogation provisions, explaining that they do not protect the rights of the overlapping group:

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[227] *Cook v. the Minister of Aboriginal Relations and Reconciliation*, *supra* note 225, para 187.
[228] *Ibid*, para 186.
[229] *Ibid*, para 162.

> "In conclusion, despite years of vigorously defending the existence and exercise of Gitanyow Aboriginal rights and title to its Territory, all at great financial an [sic] emotional cost to the Gitanyow people, neither the federal or provincial governments have made good on their assurances that the singing [sic] of a treaty with another Aboriginal Nation would not affect our Aboriginal rights and title. On the contrary, they now hold up to the Gitanyow that we have 'undefined rights and title' versus the Nisga'a having a Treaty. That is, the Nisga'a Treaty trumps Gitanyow rights and title in the opinion of government and their agencies.
>
> It is my belief that the Federal Government in its role as fiduciary to Aboriginal people should not and cannot conclude agreements with First Nations until and unless the overlap issues are resolved. This obligation on the part of the Federal Government is an active one, where it must play a part in the resolution of the overlap claims. It cannot be passive, as is its current policy, by claiming that it is up to the First Nations with competing claims to resolve their issues. Nor can it proceed with singing [sic] a treaty with only one of the First Nations if the First Nations cannot resolve their issues, without the other's claims being resolved. This policy results in extreme prejudice to the Nation who has not yet concluded a formal agreement."[230]

Similar concerns were expressed by Justice Mactavish in a previously mentioned case involving the SKDB, the NBDB and the ADKFN[231]. In this case, the SKDB and NBDB were seeking judicial review of a decision made by the federal government postponing consultations with them until the signing of an agreement-in-principle with the ADKFN relating to the ongoing comprehensive land claim negotiations between Canada and the ADKFN. Justice Mactavish acknowledged that "a non-derogation clause in a final agreement between Canada and the ADKFN will offer the SKBD and NBDB some measure of protection"[232] but she voiced concerns relating to the reality that the SKBD and NBDB will have to face once an agreement in principle is signed, stating that the

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[230]The Huron-Wendat Nation of Wendake v. The Crown in Right of Canada, Federal Court of Canada, File no T-699-09, Affidavit of Glen Williams, June 9, 2009, para 46-50.
[231] See discussion surrounding footnote 193: *Sambaa K'e Dene First Nation v. Duncan*, *supra* note 196.
[232]*Ibid*, para 183.

"prospect of reconciliation between the Crown and the SKBD and NBDB will inevitably be undermined if meaningful discussion with Canada only start after it has reached an agreement in principle with the ADKFN"[233].

Non-derogation provisions cannot prevent the very practical consequences of treaties which provide the signatory group with many advantages which are not made available to the overlapping non-signatory group, such as participation in decision-making committees often provided in land claim treaties. As R.G. Christopher Turner explains, the lack of a representative voice from the overlapping group can have the practical effect of removing rights from the territory in question:

> "Such shared decision-making typically includes a right for a treaty First Nation to provide input on the designation of land use zones in contested areas, such as for mining or intensive forest harvesting. Indigenous groups with overlapping claims, on the other hand, may have different visions and objectives for the contested area, such as the designation of a conservation zone. Under such a scenario, it is not difficult to imagine that conflicts may arise, which essentially pit the explicitly defined treaty rights of one group against the unproven and largely undefined aboriginal rights of another"[234].

Courts often favour non-derogation provisions since they believe that the only other option available to them is agreeing to halt the signing of an agreement. This solution is regarded as unacceptable, as it equates to the granting of a veto to the contesting group. As Justice Williamson indicated in the *Gitanyow* case, "[w]hile it is reasonable to argue overlapping claims must be taken into account in concluding a treaty, plainly s. 35(1) of the Constitution Act cannot be said to bestow upon one Aboriginal nation a right to a

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[233] *Ibid*.
[234] R.G. Christopher Turner, *supra* note 2 at 86.

veto over agreements between the Crown and other first nations"[235]. A similar opinion was expressed in the *Huron* case[236]. The judge refused to order that the signing of a final agreement be subject to the consent of the opposing group, claiming that this would undo many years of fruitful negotiations:

> "It would be unacceptable to allow the applicant to thwart almost 30 years of negotiations between the respondent and the interveners and veto the conclusion of a treaty for the sole reason that the territory on which it claims rights was not completely excluded from the scope of the treaty."[237]

In any case, non-derogation clauses generally lead to litigation as Aboriginal groups are either forced to have their right recognized by courts or are not satisfied that these provisions will protect their rights. As Judith Sayers, former chief of the Hupacasath First Nation explained in an interview with *The Globe and Mail*, it was expected that boundary issues would be resolved before agreements were signed with an Aboriginal group party to an overlapping claims. However, as Ms. Sayers states, "these governments want settlements so bad that they don't care about overlap, (...) [i]t is first-come, first serve."[238]

There is something fundamentally hypocritical about non-derogation provisions when considered simultaneously with the requirement of exclusivity set out by the courts and government policy. On the one hand, exclusivity requirements indicate that an

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[235] *Gitanyow v Canada*, [1998] 4 CNLR 47.
[236] *Huron-Wendat Nation of Wendake v. Canada*, *supra* note 189.
[237] *Ibid*, para 128.
[238] Dene Moore, "It's up to First Nations to resolve overlapping claims: B.C. Treaty Commission report", *The Globe and Mail* (7 October 2014), online: <http://www.theglobeandmail.com/news/british-columbia/its-up-to-first-nations-to-resolve-overlapping-claims-bc-treaty-commission-report/article20968990/>.

Aboriginal group must have had exclusive occupation of a territory, while, on the other hand, non-derogation provisions explicitly recognize the possibility that this may not have been the case. Moreover, these clauses allow the Crown to accept the first request for treaty negotiation, even if the land claim set out in this request does not meet the criterion of exclusivity established by the Crown. These non-derogation provisions maintain the uncertainty regarding jurisdiction over claimed lands and the potential for related litigation: "Worse yet, the framework may be seen as potentially coercive, in that it may be seen to reward those groups prepared to engage "voluntarily" within the current framework".[239]

3. Conclusion of Chapter

The foregoing overlapping situations constitute a small sample from the hundreds of overlapping claims currently present on Canadian territory. Based upon the policies developed by the provincial and federal governments, it is apparent that government officials rely on one of two strategies when faced with a situation of overlapping claims, either allowing competing groups to pursue their dispute before the courts or proceeding with the inclusion of a non-derogation provision in the agreement. Neither of these approaches has provided lasting solutions to the issue of overlapping claims as they do not address the underlying issues presented by the multiplicity of normative orders within a same conflict situation: "[i]n order to be sensitive, the court would have to allow for the

[239]Christopher Turner & Gail Fondahl, *supra* note 4 at 11.

fact that an entirely different conceptual framework may apply and that they (the judiciary) are not capable of knowing or reconciling the differences"[240].

Too much attention is given to the structure which must be used to address overlapping claims. Awareness of moral substance rather than strict structure is required to successfully address Aboriginal conflicts: "So long as law is premised upon a narrative to which its subjects cannot relate, one that refuses to respect their common humanity, then it is not "law" in any meaningful sense"[241]. Therefore, we must ask ourselves what steps must be taken in order to achieve a different narrative.

[240]Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", *Canadian Human Rights Year Book* (1990 1989) 3 at 28.
[241]Mark D. Walters, *supra* note 7, para 478.

Chapter 2 - Achieving an Inner Morality in Land Claim Conflicts - An (Alter)Native Approach Based on Aboriginal Legal Traditions and Dispute Resolution Practices

1. Setting the Stage for an (Alter)Native Approach

The purpose of this chapter is to provide the intellectual reasoning supporting our contention that Aboriginal legal traditions should be integrated into a conflict resolution process which could be used to solve overlapping land claim conflicts, in replacement of current policies and judicial approaches being carried out by Canadian governments and courts. References will be made to the lack of recognition of Aboriginal legal traditions in the legislative process, although this is not the crux of the issue in resolving overlapping claims as Western laws do not contain provisions regulating overlapping claims. However, a parallel can be drawn here, between the importance of recognizing Aboriginal legal traditions in legislation and in an eventual conflict resolution process addressing overlapping claims. The second part of this chapter offers a brief overview of the characteristics of Aboriginal legal traditions which could be used in conflict resolution.

1.1 Legal Theory

Our study of case law and current overlapping land claim situations in the previous chapter demonstrates that there is a problem with the way overlapping land claims are currently being addressed. The past and present approaches to resolving overlapping claims have failed all parties. All those involved in this issue, whether judges, politicians,

elders or Aboriginal individuals, have expressed dissatisfaction and frustration with the way in which progress (or lack thereof) has been made.

To identify the missing characteristics which would lead to a successful system addressing overlapping land claims, we must first ask ourselves why the current approach has failed.

We share the perspective set out by Jean Leclair who explains that the answer to this question depends on the manner in which we perceive law itself[242]. Various legal perceptions will provide different answers to this question. In dealing with issues related to Aboriginal peoples, the tendency to couch one's position at one end of a theoretical spectrum, placing it in its "own self-contained and self-referential universe"[243] has contributed to the resounding failure of reconciliation between Aboriginal interests and non-Aboriginal interests.

There are those who believe in a liberal approach, arguing that abstract rules, applied equally to all, will produce a just solution[244] :

> "They will claim, for instance, that a close analysis of the wording of legal texts and historical treaties, conjoined with the mobilization of supposedly universal *a priori* abstract legal standards such as the concepts of contract, sovereignty or rights, will lead to just interpretations and therefore to just remedies."[245]

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[242]Jean Leclair, *supra* note 164.
[243]*Ibid* at 4.
[244]*Ibid* at 3.
[245]*Ibid*.

However, as Leclair points out, these legal standards and interpretations depend on a framework of Western legal traditions - representing one of the main objections of those who share in the intellectual posture positioned at the other end of the spectrum, i.e. those arguing that there exists an "unbridgeable cultural divide between Indigenous and non-Indigenous peoples". As professor Leclair indicates, proponents of this posture believe that the intrinsic morality of a Court's decision is "tainted by the inherently imperialistic content of Western legal culture"[246]. They qualify the values of Aboriginal legal orders as being more flexible and fluid in comparison to the "artificial quality of State law"[247].

In order to determine a new intellectual posture, situated closer to the center of this theoretical spectrum, we must elaborate a theoretical framework which can provide insight into a situation opposing different epistemological views. As Bradley Bryan has written, "[w]e require new political and legal institutions that will allow divergent ways of life to cohere. We need to look for alternative ways to organise two cultures, ways that allow for divergent worldviews to subsist without one being subservient to the other - that is without one being allodial to the other"[248].

We believe that this insight can be found in Professor Lon L. Fuller's theory of the internal morality of law and his conception of law as an "interactional phenomenon"[249]. Professor Fuller attributed the term "eunomics" to the kind of reflection that we propose

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[246] *Ibid*.
[247] *Ibid*.
[248] Bradley Bruan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13 Can. J.L. &Jur. 3, at 27 cited in Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, A R Buck & Nancy E Wright, eds, *Despotic dominion: property rights in British settler societies* (Vancouver: UBC Press, 2005) 22.
[249] Lon L Fuller, "A Reply to Professors Cohen and Dworkin" (1965) 10 Villanova Law Review 655.

to partake in: "The science, theory or study of good order and workable social arrangements".

1.2 Achieving the Inner Morality of Law

Lon L. Fuller is widely known for his rejections of the positivistic contention of neutral morality. Legal positivism is essentially the viewpoint that law becomes law when it has been declared as such by the State, free of moral considerations:

> "At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it"[250]

For those who adhere to a positivistic stance, law is a system of social control, which must be vertically implanted[251]. Discussing positivism, it being a polysemic expression, can lead to debate and misunderstanding[252]. For the purpose of this thesis, we will understand "positivism" as that positivism suggested by H.L.A. Hart, holding a vision separating law and morality.

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[250]John Austin, *The Province of Jurisprudence Determined*, Cambridge Texts in the History of Political Thought (Cambridge: Wilfred E. Rumble, 1995) at 35.
[251]See: HLA Hart, *The Concept of Law*, 2d ed (New York and Oxford: Oxford University Press, 1994). Hart relies on the presence of a normative legal system set out by the State for his version of positivism.
[252]François Chevrette & Hugo Cyr, "De quel positivisme parlez-vous ?" in *Mélanges Andrée Lajoie* (Montréal: Éditions Thémis, 2008) 33 at 33.

Hart's understanding of positivism does include a nuanced approach indicating that the "legal" recognition of a rule could depend on the point of view chosen by the person conducting the analysis:

> "The case for calling the rule of recognition 'law' is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of a legal system, and so itself worth calling 'law'; the case for calling it 'fact' is that to assert that such a rule exists is indeed to make an external statement of an actual fact concerning the manner in which the rules of an 'efficacious' system are identified. Both these aspects claim attention but we cannot do justice to them both by choosing one of the labels 'law' or 'fact'. Instead, we need to remember that the ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law."[253]

However, he does not consider that the morality aspect associated to a certain point of view must be fulfilled in order to determine what constitutes law and what does not:

> "There are [...] two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism."[254]

Fuller rejects the Hartian concept of law[255], and believes, rather, that law can only survive if a community, together, is engaged, enabling a government which is ordered, fair and decent[256]:

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[253]H.L.A. Hart, *supra* note 251 at 111–112.
[254]H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593 at 598.
[255]François Chevrette & Hugo Cyr, *supra* note 252 at 44–53.
[256]Kenneth Winston, "Three Models for the Study of Law" in Willem J Witteveen & Wibren Van Der Burg, eds, *Rediscovering Fuller Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 51 at 62.

> "the analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply acting on the citizen - morally or immorally, justly or unjustly, as the case may be."[257]

For Fuller, a legal theory must insure the comprehension of "the status of legal institutions as focal points of collective problem solving and moral striving, modalities through which social conduct and decisions become legitimized and norms gain the allegiance of citizens"[258]. In order to do so, he argues, law must be represented "in terms of the ideals toward which it aims"[259].

Fuller's morality of law theory embraces a horizontal approach based on reciprocal relationships, not only between citizens but also between citizens and those which govern them[260]: "The functioning of a legal system depends upon a cooperative effort - an effective and responsible interaction - between lawgiver and subject"[261]. He believes that "the creating of an effective interaction" between lawgiver and citizen is "an essential

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[257]Lon L Fuller, *The Morality of Law*, Revised edition ed (New Haven and London: Yale University Press, 1969) at 192.
[258]Winston, *supra* note 256 at 68.
[259]*Ibid*.
[260]How can one depend on this reciprocity? As for legislation, Fuller sets out eight principles which must be respected by government in order to create a possibility of reciprocity. Fuller relies on the story of a king, Rex, who attempts to make laws but fails each time. Each failure is characterized by Fuller as a violation of the internal morality of law. Kenneth Winston, p .47: "The canons of this morality may be summarized as follows: "(1) there must be (general) rules; (2) the rules must be promulgated; (3) the rules must typically be prospective, not retroactive; (4) the rules must be clear; (5) the rules must not require contradictory actions; (6) the rules must not require actions that are impossible to perform; (7) the rules must remain relatively constant over time; and (8) there must be a congruence between the rules as declared and the rules as administered".
[261]Lon L. Fuller, *supra* note 257 at 219.

ingredient of the law itself"[262]. Fuller further explicates his theory of reciprocity as follows:

> "If we accept the view that the central purpose of law is to provide baselines for human interaction, it then becomes apparent why the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject. On the one hand, the lawgiver must be able to anticipate that the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to judge his actions, as in deciding, for example, whether he has committed a crime or claims property under a valid deed. A gross failure in the realization of either of these anticipations - of government toward citizen and of citizen toward government - can have the result that the most carefully drafted code will fail to become a functioning system of law."[263]

By creating an environment where reciprocity can be expected, Fuller explains that his theory will "rescue man from the blind play of chance and [...] put him safely on the road to purposeful and creative activity"[264]. What we can construe from Fuller's inner morality is that participation in the legal process is crucial to the success of a functioning system of law[265]. As discussed above, this participation must be measured not only in quantity, but also in quality, as it is the "quality of participation allowed by a process aimed at formulating a common normative outcome that will determine the internal morality of a legal order"[266].

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[262] *Ibid* at 193.
[263] Lon L Fuller, "Human Interaction and the Law" in Kenneth Winston, ed, *The Principles of Social Order Selected Essays of Lon L Fuller*, Revised Edition ed (Portland: Hart Publishing, 2001) 211 at 234–235.
[264] Lon L. Fuller, *supra* note 257 at 9.
[265] Jean Leclair, *supra* note 164 at 6.: "The *outcome of a decision* may be morally justified according to some external moral conception, but the *moral legitimacy of the decision* will be compromised if the process leading to it does not respect the mode of participation that is inherent to it".
[266] *Ibid* at 6.

Law must therefore be understood "as a form of social capital"[267]. The function of law is to be perceived as "a means for facilitating human interaction"[268]. Fuller argues that legal theorists "need to give more attention than they have in the past to the social processes from which rules can emerge and become effective as law without receiving the imprimatur of any explicitly legislative organ of government"[269]. Although our thesis does not address integrating Aboriginal legal traditions into official Canadian legislation specifically, the principles and reflections offered by Fuller's theory and the manner in which human interaction is stressed, support our argument that a conflict-resolution process addressing overlapping claims must include Aboriginal legal traditions.

Relying on this parallel to Fuller's theory, we can imagine a theoretical perspective allowing us to make use of Aboriginal legal traditions as an answer to overlapping claim issues.

1.3 Canadian Aboriginal Law and the Absence of Inner Morality

How does Canadian law measure up to Fuller's morality of law requirement? In other words, is "Canadian aboriginal law (...) sufficiently grounded in a reciprocal relationship of respect between the Canadian state and aboriginal peoples for it to constitute 'law' in a meaningful sense, rather than mere power or force"[270]? The answer to this question is currently negative. Notwithstanding their diverse traditions, each Aboriginal group has a

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[267]Val Napoleon, *Indigenous Legal Lodge. A Proposal* (unpublished) at 4.
[268]Lon L Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" (1975) 1975:1 BYU Law Review 89 at 89.
[269]*Ibid* at 95.
[270]Mark D. Walters, *supra* note 7 at 473.

"common experience" in that "their Indigenous legal traditions are not reflected in Canada's multi-juridical state"[271]. As Mark D. Walters explains, the narrative of Canadian Aboriginal law does not achieve Fuller's morality of law requirement:

> "(...); subjugated peoples cannot participate in or identify with the national moral narrative that founds legal meaning, and so the power that is brought to bear upon them in the form of law is only law in a thin or positivist sense."[272]

The Aboriginal voice may participate in the dialogue, but "to do so intelligibly, it must be subsumed within the existing discourses of political liberalism, nationalism, constitutionalism, and sovereignty"[273]. Historically, the colonization of Aboriginal peoples has entailed that their laws and traditions have been regarded as inferior to Western laws and have been discarded by Western laws[274]:

> "It is one of the tragedies of [W]estern history that the culture-specific nature of its own systems of law has blinded it to the existence of law in other societies. This monocultural myopia, coupled with the economic demands of an imperial ethic, has led to a dismissal of other cultural

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[271]Lisa D Chartrand, *Accommodating Indigenous Legal Traditions* (Ottawa, 2005) at 4.
[272]Mark D. Walters, *supra* note 7 at 478.
[273]Dale Turner, "Perceiving the World Differently" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57 at 59.
[274]John Borrows, "With or without you: First Nations law (in Canada)" (1996) 41 McGill LJ 629 at 633.See also: James Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1. For instance, in *St-Catherines Milling and Lumber Co. v. R.*, a very important case in Canadian jurisprudence, the Court stated that the interests of the Crown are more important than those of Aboriginal groups: see *St-Catherines Milling and Lumber Co.* v. *R* (1888), 13 SCR 577, 1887 CanLII 3 (SCC), p. 650: "Were these lands at confederation crown lands, or the private property of the Indians, is the abstract question to be determined. I am of opinion that they were crown lands, and consequently that under sections 109 and 117 of the B.N.A. Act they belong, as before confederation, to the Province of Ontario and form part of its public domain by title paramount".

> systems as not being 'legal' and a subsequent imposition of the Western way."[275]

The outright dismissal of the legality of other legal systems removes the legitimacy of the Canadian or "dominant" legal system for those whose system has been dismissed. To achieve legitimacy, "democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution"[276]. A similar argument can be made about the legitimacy of judicial institutions and other conflict resolution mechanisms. Their legitimacy will depend on their ability to allow for the meaningful participation of Aboriginal peoples and for the use of Aboriginal legal concepts and understandings in the process of resolving disputes. The current Western legal traditions which are being used do not allow for the true participation of Aboriginal peoples since they do not recognize their principles and culture within the institutions applying these traditions. As John Borrows argues, "Indigenous adjudicative institutions using indigenous principles would correct this oversight"[277].

The rule of law crisis plaguing Aboriginal communities explains, in large part, why there are so many issues troubling these communities, including the issue of overlapping claims:

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[275]Michael Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) 26:Special Edition University of British Columbia Law Review 147 at 161. See also: Moana Jackson, *The Maori and the Criminal Justice System, He WhaipaangaHou - A New Perspective, Part 2* (New Zealand Department of Justice, 1988) at 262–264.
[276]*Reference Re Secession of Quebec*, [1998] SCR 217, 217-218.
[277]John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Washington University Journal of Law and Policy 167 at 208.

> "We have a real crisis in the rule of law in Aboriginal communities. And it is not a crisis because Aboriginal peoples don't have the rule of law; it is a crisis of legitimacy about the rule of law and Aboriginal communities. If Aboriginal peoples were able to start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, I believe that would go at least some distance to diminishing some of the problems that we have. It is not the whole solution, but it is a part of the solution."[278]

1.4 Proposing a New Framework

The purpose of this thesis is not to provide a framework which could guarantee reciprocal relationships of respect in every field of law. We only intend to address the creation of such a reciprocal relationship in the case of conflict resolution mechanisms which could address the issue of overlapping land claims in Canada. In order to do so, and since these disputes involve Aboriginal claimants, we must identify *Aboriginal* notions of the rule of law "that produce the sort of internal morality of law contemplated by Fuller - a spirit of legality that respects the common humanity of people"[279].

Currently, there is a lack of consideration of Aboriginal epistemology in the conflict resolution process in Canadian overlapping claim situations. If Aboriginal legal traditions were integrated into the legal and political approach to solving overlapping land claims, this would not only meet the demands of all the Aboriginal claimants involved, but it would also ground the Canadian and Aboriginal relationship in a reciprocal relationship based on respect, rather than a "mere exercise of power"[280], therefore meeting elements

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[278]John Borrows, *supra* note 69 at 168.
[279]Mark D. Walters, *supra* note 7 at 479.
[280]*Ibid* at 470.

of internal morality. This, by ricochet, would also strengthen the legitimacy of the Canadian legal order as a whole.

Aboriginal legal traditions must not merely be integrated and translated into existing Western legal concepts, as suggested by the Supreme Court of Canada. It is our opinion that Aboriginal legal traditions must be considered along with, rather than within Western legal traditions, and as integral to Canada's legal foundation, instead of integrated and amalgamated to the current legal foundation[281]. This is particularly so in overlapping claims' cases.

As Borrows explains, "[a]ffirming Indigenous legal traditions would expand and improve the rule of law in the country, and benefit Aboriginal peoples and our society as a whole"[282]. A dispute resolution system, in a situation of overlapping claims concerning primarily two or more Aboriginal parties, which would allow said Aboriginal parties to interact according to their own legal principles could constitute the uniting point between legitimacy and legality.

The recognition of Aboriginal legal traditions with regard to dispute resolution mechanisms for overlapping claims must be undertaken under a renewed epistemological lens, integrating "indigenous intellectual methodologies that express indigenous legal concepts"[283] in order to fully consider the Aboriginal dispute resolution system as "an active system that contains its own values, norms, uses, standards, criteria and principles

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[281]Lisa D. Chartrand, *supra* note 271 at 5.
[282]John Borrows, *Indigenous Legal Traditions in Canada*, Report for the Law Commission of Canada (2006) at 6.
[283]John Borrows, *supra* note 277 at 222.

for the use of such knowledge"[284]. In the case of overlapping claims, such an approach "may result in a range of outcomes much more sophisticated, and appropriate, than the narrow and limited approach of simply drawing a line on a map"[285].

However, more must be done than the recognition of Aboriginal legal traditions. There is a need for a serious internal reflection on the part of the Supreme Court regarding the understanding of the exclusivity requirement and the refusal of the Crown to honour such requirement. Two separate but equally important conclusions should be drawn from this reflection.

As we have seen above, the exclusivity requirement is interpreted without the consideration of the underlying normative authority which may have existed for other groups using the same territory. For instance, if group A uses a tract of land which is also used by group B, and if group A petitions the Court for a declaration of Aboriginal title, group B could be faced with a situation where its pre-existing rights on the land are jeopardized. These rights on overlapping lands must survive the determination of Aboriginal title and must not be ignored. In order to do so, as we have discussed in Chapter 1, the Court should interpret these rights as a source of normative authority over the management of the land. For instance, this theory could be applicable in the case of shared lands for which only a section overlap, creating buffer zones on which both

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[284] *Ibid*.
[285] Union of British Columbia Indian Chiefs, *Discussion Paper from 2008 Chiefs Forum: Shared Territories/Overlap Resolution Mechanism* (2008) at 4. See also Brian Thom, "The paradox of boundaries in Coast Salish territories" (2009) 16:2 Cultural Geographies 179 and Christopher Turner & Gail Fondahl, *supra* note 4.

groups could hold joint Aboriginal title; recognizing that exclusivity need not exclude all other Aboriginal groups:

> "Preference for exclusivity (e.g., a resolution to "the overlap problem") reproduces the hegemonic order of mutually exclusive property (Egan 2013; Thom 2014). In one sense overlapping claims can be understood as a (perhaps unintentional) challenge to the taken-for-granted spatial practice of representing territories as discretely bounded and exclusive."[286]

Moreover, the Supreme Court must take note of the dubious (to say the least) manner in which the Crown applies the exclusivity requirement in negotiations with Aboriginal groups. As we have seen, by agreeing to sign a treaty over land which it is entirely aware is subject to overlapping land claims, the Crown is implicitly denying any legitimacy to these overlapping claims even though, historically, other Aboriginal groups have shared the territory's resources. Now, even though a group may achieve a certain demonstration of exclusivity, if, in fact, another group claims an overlap on the same portion of land, can exclusivity really be demonstrated? Hence our indication that the Crown uses a "modified" approach to exclusivity, one that is not in harmony with either government policy or judicial decisions. It is our opinion that non-derogation provisions are not an acceptable solution as they do not offer protection of section 35 rights. As such, and at the very least, one could claim that the Crown is not acting, as it should, in an honourable fashion. The Supreme Court must recognize that the Crown's methods contradict the exclusivity requirement it developed and that such methods deny the possibility of joint title between two groups[287].

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[286]Christopher Turner & Gail Fondahl, *supra* note 4 at 8.
[287]For more on the subject of joint Aboriginal title see: Kent McNeil, *supra* note 51.

In undertaking both these actions, the Court must recognize that many Aboriginal groups can hold rights on a given territory. As Turner and Fondahl explain, it is not only physical tracts of land which overlap which each other, but also the criteria employed by Aboriginal groups in order to define these lands[288]. The meaning of traditional territory can be interpreted in a host of ways, prompting difficulty in knowing whether the claim to this territory if based on "exclusivity, shared exclusivity, or other markers of distinction such as language, historic land use and occupancy, contemporary land use and occupancy and so on"[289].

The Court must engage all groups equally by requiring that the Crown consult with all Aboriginal groups involved with a particular tract of land and by legitimizing the fact that these groups are legally and morally entitled to put in place institutions to address their overlapping claims amongst themselves, allowing their respective criteria for defining traditional territory to interact. In doing so, the Crown would not only fulfill its constitutional duty to consult; it would substantially modify the moral narrative by trading a purely Western-centric legal understanding of land "control" for one that, without excluding Western notions, would give ample space to the appropriate legal and cultural references of each Aboriginal group involved.

What we are suggesting is eloquently explained by Diana Lowe and Jonathan H. Davidson as follows: "a multi-option dispute resolution system that enables our contemporary legal system to recognize, incorporate, and defer to culturally appropriate

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[288]Christopher Turner & Gail Fondahl, *supra* note 4 at 9.
[289]*Ibid*.

dispute resolution"[290]. As will be explained in the final section of Chapter 2, we believe that such a dispute resolution system addressing overlapping claims and employing Aboriginal legal traditions can exist within the framework of Canadian law.

2. Defining a Conflict-Resolution Process Based in Internal Morality

John Borrows describes Aboriginal legal traditions as originating in "the political, economic, spiritual and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders"[291]. Aboriginal legal traditions are at the center of Aboriginal culture, identity, languages, institutions, and relationships with land and resources[292]. Historically, they governed the relations within nations in addition to providing a set of rules in order to maintain a peaceful coexistence with other nations[293]. In order to achieve a successful discussion surrounding the resolution of overlapping claims, these traditions must be identified and included in the normative framework employed to address such claims.

The first part of this section will provide a brief definition of the term "legal tradition" used throughout this thesis in order to situate the reader. The second part of the section will offer certain Aboriginal perspectives on key elements which may help in unlocking the solution to addressing overlapping claims within a legitimate and efficient process.

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[290]Diana Lowe & Jonathan H Davidson, "What's Old Is New Again: Aboriginal Dispute Resolution and the Civil Justice System" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 280 at 283.
[291]John Borrows, *supra* note 274 at 646.
[292]John Borrows, *supra* note 277 at 205.
[293]Lisa D. Chartrand, *supra* note 271 at 8.

2.1 Defining an Aboriginal Legal Tradition Using the Notion of Chthonic Traditions

Defining an Aboriginal legal tradition is not a simple task. Entire theses have been devoted to this feat. For the purpose of this thesis, we will use the work of author H. Patrick Glenn, more specifically his book *Legal Traditions of the World* in which he provides a definition of a "chthonic legal tradition"[294]. Before providing a definition of a chtonic legal tradition, let us look at the meaning of tradition and, more specifically the meaning of "legal tradition".

The word tradition is associated to the passage of time or to a "pastness"[295]. As a tradition ages in time, its fragility decreases and its support increases[296]. A tradition must further be "continuously transmitted, in a particular social context, in order for it to be of current relevance"[297]. The continuity of tradition distinguishes it from law in the strict sense. For instance, under a positivist understanding of law, a law can move from non-existent to existent by a simple act of sanction, an act which does not require pastness or continuity.

A tradition is composed of different information as it evolves through a generation's interpretation[298]. This causes Glenn to conclude that "all traditions are undefinable or incomplete"[299]. Thinking of tradition in this manner provokes questions of stability and fragility. As Glenn explains, perceiving a tradition as received information entails

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[294]H Patrick Glenn, *Legal Traditions of the World*, Fifth ed (Oxford: University Press, 2014) at 5.
[295]*Ibid* at 4.
[296]*Ibid* at 6.
[297]*Ibid* at 13.
[298]*Ibid* at 15.
[299]*Ibid* at 16.

elements of diversity and change, but "[i]t also bears within itself the seeds of corruption, the various forms of human frailty which would convert it to an instrument of perverse and personal ends. All this is the world within, the risks and perils in the internal life of a tradition"[300].

The question of what is understood by a "legal tradition" remains. Legal traditions have the characteristic of being operative over time[301]. They present a normative function, being composed of information which is *normative* in nature. Glenn offers the following definition: "A legal tradition is thus inclusive of a great deal of normative information that may be gathered or captured over a very long period of time"[302].

It is crucial to this thesis that our concept of "law" be perceived as tradition-based as it allows the possibility of conciliating Aboriginal laws and Western laws[303]. As Glenn explains, a concept of legal tradition "provides the conceptual and conciliatory devices necessary for the peaceful coexistence of different ideas and peoples"[304]. Legal traditions evolve together; communicate with each other and can each recognize normativity attached to the rules and principles which they are composed of: "tradition is compatible with dialogue, and this is the case for national legal traditions as well as non-national

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[300] *Ibid* at 30.
[301] H Patrick Glenn, "A Concept of Legal Tradition" (2008) 34 Queen's Law Journal 427 at 435.
[302] *Ibid* at 438.
[303] *Ibid* at 445.
[304] *Ibid*.

legal traditions. The concept of a legal tradition allows for normative engagement, as opposed to hierarchical dominance"[305].

Glenn proposes a "multivalent logic" in order to accept that legal traditions can interact and are not mutually exclusive. This conciliatory method must be employed by the courts in order to accept that both Aboriginal legal traditions and Western legal traditions interact while each retain their normative function. Moreover, this logic must also be adopted by the Aboriginal groups themselves when considering a solution to their overlapping claims, in order to recognize that a certain area of land can be subject to multiple normative rights.

In the case of Aboriginal peoples, Glenn attaches the term "chthonic" to their legal traditions. Chthonic designates close harmony with the earth. Describing a legal tradition as chthonic is an "attempt to see the tradition from within itself, as opposed to imposed criteria"[306].

Glenn explains that a chthonic legal tradition has no point of origin. Such a tradition "simply emerged, as experience grew and orality and memory did their work. Since all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition"[307]. He describes the most obvious feature of a chthonic tradition as being its orality[308]. Although this may appear, at first glance, to be an unreliable source of information, one can be comforted by the fact that these legal

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[305] *Ibid* at 441–442.
[306] H. Patrick Glenn, *supra* note 294 at 62.
[307] *Ibid*.
[308] *Ibid* at 63.

traditions have been preserved for a large part of humanity[309]. Moreover, as the chthonic legal traditions have not been written down, they have not been influenced by what Glenn refers to as "large, ongoing commentaries" written by scribes who themselves became a source of law[310].

Chthonic legal traditions are composed of a fundamental core, "the sacred character of the world", which cannot be changed, as it would remove the chthonic characteristic from the tradition[311]. However, this does not mean that chthonic legal traditions are immutable or frozen in time[312]. In fact, Glenn explains that because of the influence of Western legal traditions, there is no such thing as a pure chthonic tradition in today's world[313]. Chthonic traditions can exchange information with other traditions because of their open character, making the content of the tradition most significant: "Yet the continuing existence of chthonic tradition indicates that openness and vulnerability are not the dominant criteria in the ongoing life of a tradition. Much more would appear to depend on what the tradition says"[314].

Some other common characteristics of chthonic or Aboriginal legal traditions include the following:

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[309] *Ibid*.
[310] *Ibid* at 64.
[311] *Ibid* at 81.
[312] See also John Borrows, *supra* note 277 at 199.: "Indigenous legal traditions are not frozen at some artificial moment in the past; they continually develop to meet the needs of each generation. No culture is free from so-called external 'contaminating' pressures. Indigenous cultures are no exception, though one should be careful not to equate change in indigenous culture with the extinction of indigenous cultures. Something does not automatically become non-indigenous just because indigenous peoples adapt and adopt contemporary objects in their ideas and expressions."
[313] H. Patrick Glenn, *supra* note 294 at 83.
[314] *Ibid* at 85.

> "the importance of custom, the absence of coercive institutions, the liberty of the individual, the solidarity of communities, the integration of legal, moral, and spiritual values, the central role of oral tradition, and finally, the individual quest for that state of mind in which community definitions of duty and responsibility were appreciated and internalized."[315]

However, despite these common elements, it is important to remember that Aboriginal legal traditions vary widely amongst groups throughout Canada as do their traditional dispute resolution techniques.

For instance, the following example from Rupert Ross provides an amusing example of the cultural differences between Mohawk and Crees:

> "The Mohawk people, who had been agricultural for many centuries, long before Europeans arrived in this land, had of course, much more by the way of food and they developed a custom of setting out much more food than anybody could possibly hope to eat. Any (sic) by that they wish to show their generosity and their respect for their guests. The Cree people that came were from a different setting and it was a setting where there wasn't that much plenty and they had developed the opposite custom. That is you eat everything that is put in front of you to show respect for the person who is giving it to you. As the feast progressed you can imagine the difficulty. The Cree kept eating and eating and eating and thinking these guys are out to poison us... The Mohawk kept running back to the kitchen for more food saying 'who are these guys trying to prove that we don't have enough food to go around'."[316]

As Ross explains, this story illustrates "the difficulty we have of seeing through our own rules" and "seeing accurately through the rules of other people"[317].

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[315]Mark D. Walters, *supra* note 7 at 482.

[316]*Speech by Rupert Ross to the Aboriginal Policing Conference, Edmonton, Alberta, May 29 to June 1, 1990, in "Sharing Common Ground: A Leadership Conference on Aboriginal Policing Services" May 29 to June 1, 1990, Edmonton, Alberta (Unpublished)* at 88–89. See also Val Napoleon, *supra* note 5 at 4.: Val Napoleon makes similar comments regarding the difficulty to see law in other cultures. As she explains, "law is culturally bound - it is only law within the culture that created it. Gitskan law is not law to Cree people, and vice versa".

[317]note 316 at 88–89.

Together, chthonic legal traditions comprise what can be referred to as chthonic law. Glenn describes chthonic law as being an informal "repertoire" in which "all, or most share and in which all, or most, may participate"[318]. He offers the following reflection when defining the expression chthonic law:

> "Since there are no (well, few) formally designated actors in chthonic law there is no one whose activity can readily be designated as law. (...) So the law that we know is in there, in the chthonic tradition, is all mixed up with other things - how to cook, how to catch rabbits and deer, how to behave to one's family (in a very large sense), how to be honourable. We can't be too precise about this. *It just doesn't matter*. If we take law simply as some sort of social glue, among others and of whatever composition, chthonic peoples have it. If pressed, they can produce it, and even convince supreme courts of it, but there is something not quite chthonic in the process. Chthonic law is thus inextricably woven with all the beliefs of chthonic and indigenous peoples and is inevitably, and profoundly, infused with all those other beliefs."[319]

Chthonic law is therefore linked to chthonic tradition. It is a flexible law which allows many different forms of social organization and which commands respect of the natural world[320].

The natural world is not, however, the only source of law within Aboriginal communities. John Borrows has identified five main sources of Aboriginal law: (1) sacred law, as stemming from the Creator or creation stories[321], (2) natural law, stemming from observations of the physical world based on "how the earth maintains

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[318]H. Patrick Glenn, *supra* note 294 at 64–65.
[319]*Ibid* at 72.
[320]*Ibid* at 83.
[321]John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 24–28.

functions that benefit us and all other beings"[322], (3) deliberative, stemming from discussion, persuasion and deliberation[323], (4) positivistic law, stemming from the "proclamations, rules, regulations, codes, teachings, and axioms that are regarded as binding or regulating people's behaviour"[324] and finally (5) customary law. Customary law is described by Borrows as the "label" that would be given by those who do not understand the complexities of Aboriginal societies[325]. He defines customary law as "those practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them"[326]. Custom is a source of law in other legal systems as well, such as civil, common and international legal systems.

Somme common characteristics of Aboriginal law include the fact that this law was often "non-prescriptive, non-adversarial and non-punitive"[327] and characterized by values which promote "respect, restoration and consensus and are closely connected to the land, the Creator and the community"[328]. This last element, connection to the land, is crucial to an understanding of Aboriginal culture and Aboriginal morality. The next section of this chapter will address this aspect of land connectivity and its impact on the Aboriginal perspective of exclusive land ownership and requirement to demonstrate exclusive occupation as determined by Canadian case law and policy, for this is a major hurdle in the current conflict resolution approach with regard to overlapping claims.

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[322] *Ibid* at 28.
[323] *Ibid* at 35–46.
[324] *Ibid* at 46.
[325] *Ibid* at 51.
[326] *Ibid*.
[327] John Borrows & Law Commission of Canada, *Justice within: Indigenous legal traditions : discussion paper*. ([Ottawa]: Law Commission of Canada, 2006) at 3.
[328] *Ibid*.

2.2 Aboriginal Perspective on Key Elements for Overlapping Claims Resolution

(a) Land

The relationship between Aboriginal people and the land is without a doubt the most significant component of the Aboriginal identity[329] : "[w]hile there are many and diverse Aboriginal cultures, in all of them, the land has a place almost beyond the comprehension of a European-trained mind, which generally speaking, deals with land as an economic commodity"[330]. However, as we will now see, although land plays an existential role in Aboriginal legal universes, the idea that Aboriginal peoples were proto-communists sharing the land in an undiscriminating fashion, they being ignorant of frontiers, is not supported by historical evidence. Aboriginal Nations recognized the existence of frontiers, but the latter were more porous than exclusive.

The Royal Commission on Aboriginal Peoples provides the following explanation on the reality of the land relationship for Aboriginal peoples:

> "Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.
>
> Many Aboriginal languages have a term that can be translated as 'land'. Thus, the Cree, the Innu and the Montagnais say *aski;* Dene, *digeh*; the Ojibwa and Odawa, *aki*. To Aboriginal people, land has a broad meaning (...) To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such.

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[329]Sébastien Grammond, *Aménager la coexistence: les peuples autochtones et le droit canadien*, Droits, territoires, cultures 3 (Bruxelles: Bruylant [u.a.], 2003) at 145.
[330]H.W. Roger Townshend, *supra* note 70 at 2.

> The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community. Land touches every aspect of life: conceptual and spiritual views; securing food, shelter and clothing; cycles of economic activities including the division of labour; forms of social organization such as recreational and ceremonial events; and systems of governance and management."[331]

The Aboriginal relationship with land is discussed at length by authors Henderson, Benson and Findlay in their book *Aboriginal tenure in Canada*. They explain that the Aboriginal order is based on "the law of belonging to an ecological space"[332]. The following excerpt is cited as constituting a unifying vision of land:

> "We are the land. To the best of my understanding, that is the fundamental idea embodied in Native American life and culture... More than remembered, the earth is the mind of the people as we are the mind of the earth. The land is not really the place (separate from ourselves) where we act out the drama of our isolate destinies. (...) It is not the ever-present 'Other' which supplies us with a sense of "I'. It is rather a part of our being, dynamic, significant, real. It is ourselves, in as real a sense as such notion as 'ego, libido' or social network, in a sense more real than any conceptualization or abstraction about the nature of human being can ever be (...) The Earth is, in a very real sense, the same as ourself (or selves)."[333]

The authors explain that an Aboriginal vision of land rests on an "ecological proprietarian order"[334], that is, that land is not a commodity but rather a "shared and

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[331]Royal Commission on Aboriginal Peoples, *supra* note 122 at 448–449.
[332]James Youngblood Henderson, Marjorie L Benson & Isobel Findlay, *Aboriginal tenure in the Constitution of Canada* (Scarborough, Ont: Carswell, 2000) at 406. See also H. Patrick Glenn, *supra* note 294 at 69. "Chthonic notions of property are therefore those of a chthonic life, and the human person is generally not elevated to a position of domination, or dominium, over the natural world (...) According to evidence of chthonic law which has convinced high courts, the chthonic use of land consisted of communal or collective enjoyment, with no formal concept of property crystallizing this loose relationship between groups of people and the soil upon which they lived".
[333]Henderson, Benson & Findlay, *supra* note 332 at 409.
[334]*Ibid* at 411.

sacred ecological space"[335]. As the authors explain, "the Aboriginal law manifests many different visions of land tenure derived from the unifying principle and ecological proprietarian order"[336]. Indeed, Aboriginal groups each possess their own customs, practices and knowledge which influence their particular relationship with land.

The following quote from Aimée Craft's book demonstrates the significance and central role that the relationship with the land played in the lives of Anishinabe people:

> "Through the high places and low, Kitchi-Manitou shows us, speaks to us. Our ancestors watched and listened. The land was their book. The land has given us our understandings, beliefs, perceptions, laws, customs. It has bent and shaped our notions of human nature, conduct and the Great Laws. And our ancestors tried to abide by those laws. The land has given us everything."[337]

The relationship with the land has an undeniable influence on the consideration of land as a commodity. For instance, the Cree system of property has been described as functioning according to three legitimating principles[338]. The first principle is that a household has primary rights on the products of its own labour, such as the objects it creates or the animals which have been hunted[339]. The second principle which balances the first is in favour of the collectivity, restraining any need for greed: "no household may use, restrict or accumulate resources and products in ways prejudicial to the interests

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[335] *Ibid*.
[336] *Ibid*.
[337] *Ibid* at 97, quoting Basil Johnston, *Honour Earth Mother: Mino-AudjaudauhMizzu-Kummik-Quae*, (Cape Croker: Kegedonce Press, 2003) p. xv.
[338] Colin Scott, "Property, practice and aboriginal rights among Quebec Cree Hunters" in Tim Ingold et al, eds, *Hunters and gatherers*, Explorations in anthropology (Oxford [Oxfordshire] ; New York : New York: Berg ; Distributed in the US and Canada by St. Martin's Press, 1988) 35 at 35.
[339] *Ibid*.

of others"[340]. The third and final principle provides a guarantee of household rights and collective rights, in the form of power restrictions on territory stewards: "this is the principle that ungarnered resources, 'the land', cannot be alienated for the private benefit of any privileged individual or sector of the community"[341]. What these principles tell us is that the Cree, not unlike other Aboriginal groups, do not necessarily perceive exclusivity in the same manner that most Western societies do.

An important perspective on this topic is the one brought forward by Sylvie Vincent who discusses the Quebec Algonquian's relationship to the land regarding boundaries and overlaps[342]. Based on her research, she is able to confirm the existence of historical "border crossings" at the limit of an Aboriginal group's territory:

> "Ces quelques informations permettent de dire qu'il existait au XVII^{e} siècle un principe de géopolitique et d'économie fondamental et accepté par tous selon lequel, comme l'écrit Bruce Trigger, nul n'avait le droit de circuler sans autorisation sur le territoire d'autrui. Encore fallait-il que chacun sache quelles étaient les frontières de son propre territoire et de celui de son voisin. Ce qui m'amène à conclure qu'aux premières heures du contact, et probablement bien avant, les nations du nord-est de l'Amérique du Nord convenaient entre elles des limites de leurs territoires et veillaient à ce qu'elles soient respectées. Ces limites étaient reconnues par chacune des nations et connues des Français."[343]

She discusses the existence of traditional limits and, in some cases, trespass laws, among the Algonquians, Innus, Naskapis and Cree. For instance, when discussing the Naskapis, she quotes anthropologist Eleanor Leacock who indicates that: "the important fact is that

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[340] *Ibid*.
[341] *Ibid*.
[342] Sylvie Vincent, *"Chevauchements" territoriaux : ou comment l'ignorance du droit coutumier algonquien permet de créer de faux problèmes*. Unpublished manuscript quoted with the permission of the author.
[343] *Ibid* at 6.

traditional limits did exist"[344]. When discussing the Algonquian territorial limits, Vincent provides insights into what these limits represented in application. She indicates that a territory limit can be considered as open, in that, if a family was unable to find food on its own territory and was in critical need, it could use a neighbouring territory to hunt or fish[345]. However, as we have seen, this willingness to share does not mean that territorial limits did not exist or that Aboriginal groups or families were ready to accept overlaps[346]. The willingness to share must also be quantified; where an Aboriginal family could accept that another family hunt and gather a small amount of plants or animals on their territory, they would most certainly refuse that family if they settled long-term on their territory without authorization[347].

If these territorial limits did indeed exist and were recognized by Aboriginal groups, and if Aboriginal groups lived by their legal orders which regulated land use and resource exploitation without referring to the concept of overlapping claims[348], why are we now confronted to the issue of overlaps?

(b) Exclusivity

Author Harold Johnson offers an interesting standpoint on one of the fundamental differences between an Aboriginal and non-Aboriginal perspective on exclusivity.

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[344] *Ibid* at 10.
[345] *Ibid* at 16.
[346] *Ibid*. Quite to the contrary, as Aboriginal groups do not hesitate to petition the courts in order to avoid overlaps on their territory. Just recently, in June 2015, three Algonquian First Nations declared that they are contemplating court action in order to stop the Algonquian of Ontario's treaty negotiations.
[347] *Ibid* at 17.
[348] *Ibid* at 18. Vincent quotes Paul Charest who finds that : "il n'est jamais directement question de chevauchement dans les données historiques qui ont été exposées".

Speaking from a Cree perspective, he states that Aboriginal law cannot "abide the subjugation of the many by the few"[349]. Johnson's argument is largely based on the dichotomy between a Western liberal view of the individual and the Aboriginal view of the collective. Johnson rejects the western notion of property which he qualifies as sterile and devoid of human connection[350]. He also argues that entirely exclusive control and the exploitation of certain portions of a territory are not consistent with the Aboriginal agreement to share:

> "the artificial shortages that seem essential to your social organization are contrary to our law, which mandates that everyone should have equal access to the gifts and generosity of the Creator and our Mother the Earth (...) It is only because of the laws of property, and the fact that property can be held by artificial entities that create shortages for profit, that people in this territory go hungry, or do not own their own homes."[351]

As discussed in section 1.2(b) of Chapter 1, Chief Augustine of the Mi'kmaq Nation provided lengthy description of the Aboriginal perspective on land tenure and use. He is quoted repeatedly as indicating that there is no term in Mi'kmaq language which stands for ownership of property as it is understood today. As for the existence of overlapping claims between territories, Chief Augustine eloquently explains his perspective as follows:

> "(...) in our philosophical understanding of our world, there was no proprietary ownership of territory in our regions, that everybody had the freedom to traverse through the land quite freely, as long as they did not interrupt the way of life of the other group. (...)

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[349]Harold Johnson, *Two families: treaties and government* (Saskatoon: Purich Pub, 2007) at 45.
[350]*Ibid* at 64.
[351]*Ibid* at 45–47.

> So the lines are very, very fluid and they are not very, very distinguishably [sic] this is the line that divides one district to another [sic] There would be [sic] seem to be quite a wide buffer zone in between these two areas where individuals from either district would be able to camp in those areas, as long as they were not causing problems for those that were within that area."[352]

The predominant non-Aboriginal approach to resolving overlapping land claims is simple: identify a boundary between the territory of one nation and the other[353]. This understanding has been referred to as a "common law and Eurocentric concept"[354] of the overlapping land claims issue. As Chief Augustine explains, the Mi'kmaq did not abide by these traditions. Aboriginal representatives have also come forward to voice their disagreement with Western methods. For instance, the Chiefs of British Columbia have indicated that "First Nations did not historically manage complex interrelations through clarification and adoption of borders on a map. Rather, this was done through a range of mechanisms"[355].

2.3 Exploring the Notion of Boundaries in Overlapping Land Claims

(a) Exclusivity as a Political Tool to Control Land Claims

As seen in Chapter 1, by introducing the notion of exclusivity into land tenure, Canadian courts and Canadian policy artificially modified the way in which Aboriginal peoples traditionally considered land use and land ownership:

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[352] *R. v. Marshall*, *supra* note 72, para 148.
[353] BC First Nations All Chiefs' Forum, *Shared Territories/Overlap Resolution* (2008) at 4.
[354] *Ibid*.
[355] *Ibid*.

> "All of the state mechanisms promote and extend the language of exclusivity, boundedness, statehood and private property onto indigenous relationships to land. They work to maximize the certainty and effectiveness of state jurisdictions and systems of property, enabling the development of land, resources, and community."[356]

As researcher Nadasdy explains, the land claims process is not a mechanism "simply formalizing jurisdictional boundaries among pre-existing First Nation polities"[357], it is in fact a mechanism responsible for the creation of "legal and administrative systems that bring those polities into being"[358].

The exclusivity requirement in the land claims process is also used by the federal government in order to disqualify claims when they are faced with overlaps, claiming that these overlaps remove the exclusive aspect of a land claim. The government is therefore creating tense situations between Aboriginal groups, for its sole benefit:

> "Les processus canadiens de revendication foncière exigent des communautés autochtones qu'elles représentent leurs territoires avec des lignes de frontières nettes, et lorsque les plans territoriaux qui en résultent montrent des chevauchements entre communautés voisines l'État nie avoir des obligations envers des requérants dont la territorialité complexe ne peut pourtant pas se traduire adéquatement par l'abstraction d'une simple ligne."[359]

Sylvie Vincent illustrates this argument by using two of our previously discussed overlapping examples (see section 2.2(a) of Chapter 1) in order to demonstrate that the

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[356]Brian Thom, *supra* note 4 at 17.
[357]Paul Nadasdy, "Boundaries among Kin: Sovereignty, the Modern Treaty Process, and the Rise of Ethno-Territorial Nationalism among Yukon First Nations" (2012) 54:3 Comparative Studies in Society and History 499 at 503.
[358]*Ibid*.
[359]Brian Thom, *supra* note 48 at 93.

notion of overlapping claims is a product of government policy[360]. The first example she uses is that of the James Bay and Northern Quebec Agreement which unilaterally extinguished all Aboriginal rights on the treaty territory, regardless of the rights-holders. As she explains, although these Aboriginal groups could have come to an agreement in 1975, they are now stuck with a problem entirely created by decisions based on laws which do not correspond to their own and which are now imposed upon them[361], creating frustrating situations for these groups:

> "La frustration des Innus, qui se sentent dépossédés d'une partie de leur territoire, et sans doute le malaise de certains Cris viennent d'une décision que l'on peut dire colonialiste prise par des gouvernements qui se sont octroyé le droit de dessiner de façon unilatérale les territoires des nations autochtones et qui, ce faisant, ont créé cette zone problématique dite 'de chevauchement'."[362]

The second example she uses is the overlap between Innu groups in Quebec. In 1975, the nine Innu (montagnais) communities of Quebec and three Attikamekw communities of Quebec joined together by creating the Conseil Atikamekw Montagnais ("CAM") to better negotiate their land claims. In 1979, the CAM submitted a map representing its global land claim to the government of Canada and Quebec. However, the government required that each group within the CAM provide limits for each of their respective territory. These limits do not necessarily represent the reality of Innu land use and constitute rather a political tool for band councils in their negotiation with government representatives[363]. In 1994, the CAM broke apart but the previously defined limits have

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[360]Sylvie Vincent, *supra* note 342.Brian Thom, *supra* note 48 at 94.
[361]Sylvie Vincent, *supra* note 342 at 20.
[362]*Ibid* at 21.
[363]*Ibid*.

been carried on in negotiations and have created overlapping claims where they could have previously been avoided.

As we have seen, federal and provincial policies ask that Aboriginal groups come to an agreement on their overlapping claims before negotiations for a treaty can proceed. Therefore, the government is essentially asking Aboriginal groups to solve the problems that it has created by ignoring Aboriginal laws and legal traditions[364]. In essence, the Canadian government is requiring that Aboriginal groups create an artificial truth for reasons based on practicality, while ignoring the actual state of Aboriginal land ownership and exclusivity. Moreover, this requirement can also increase the tension between two Aboriginal groups who had previous disagreements about land sharing but coped with them in their own manner: "All too often the state's expectations that indigenous communities should delineate exclusive territories have exacerbated preexisting tensions in overlapping territorial relationships, or created new ones"[365].

Generally speaking, the common law methods have failed because they have not considered the context in which they are being employed. Dispute resolution methods based on liberal concepts devoid of Aboriginal epistemological considerations cannot be successful:

> "Il serait assez naïf de croire que les techniques, méthodes et références utilisées pour régler des différends territoriaux entre États pourraient être

[364] *Ibid* at 22.
[365] Brian Thom, *supra* note 4 at 4.

> d'un bon secours pour résoudre la question des territoires chevauchants, revendiqués par les communautés autochtones. "[366]

Aboriginal traditions are characterized by complex relationships with the land which, we believe[367], cannot be fully comprehended by Western law:

> "the actual complexity of kin-based territorial organization is difficult to represent cartographically. (...) Consequently, the complex nature of contemporary indigenous territoriality is poorly served by the current practice of drawing contiguous territories marked by singular, 'exclusive' boundary lines."[368]

(b) Aboriginal Perspectives on Boundary Framework

It is undeniable that boundary lines did indeed exist between most Aboriginal groups, certainly between those who lived in close proximity to others. The purpose of this thesis is not to map out the boundary lines of a specific group, but rather to suggest a mechanism which would allow groups to conciliate these boundary lines within a framework representing their legal culture. However, based on the available literature

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[366]Henri Dorion & Jean-Paul Lacasse, *Le Quebec: territoire incertain*, Collection territoires (Quebec: Septentrion, 2011) at 217.

[367]It is important to note, however, that the perception that, prior to colonization, Indigenous nations did not entertain a strong sense of the exclusivity of their respective territories has been very seriously challenged. See : Michel Morin, « Propriétés et territoires autochtones en Nouvelle-France I – Contrôle territorial et reconnaissance de territoires nationaux », (2013) 43 (2-3) *Recherches amérindiennes au Québec* 59-75; and Michel Morin, «Propriétés et territoires autochtones en Nouvelle-France II – La gestion des districts de chasse », (2014) 44 (1) *Recherches amérindiennes au Québec* 129-136. That said, this does not call into question the more relational approach to the land defended in this thesis, i.e. one that focuses on social and political relations between parties such as marriage, kinship, trade, and other arrangements, both historic and modern. Even if the Aboriginal understandings of territoriality were historically less radically foreign to the Western notion of territorial exclusivity, the fact remains that, in the minds of the vast majority of contemporary Aboriginal actors, their relationship to land is *imagined* as relational, and this reality cannot be ignored. The development of potential solutions to overlapping conflicts carrying some measure of legitimacy should therefore reflect this contemporary Aboriginal epistemological perspective.

[368]Brian Thom, *supra* note 4 at 19.

and the current overlapping negotiations and agreements which have taken place between Aboriginal groups, we can hypothesize on possible outcomes of said framework.

Aboriginal groups did conceptualize boundaries and access to territory granted by permission. For instance, in 1637, Father Paul Le Jeune, a Jesuit, describes the Montagnais in Quebec as exacting permission before passing on their territory, failing which canoes could be broken and dangers of war were provoked[369]. Vincent affirms that during the 17th century, there was an economic and geopolitical system amongst Aboriginal groups in North-East North America which was accepted by all and which provided that no party could circulate on another's territory without first obtaining permission[370]. She concludes that the Aboriginal groups were aware of each other's territories and respected them[371].

As Vincent and Brian Thom explain throughout their work, Aboriginal groups had their own understanding of exclusivity which was not represented by a single boundary line:

> "Typical ethnographic mapping of indigenous lands leads to the production of territorial boundaries to advance claims to land and resource rights. These boundaries, and the indigenous social groups they attempt to represent, often conform to protocols familiar to the state institutions with which indigenous people are engaging. They tend not to represent a phenomenologically informed view of indigenous relationships to land and formulations of community. There is an inherent tension in 'counter-mapping' of this sort. The very maps that indigenous people hope will reconcile their claims with the jurisdiction and property claims of the state may in fact subvert indigenous notions of territory and boundaries."[372]

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[369] *Relations des Jésuites (1611-1672)* (Montréal: Éditions du Jour) at 86.
[370] Sylvie Vincent, *supra* note 329 at 6. Vincent quotes Bruce Trigger in Bruce Trigger, *Les Enfants d'Aataentsic* (Montréal: Éditions Libre Expression, 1991) at 205.
[371] *Ibid* at 6.
[372] Brian Thom, *supra* note 285 at 179.

[emphasis added]

As Thom explains above, not only is the single boundary line inadequate to cartographically represent Aboriginal understandings of territory, jurisdiction and property, but it also adds to the emergence of overlap between groups by implementing the idea of an "ethno-territorial" identity[373]. In order to counteract such implications, Aboriginal groups must refocus the discussion around their own understanding of territory, exclusivity and sharing, as the case may be:

> "Cela signifie, à mon avis, que la société coloniale et les gouvernements qu'elle se donne vont devoir accepter de voir qu'ils ont forgé de toutes pièces nombre de problèmes comme celui des soi-disant 'chevauchements' et que rien ne pourra les régler sans la connaissance et la reconnaissance du droit coutumier propre à chacune des Premières Nations. Cela nécessite aussi, de la part des Premières Nations, la conviction que leurs droits coutumiers offrent des pistes de solution qui, dans certaines situations, pourraient être non seulement valables aujourd'hui mais aussi meilleures que le recours au droit occidental."[374]
>
> [emphasis added]

Considering this reality, we must ask ourselves why we would attempt to define Aboriginal territory by using Western references of exclusive occupation. Must we stick with the concept of exclusive occupation but water it down to the point that it no longer resembles anything exclusive[375]? Why subject the Western concept to this alteration at all? We submit that resolving overlap issues should be undertaken by utilizing a dispute

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[373]Brian Thom, *supra* note 4 at 18.
[374]Sylvie Vincent, *supra* note 329 at 25.
[375]Brian J Burke, "Left Out in the Cold: The Problem with Aboriginal Title Under Section 35(1) of The Constitution Act, 1982 for Historically Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall LJ 1 at 29–30.

resolution process which recognizes and operates according to Aboriginal laws and legal traditions, referencing their understanding of exclusivity[376].

It is hard to conceptualize what a map representing Aboriginal legal traditions of exclusivity and land-sharing would look like. In certain cases, boundaries might include complex notions such as "kin, travel, descent and sharing", rendering these boundaries permeable[377]. Author Tim Ingold describes such boundaries as "more like sign posts than fences, comprising part of a system of practical communication rather than social control"[378].

Another interesting suggestion is provided by Brian Thom who indicates that lines could radiate from the residence of an individual and connect to ancestral land areas, creating a field of "stars radiating out to a multitude of locations throughout a broad landscape of corporate groups of bilaterally related kin"[379]. In this case, representation of kin relations is of crucial importance as these relationships comprise an essential portion of Coast Salish culture.

In other cases, groups may decide to designate zones with different territorial applications. Authors Henri Dorion and Jean-Paul Lacasse provide specific information about the conception of territory within Quebec Innu groups, explaining that these groups consider that the notion of boundary traditionally corresponds to "boundary zones" or

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[376]BC First Nations. All Chiefs' Forum, *supra* note 340 at 6.
[377]Brian Thom, *supra* note 285 at 179.
[378]Tim Ingold, "Territoriality and tenure: the appropriation of space in hunting and gathering societies" in Tim Ingold, ed, *The appropriation of nature: essays on human ecology and social relations* (Iowa City: University of Iowa Press, 1987) 130 at 156.
[379]Brian Thom, *supra* note 285 at 199.

"boundary regions" rather than boundary lines[380]. This could be another option, as in the case of the shared zones between the Cree and the Inuit of Quebec. Their shared zone is sandwiched between exclusive zones belonging to each group.

We suggest that a map representing complex notions such as property, territory and exclusivity would vary depending on the understandings of each group. As authors Christopher Turner and Gail Fondahl explain, "Indigenous peoples cognize territoriality in a wide variety of ways, some of them substantially different from those common to State governments, including territorialities difficult to capture as mutually exclusive polygons"[381].

2.4 Dispute Resolution Models

The following section will briefly review modern Canadian dispute resolution mechanisms which have been referred to as "alternative". The second part of this section will provide commentary on various Aboriginal dispute resolution mechanisms which were and still are used by Aboriginal groups in traditional and modern conflict resolution. We will examine the important elements of these mechanisms which could be reflected in a framework addressing overlapping claims.

(a) Alternative Dispute Resolution in Canada

(i) Introductory Comments

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[380]Henri Dorion & Jean-Paul Lacasse, *supra* note 366 at 219.
[381]Christopher Turner & Gail Fondahl, *supra* note 4 at 2.

The development of dispute resolution in the past few decades has been marked by a movement away from the traditional approach of litigation towards an approach integrating alternative dispute resolution processes (ADR). This disassociation from the traditional court process can be explained by a number of factors, which include a general dissatisfaction of Canadians with the adversarial process as a whole, caused by its complex procedures, lengthy timeline, enormous costs and lack of involvement in the outcome of the dispute[382].

The development of ADR in Canada and in the United States allowed parties to utilize an approach which is less antagonistic and adversarial[383]. The popularity of ADR is undeniable, prompting some to question whether "it is still appropriate to refer to it as 'alternative' since the term may be misinterpreted to mean merely peripheral or inferior to judicial processes"[384]. For instance, in Quebec, the newly adopted *Code of Civil Procedure* requires that parties must first "consider private prevention and resolution processes before referring their dispute to the courts"[385]. Article 1 of this new code lists the main resolution processes as being negotiation, mediation and arbitration. However, article 1 also provides that "[t]he parties may also resort to any other process that suits

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[382]Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 241 at 254.
[383]Carlo Osi, *supra* note 169 at 199.
[384]*Ibid*. See also Catherine Bell, *supra* note 382 at 254–255.
[385]*Code of Civil Procedure*, 21 February 2014, CQLR c C-2501, sec 1. Although the Bill establishing the new Code of Civil Procedure has been passed and has received royal assent, the coming into force of the majority of the articles of the Bill, including article 1, is scheduled for January 1, 2016.

them and that they consider appropriate, whether or not it borrows from negotiation, mediation or arbitration"[386].

Mediation and arbitration both involve a third party which has, depending on the method employed, more or less authority on the decision-making process. In the context of Western ADR, mediators and arbitrators are expected to be neutral parties, accredited by an organisation and having received some sort of formal training. Mediation and arbitration are generally voluntary processes, but can both be provided for in binding contracts as the favoured dispute resolution procedure.

(ii) Overlapping Claims and ADR

Currently, the favoured dispute resolution strategy for addressing overlapping claims is that of negotiation. Alternative dispute resolution theorists explain that negotiation can be of two types: competitive or problem-solving[387]. In competitive negotiation, each party's end purpose is to win the negotiation[388]. The tactics associated to competitive negotiation include confrontational attitudes, secret strategies and difficult concessions[389]: "The confrontational stance adopted tends to create many opportunities for impasse between the parties, and this will often breed mistrust, frustration, anger, and, consequently, breakdowns in negotiations"[390].

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[386] *Ibid*.
[387] Andrea Gaye McCallum, *supra* note 104 at 3.
[388] *Ibid*.
[389] *Ibid*.
[390] *Ibid*.

Inversely, the problem-solving approach favours mutually acceptable solutions[391]. In order to achieve such solutions, the parties focus on their interdependence and attempt to understand the other party's point of view, needs and interests. By considering these needs and interests as relevant and legitimate, it is easier to identify common and complementary interests[392]. Once needs are identified by each party, various solutions addressing these needs can be devised :"As a corollary, because not all individuals value the same things in the same way, the exploitation of differential or complementary needs will produce a wider variety of solutions which more closely meet the parties' needs"[393]. Moreover, it has been demonstrated that an active participation in the negotiation of mutually acceptable outcomes is indicative of an increased implementation of agreement terms[394].

In the overlapping claims process, negotiation must take place between two or more Aboriginal parties, before representatives of the federal and provincial or territorial government. Although the negotiation is between two or more Aboriginal parties, the presence of government representatives can, in some cases, increase the hostility at the negotiation table[395]. This hostility is most probably a consequence of the distrust caused by the imbalance of power between Aboriginal groups and governments. The notion of power is not "a characteristic of an organization or person but is an attribute of a

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[391]*Ibid*.
[392]*Ibid*.
[393]Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (1984) 31 UCLA Law Review 754.
[394]Andre Gaye McCallum, *supra* note 104.
[395]*Ibid*, s 2.3.

relationship"[396]. One party's power is related to the power of their opponent[397]. Studies have demonstrated that unequal levels of power generally produce less effective outcomes than situations which were characterized by an equal distribution of power[398]. Unfortunately, a principled or problem-solving approach can nonetheless be perceived by Aboriginal groups as adversarial, because of the power imbalance between government and Aboriginal groups[399].

Indeed, before arriving to a situation of overlapping claims, groups have generally gone through the comprehensive claims process detailed in Chapter 1. Therefore, when parties arrive to negotiate overlapping claims, they bring with them their baggage from the comprehensive claims process, where power imbalances are present. That is why it is important to consider the influence of these power imbalances even though the negotiation of overlapping claims will eventually be between two (or more) Aboriginal groups, as these imbalances still have a significant impact in these overlap agreements.

Power imbalances are in fact illustrated throughout the entire negotiation process, beginning with the power of the federal government to accept or reject claims. They are further evidenced throughout the claims policy, notably by the terminology employed by the federal and provincial governments which is inscribed within a colonial discourse of

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[396]Joelle Montminy, *The Search for Appropriate Dispute Resolution Mechanisms to Resolve Aboriginal Land Claims: Empowerment and Recognition* (Master of Laws, Université Laval, 1992) [unpublished] at 87.
[397]*Ibid*.
[398]*Ibid*., citing Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict,* (San Francisco: Jossey-Bass, 1986) at 278 ; Jeffrey Z. Rubin and Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975) at 221-223.
[399]Frank Cassidy, *Reaching Just Settlements. Land Claims in British Columbia* (Halifax: Oolichan Books and The Institute for Research on Public Policy, 1991).

Aboriginal people "claiming" the land, that is, that they "bear the burden of establishing the validity of their rights"[400]. Aboriginal groups have expressed their dissatisfaction with this expression as it maintains and reinforces power imbalance between parties[401]. George Watts, Chairman of the Nuu-chah-nulth Tribal Council expresses his views on the colonial terminology, such as the use of the word "claim":

> "... we have to get rid of this concept that this is a land claim. It isn't a land claim, it's a settlement; a settlement of two different jurisdictions. There is a European jurisdiction that came here and there is the aboriginal jurisdiction over that land that has always been here. Please remove from your mind the European concept that you own everything and you can give it away. It's not possible. You cannot give me the land which my great-great-great-great-great grandfather passed on to me and I'm going to pass on to my great-great-great grandchildren. You will never give us the land, but what you can do is come to an accommodation of the conflicts in the titles that we have."[402]

Author Michael Coyle has written extensively on the presence of power relations in negotiations between governments and Aboriginal groups[403]. In theory, power relations in a negotiation are influenced by the capacity of a party to exercise influence on the negotiation outcome[404]. It is said that the determining factor for exercising influence and advancing an interest is whether or not a party has a strong alternative to negotiating an

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[400]Andre Gaye McCallum, *supra* note 104, s 3.1.1.
[401]Joelle Montminy, *supra* note 396 at 89.
[402]Frank Cassidy, *supra* note 399 at 21–22.
[403]Michael Coyle, "Marginalized by Sui Generis? Duress, Undue Influence and Crown-Aboriginal Treaties" (2007) 32:2 Manitoba Law Journal 34.; Michael Coyle, "Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand" (2011) 24:4 New Zealand Universities Law Review 596.; Michael Coyle, "Negotiating Indigenous Peoples' Exit From Colonialism: The Case for an Integrative Approach" (2014) 27 Can JL & Juris 283.
[404]Michael Coyle, "Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand", *supra* note 389 at 609.

agreement[405]. In other words, if a party has no other choice but to negotiate an agreement, it will hold a less powerful position in negotiations.

In the case of Aboriginal groups, Coyle identifies three choices of alternatives in negotiating claims: the group may accept the status quo, it may pursue its claim before the courts and it may pursue political methods to advance the claim. In practice, Aboriginal groups are:

> "usually in the position of supplicants seeking redress from parties whose interests in achieving an agreed settlement are not as great as their own. The opposing parties are usually governments backed by greater resources for the conduct of negotiations and able to rely on the coercive machinery of the government to enforce the status quo in the event of break-down."[406]

Therefore, if we examine the relative strength of each party, it is evident that the Crown has a power advantage. Coyle suggests, as we are, that this power imbalance continues to be present during the dispute resolution process used by government representatives in the resolution of overlapping claims, therefore affecting the legitimacy of the process:

> "Thus, if one party is able to impose its own cultural values, both in terms of how the parties are permitted to frame their competing claims as well as establishing a standard by which those claims are to be assessed, one might reasonably infer that a pre-existing power imbalance has been institutionalized into what claims to be a neutral process."[407]

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[405] *Ibid* at 602.
[406] RC Daniel, *A History of Native Claims Processes in Canada 1867-1979*, Report prepared for the Department of Indian Affairs and Northern Development (1980) at 222–225.
[407] Michael Coyle, "Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand", *supra* note 389 at 616.

Culture shapes both the understanding and the preferences of a negotiation process[408]. Including elements of Aboriginal legal traditions and dispute resolution techniques in this process could simultaneously address issues of rebalancing negotiation power and create an appropriate framework to address overlapping claim situations.

(b) Embracing Aboriginal Dispute Resolution As a Whole

All peoples experience conflict, whether it is land conflict or another kind of conflict. As Val Napoleon explains, it is not the conflict itself which is problematic, but rather the management of the conflict so that "it does not paralyze people"[409]. The paralyzing effect that overlapping claims are having over treaty negotiations across Canada is a factual demonstration of the Canadian policies' and Canadian courts' failure to successfully manage this critical issue.

(i) Development of Canadian ADR and Aboriginal Dispute Resolution

Aboriginal dispute resolution processes have existed since time immemorial and function according to Aboriginal paradigms and beliefs. These beliefs include those based on respect and maintaining relationships, and are "characterized by flexibility, utilization of cyclical time, qualitative measurement of success and people-orientation"[410]. These dispute resolution processes were not "alternative" to litigious practices such as is the case for Western ADR; they were the procedures used by Aboriginal peoples simply

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[408] *Ibid*.
[409] Val Napoleon, *supra* note 5 at 12.
[410] Carlo Osi, *supra* note 169 at 194.

because they were integral to their traditions[411]. Dispute resolution was not only used to prevent violence, although it is most recognized for such purposes. Dispute resolution was used in everyday situations to address problems related to miscommunications, family conflict, trespass, and, evidently, boundary disputes.

Lawyer and mediator Mark Dockstator compares the dispute resolution process in a Western paradigm with that of an Aboriginal paradigm by utilizing the example of a teeter-totter. He explains that a Western approach to balancing a teeter-totter would comprise the placing of an equal weight on each side to achieve a perfect balance, whereas an Aboriginal approach would focus on bringing the parties together in the center of the teeter-totter[412]. Although this approach may seem to resemble a classic ADR approach, the urge to categorize Aboriginal dispute resolution as integrated into the dominant system of Western-based dispute resolution must be resisted[413] : "The more correct approach, (...) is to start with the assumption that each system is distinctive and attempt to construct a model of dispute resolution that recognizes the equality and validity of these differences"[414].

John Borrows highlights the importance of this recognition: "[the] further development of Indigenous dispute resolution is necessary because Canada's other legal traditions do

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[411] *Ibid*.
[412] See: UVic Institute for Dispute Resolution, *Making Peace and Sharing Power: a national gathering on aboriginal peoples & dispute resolution : proceedings.* (Victoria: UVic Institute for Dispute Resolution, 1997) at 167–168.
[413] *Ibid* at 167.
[414] *Ibid* at 168. See also: Leon Mitchell, "Using Mediation to Resolve Disputes over Aboriginal Rights: A Case Study" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for justice: aboriginal peoples and aboriginal rights* (Toronto ; Buffalo: University of Toronto Press, 1985).; and Catherine Bell, *supra* note 382 at 244.

not sufficiently engage Indigenous values and thus do not appropriately encourage Indigenous participations"[415]. Chosen methods must not simply "accommodat[e] Aboriginal identity and culture"[416] but must truly allow transcendence of this identity and culture:

> "Indigenous legal traditions could become even stronger if indigenous systems were the default whenever management, regulatory or dispute resolution issues arose. Indigenous peoples could define their claims and resolve them in the 'context' of their own living culture. This would help to ensure that their legal traditions were not considered a relic of some long-lost, distant past, protected in a glass cage and treated as the heritage of mankind."[417]

For instance, the Osnaburgh/Windigo Tribal Council Justice Review Committee related the importance of maintaining harmony within the community to the specific interdependent requirements of a society based on hunting and gathering[418]. This teaches us that Aboriginal dispute resolution is "integrally linked to both social organization and cultural values and belief"[419]. If these cultural values are not reflected in the dominant dispute resolution system, groups may perceive them to be unjust, therefore denying their efficacy and legitimacy.

Speaking of the criminal justice system, Maori author Moana Jackson, explains that the efficacy of a system "ultimately depends upon society's perception of its ability to

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[415]John Borrows, *supra* note 308 at 208.
[416]Wenona Victor, *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review* (Canadian Human Rights Commission, 2007) at 33.
[417]John Borrows, *supra* note 277 at 201.
[418]Osnaburgh-Windigo Tribal Council and Alan Grant, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (Government of Ontario, 1990).
[419]*Ibid*.

provide justice"[420]. She relates the acceptance of sanctions and rules to the presence of one's personal culture, without which the perception of fairness cannot be achieved. A parallel can be drawn for the mechanisms and rules used in the resolution of overlapping claims.

(ii) Importance of Community, Peace and Harmony

The importance of kinship, community and maintaining harmony within a community is one of the most significant cultural distinctions between Aboriginal dispute resolution and Western dispute resolution[421]. This description is echoed by Rupert Ross who describes the Aboriginal dispute resolution system as one focussed on "real resolution, restoration of cooperative co-existence and the elimination of bad feelings"[422]. The philosophy of peace and harmony has been identified by others as "the linchpin to an effective understanding of Aboriginal Dispute Resolution"[423].

Author Catherine Bell identifies common themes throughout various Aboriginal dispute resolution practices. The first main theme which emerges is that an Aboriginal justice initiative must rely on the recognition of "core community values" and the bolstering of

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[420]Moana Jackson, *supra* note 275 at 262–264.

[421]Diana Lowe & Jonathan H. Davidson, *supra* note 290 at 282. See also :Michael Jackson, *supra* note 275.; Chester Cunningham, "Alternative Dispute Resolution Experience in Canada", in *Making Peace and Sharing Power: a national gathering on aboriginal peoples and dispute resolution*, (Victoria: UVic Institute for Dispute Resolution, 1997) 168; Matt Arbaugh, "Making Peace the Old Fashioned Way: Infusing Traditional Tribal Practices into Modern ADR" (2002) 2 Pepperdine Dispute Resolution Law Journal 303.

[422]Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial. Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, March 1991, Volume 1* (1991) at 9–6. See also :Yvonne Boyer, "Comparative Analysis of Canadian Law, Aboriginal Law and Civil Law Traditions" (2010) 14(2) AILR 63 at 65.

[423]Richard T Price, Cynthia Dunnigan & UVic Institute for Dispute Resolution, *Toward an understanding of aboriginal peacemaking* (Victoria: UVIC Institute for Dispute Resolution, 1995) at 2.

"community traditions" in order to be successful. This process can be challenging in that some Aboriginal communities have lost some of their traditions by reason of Canada's policies focussed on assimilation. As Borrows explains, for the communities that have "lost touch with their traditions, reclaiming and regenerating their traditions for contemporary application is therefore vital"[424]. Communities can use different methods to reconnect to their traditions, whether by asking Elders to identify fundamental values, drafting official documents based on their recollection or even engaging with other communities in order to identify some traditions and values which may help them reconstruct their own legal traditions[425].

It is important to stress that a community must not only focus on historical values which existed before colonization[426]. The community must undertake an introspection to determine which values have been amalgamated with Western notions of law and which may better correspond to contemporary values. Bell describes this as a struggle relating to the balance between "the desire to revive and protect traditional values and processes and, at the same time, be accountable to those in the community who have become separated from traditional ways"[427]. Even in the most cohesive communities, there may be different views on what the contemporary meaning of a tradition should be[428]. A

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[424]John Borrows & Law Commission of Canada, *supra* note 314 at 10.
[425]*Ibid* at 11.
[426]Catherine Bell, *supra* note 382 at 246.
[427]*Ibid* at 246–247.
[428]John Borrows & Law Commission of Canada, *supra* note 314 at 11. For instance, the author provides the example of Aboriginal women, who fear that some Aboriginal men and women have "internalized the notions of gender imposed by the *Indian Act* and that this may lead to distorted interpretations of traditions" (at 12)

unanimous understanding of values simply does not exist[429]. For instance, if identified values include impartiality and fair process, some individuals in communities may want to steer away from choosing decision makers within their own community, as they may fear that this will be considered as nepotism or that the chosen decision makers may be tainted with existing bias[430].

Various methods of Aboriginal dispute resolution reflect the importance of community, peace and harmony, such as peacemaking and community-based negotiation. Peacemaking is used in diverse forms depending on the group and its traditions. For instance, within the Navajo Nation, the process begins with a prayer between the parties and a peacemaker who may know one of the parties involved in the dispute[431]. The process is focussed on finding a solution and restoring the healthy relationship between the parties: "[t]his puts the parties in a mindset much different than the traditional adversarial mindset we are accustomed to seeing in dispute resolution processes"[432].

Community-based negotiation is another technique often used by Aboriginal groups who will submit an agreement to community approval at the end of the process. By using this technique, Aboriginal groups gain more protection against a rejected agreement after negotiation, ratifying with the community as they negotiate[433]. Members of the community can also have access to their own negotiators, as well as government

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[429]Jean Leclair, *Penser le Canada dans un monde désenchanté,* presentation given at Voir grand 2015, organized by the Federation for the Humanities and Social Sciences and the University of Ottawa(2015) at 6.
[430]Catherine Bell, *supra* note 382 at 249.
[431]James W Zion & Robert Yazzie, "Indigenous Law in North America in the Wake of Conquest" (1997) 20 Boston College International and Comparative Law Review 55 at 78.
[432]Matt Arbaugh, *supra* note 421 at 310.
[433]Frank Cassidy, *supra* note 399 at 68.

negotiators and staff[434]. There is also a positive outcome for government negotiators, who can "understand the practical application of the sometimes impersonal concepts and issues that they are negotiating"[435].

(iii) Community Strength

Using Aboriginal dispute resolution techniques forces communities to utilize their internal resources to resolve disputes, therefore reducing their reliance on outside assistance[436]. Recognizing Aboriginal laws is an important step in supporting "the strength and integrity of aboriginal communities"[437]. In this manner, the use of Aboriginal legal traditions in dispute resolution can also be viewed as a piece of the puzzle towards stronger Aboriginal governance. In fact, recognizing Aboriginal laws would allow individuals to develop within their own values and principles, and build up the rule of law within communities[438]. This is turn, would bolster personal, collective and governmental responsibility[439]:

> "Decision-making in indigenous communities should not necessarily occur through those who are distant, professionalized and impersonal; indigenous dispute resolution has the potential to involve a greater range of people in determining the consequences for actions. Dispute resolution following this model would enable indigenous peoples to take responsibility for their own actions, and simultaneously be accountable for them."[440]

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[434]*Ibid* at 67.
[435]*Ibid* at 68.
[436]Jessica Dickson, *Addressing Disputes Between First Nations: An Exploration of the Indigenous Legal Lodge* (Master of Arts in Dispute Resolution, University of Victoria, 2011) [unpublished] at 20.
[437]Norman Zlotkin, "From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada" in Catherine Bell & Robert K Paterson, eds, *Protection of First Nations Cultural Heritage Laws, Policy, and Reform* (Vancouver: UBC Press, 2009) 343 at 343.
[438]John Borrows, *supra* note 308 at 272.
[439]*Ibid*.
[440]John Borrows, *supra* note 277 at 196.

During the *BC First Nations All Chiefs' Forum*, Chiefs from communities all over British Columbia demonstrated the importance of considering Aboriginal perspective when addressing issues impacting the lives of Aboriginals. The Chiefs reflect our earlier comments on diverse Aboriginal legal systems and approaches to land issues by indicating that there cannot be a "one size fits all" approach to resolving overlapping claims since all Aboriginal groups differ from one another[441].

Such a dispute resolution process would require a high-level of legitimacy in the eyes of the federal government in order to be successful. As John Borrows states: "Indigenous legal traditions will more positively permeate our societies if their power is acknowledged by official state and community institutions"[442].

Practically speaking, "Aboriginal institutions are probably better placed than their civil law or common law counterparts to articulate legal principles that will have meaning and legitimacy in Aboriginal communities"[443]. Fundamentally speaking, Aboriginal people should participate in the dispute resolution of issues concerning them because their knowledge, rather than being treated as something that should be studied and judged,

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[441]Union of British Columbia Indian Chiefs, *supra* note 285. The Chiefs suggest the creation of a council, which would be composed of Aboriginals, but which would be neutral and non-affiliated. The council would provide dispute resolution services for First Nations dealing with overlapping claim situations. The Chiefs do not however entirely exclude the Crown from participation in such a resolution body. Indeed, the Chiefs indicate that the resolution of overlaps calls for a commitment by the Crown to provide resources to support the process. The general functions of such a body would include the following: "Research, design and development of template processes for the resolution of shared territory/overlap disputes. Facilitate the development and implementation of a process of shared territory/overlap resolution, at the request of First Nations. At the request of First Nations, play a neutral role within the shared territory/overlap resolution process, including mediating, and where appropriate, arbitrating. Depending on the nature of the process, and at the request of the Nations, play a binding decision-making role".
[442]John Borrows, *supra* note 308 at 178.
[443]John Borrows & Law Commission of Canada, *supra* note 314 at 26.

should be treated as an "active system that contains its own values, norms, uses, standards, criteria and principles for the use of such knowledge"[444].

(iv) Challenges of Aboriginal Dispute Resolution

Having outlined the advantages of using Aboriginal dispute resolution, it is nonetheless important to consider that not all Aboriginal legal traditions and dispute resolution mechanisms are inherently "good" or rest upon a higher normative value than Western approaches[445]. Problems can arise within Aboriginal dispute resolution processes, as they would in Western processes.

For instance, power imbalances can and do exist within Aboriginal dispute resolution systems similarly to Western dispute resolution systems. In order to avoid situations of power imbalance, it is crucial to focus on instilling mechanisms addressing these imbalances in power. As Borrows explains, such mechanisms can include the designing of checks and balances, which are "more likely to overcome the challenge of justice in small communities than an over reliance on technocratic, third-party decision makers"[446]. For instance, Borrows suggests that Aboriginal groups could design a process similar to s. 33 of the *Canadian Charter of Rights and Freedoms* in order to provide a "legislative override, if decisions of their justice system required review"[447]. He also provides the example of the Great Law of Peace for the Haudenosaunee and the Iroquois system of

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[444]John Borrows, *supra* note 277 at 222.
[445]Jessica Dickson, *supra* note 436 at 42.
[446]John Borrows, "A Separate Peace: Strengthening Shared Justice" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press) 343 at 355.
[447]*Ibid* at 351.

checks and balances[448]. Aboriginal groups could also separate their branches of government with substantive and procedural limits or resort to larger cultural groups such as an elders council or a wider panel, such as those used by the Navajo and the Metis Settlements[449]. The point, as Borrows explains, is that Aboriginal groups can develop their own checks and balances through "innovation and experimentation" when deciding on the structure of their justice systems[450] and could so do "in a manner that most appropriately matches their cultural norms"[451].

A second important issue evoked by some authors is the feeling of "internalized colonialism or colonial thinking"[452] in developing dispute resolution mechanisms. For instance, some Aboriginal members could express worry that their mechanisms are less reliable than those of the "dominant society". This can contribute to "a loss of confidence in traditional methods, or controversy about what these methods truly are and whom these methods serve"[453]. They may fear conflict with Western mechanisms and could "find it less complex to rationalize that the majority's system should be followed, thereby potentially creating disorder within their own community"[454]. On the other hand, some individuals may not feel as though adhering to the Western mechanisms is representative

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[448] *Ibid*.
[449] *Ibid* at 352.
[450] *Ibid* at 351–352.
[451] *Ibid* at 352.
[452] Carlo Osi, *supra* note 169 at 198.Catherine Bell, *supra* note 382 at 242.
[453] Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 11 at 23.
[454] Carlo Osi, *supra* note 169 at 198.

of internalized colonialism, they may in fact feel as though these mechanisms correspond to their values[455].

Along the same lines, a third concern exists regarding the possible conflict between legal traditions of each group involved in the dispute resolution. Just as members of an Aboriginal group might not be unanimous as to the substance of its legal tradition, the legal traditions between two groups may also clash. This topic has not been widely addressed in commentary regarding Aboriginal dispute resolution, as conflict is usually regarded as existing with the Canadian government and not between two Aboriginal groups. However, historical examples of agreements between Aboriginal groups demonstrate that conflict between legal traditions can be overcome. For instance, differing legal traditions have been historically represented within political agreements based on kinship and ritual between Aboriginal groups, such as the agreements related to the Huron Confederacy or the Iroquois League[456].

A fifth concern is the difficulty to garner excitement and interest from people regarding initiatives involving them. Human beings, whether they be Aboriginal or not, are often sceptical and weary of change. For example, in the Aboriginal community of Kahnawà:ke, the people of Kahnawà:ke expressed dissatisfaction towards the way decisions were being made, by reason of the lack of separation between judicial and

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[455]Catherine Bell, *supra* note 382 at 246–247.
[456] J.R. Miller, *Compact, Contract, Covenant. Aboriginal Treaty-Making in Canada*, University of Toronto Press, Toronto, 2009, p. 34. See also: Arthur Caswell Parker, *The Constitution of the Five Nations, or, the Iroquois Book of the Great Law*, Ohsweken, Ont, Iroqrafts, 1991.

legislative and the lack of community involvement[457]. The Office of the Council of Chiefs, a body which provides support services to the Mohawk Council of Kahnawà:ke Chiefs, investigated the issue and proposed a consensus-based decision making process entitled the Community Decision Making Model ("CDMM") which included principles drawn from the traditional methods of Haudenosaunee decision-making[458]. The Mohawk Council of Kahnawà:ke established the Interim Legislative Coordinating Committee (ILCC) in May of 2005 and provided them with the responsibility over the legislative process[459]. The ILCC developed the CDMM into the Community Decision Making Process ("CDMP") and was responsible for testing it within the community[460].

One of the main challenges associated with the CDMP was garnering community participation in the process. As Horn-Miller explains, the "[i]mplementation of the process also asks the community to change its way of thinking, that is, to go from thinking only of individual needs to considering the needs of the collective and impacts of those decisions seven generations into the future"[461]. The underlying factor fuelling this difficulty is the lack of trust, in part because of "ignorance and fear of the unknown"[462]. In a 2013 survey about the difficulties of the CDMP process, community members indicated in large majority that they had never participated at community

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[457]Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like: Kahnawa:ke's Community Decision Making Process" (2013) 18 Review of Constitutional Studies 111 at 120.
[458]*Ibid* at 120–121.
[459]*Ibid* at 121.
[460]*Ibid*. The CDMP concerns three types of legislation. The first is Type 1 and applies to laws which have a general application and which may have an impact on all members of the Kahnawà:ke community. The second is Type II and concerns "regulatory, financial, and/or administrative laws, or laws that affect a specific sector, interest group or portion of the community. The third is Urgent requests in which case there must be a threat to safety of security. Each type of law has a different complex process. See pages 122-129.
[461]*Ibid* at 130.
[462]*Ibid*.

hearings or given written feedback on a proposed law[463]. Some reasons evoked by participants for the lack of participation include intimidation, lack of trust, lack of faith, false sense of importance and lack of knowledge[464].

A final difficulty which we foresee is that of recognizing legitimacy to a dispute-resolution body which is not band-based. We believe however, that strength is indeed found in numbers and that Aboriginal participants will have to conciliate their traditions with those of other groups in order to accept the will expressed by a public authority that will be comprised of people foreign to their specific cultural group.

2.5 Conclusion of Sections 1 and 2

It is not because the Western and Aboriginal paradigm are distinct that one cannot draw positive elements from one or the other. What the dissimilarity between both paradigms does entail is that each worldview must be respected and the impacts of colonialism must be acknowledged when considering the interaction between the two paradigms[465].

Author Wenona Victor identifies two separate frameworks in order to comprehend the difference between the paradigms of Aboriginal dispute resolution and Western ADR[466]. The first framework is suggested by Rupert Ross, for the particular aspect of criminal justice. It is nonetheless of interest for our examination of utilizing Aboriginal dispute resolution in a Canadian context. His notion of "dueling paradigms" is to place both

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[463]Kahnawà:ke Legislative Coordinating Commission, *CDMP Information Survey 2013* (2013) at 2.
[464]*Ibid* at 2–4.
[465]Wenona Victor, *supra* note 416 at 5.
[466]*Ibid* at 34 –37.

paradigms on opposite ends of a spectrum[467]. At one end of the spectrum, he places Western forms of criminal justice, and, at the other end, he places Aboriginal forms of justice. Each ADR process would be placed on the spectrum and could move across it depending on how the dispute resolution process is carried out[468].

The other framework is proposed by Mary Ellen Turpel and suggests that the Aboriginal justice system and the Canadian justice system run parallel to each other[469], intersecting at "points of convergence" where one system borrows elements from another.

Although the latter framework is not without its faults, it is our opinion that an understanding of the Aboriginal dispute resolution mechanisms as running parallel to Canadian dispute resolution mechanisms is the most appropriate manner by which we can conceptualize a system based on Aboriginal legal traditions, accepted by Canadian law, which can successfully address overlapping claim issues between Aboriginal groups and implicate the federal, provincial and territorial governments that all have an interest in the resolution of these issues.

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[467]Rupert Ross, "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 241 at 242.
[468]Wenona Victor, *supra* note 416 at 34.
[469]Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 206 at 208.

3. Embodiment of the Proposed Solution

Before we begin this last section, an important reminder must be given to the reader. This thesis is not attempting to expose a "one-size-fits-all" approach to resolving overlapping claims, but rather an intellectual perspective rendering such approach possible: "What must be remembered as we begin to face this new challenge together is that the shape of the answer is not singular. There is no single answer that will speak to the diversity of experiences, geography, and culture of Aboriginal people in our communities"[470].

In keeping with an Aboriginal perspective and worldview, the introduction of this section will be comprised of a story, which tells the reader that the challenges identified in the first two chapters are not insurmountable, and that 'thinking outside the box' can have extraordinary consequences. The story is from Dewhurst:

> "Once upon a time there were two spiders in a lodge, sitting on the roof; discussing the web of justice. After a very long time they both agreed there was injustice in the world that needed to be fixed. And, because spinning webs is what spiders do, they both agreed that they had to spin a better web. But, sadly, they could not agree on how the new web should be spun. So, each spider decided to try to solve the problem in the best way she could.
>
> The first spider continued to sit on the roof thinking about how to build the complete and perfect web. She sat and she sat without moving, without spinning, thinking about all the things that could go wrong. If she moved too fast she might make a misstep, destroy the web, or fall to her death far below. If the creatures that sometime lived in the lodge with her didn't like her web, or if it got in their way, she would be frustrated and hurt by building her web only to have it smashed. The more she thought, the more problems she discovered. To try and head off these disasters, she thought about the best place to start her web. While many places seemed

[470]Mary Ellen Turpel & Patricia Monture, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 University of British Columbia Law Review 239 at 253.

> beneficial, none seemed perfect. So, she thought about where her web should end. Again, there were too many possibilities. She couldn't sort through them all. So then she thought about the exact design of her web. There were just too many things beyond her control that might affect the web's shape, like the wind and the movements of the other creatures. She finally decided that she could not predict exactly how her web should turn out. When the other creatures saw her sitting there and offered to give her a helping hand, she refused for fear that the hand might crush her or be snatched away, leaving her to fall. So there she sat, without a web to sustain her, and then she died.
>
> The second spider crawled across the roof of the lodge looking for a place to spin her web. In a little while she found an opening where no webs had been built. Although she wasn't sure exactly how her web would turn out, she felt that it had to begin with the first strand. So, anchoring the first strand of her web securely to the framework of the lodge around her, she dropped into the empty space. There she hung, suspended in midair. She wasn't sure where the wind or the other passing creatures would take her but she placed her faith in the forces of nature to take her to a spot where should tie off her first strand. The wind blew her back and forth. Finally, it blew her to a place where she could tie off her first strand and she quickly did so. Then she started the whole process over again. On and on she worked, and her web took shape: sometimes through her own efforts, sometimes redirected or assisted by those around her, sometimes guided by the forces of nature. As she spun, some of the old strands were cut or broken, and she replaced them or resecured them. She never knew in advance what the final shape of her web would be. As her web developed she took time to appreciate what she had done and a pattern began to emerge. In the end, after long effort, she had spun something unique and beautiful. Her web was firm and flexible, it filled the openings that she found, and it was able to sustain her in a way that nothing had before."[471]

This section will be comprised of two sub-sections. The first will be a review of certain Aboriginal dispute resolution mechanisms which show some promise of success in the resolution of overlapping claims and the second will consist of a presentation of the approach which we have identified as bearing the most promise for the successful resolution of overlapping claims.

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[471]Dale Dewhurst, "Parallel Justice Systems, or a Tale of Two Spiders" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 213 at 213–214.

3.1. Successful Dispute Resolution

The following four examples have been isolated as instances of dispute resolution mechanisms which have had some success in the resolution of overlapping claims or show promise to that effect.

(a) Nisga'a Treaty

The Nisga'a Treaty provides dispute resolution procedures which reflect elements characterizing Nisga'a justice traditions, such as "respect, acknowledgment, harmony and reconciliation"[472]. The dispute resolution process concerns only the conflicts or disputes between parties to the Nisga'a Final Agreement (either the Nisga'a First Nation, the Government of Canada or Government of British Columbia) and only to conflicts or disputes respecting the interpretation, application or implementation of the Final Agreement and where specifically provided in the Final Agreement[473].

The dispute resolution is set out in a three-stage process: collaborative negotiations, facilitated processes, and adjudication/arbitration[474]. Despite the presence of an adjudicative solution, the dispute resolution procedures focus on understanding the conflict based on notions which exceed the legal scope of the dispute. For instance,

[472]Catherine Bell, *supra* note 382 at 257.
[473]*Nisga'a Final Agreement Act* (S.B.C. 1999, c. 2), ch 19, s. 7.
[474]Catherine Bell, *supra* note 382 at 257–260.

Section 9 of Appendix M-1 of the Nisga'a Final Agreement Act[475], the legislation giving effect to the Nisga'a Final Agreement, provides that:

> "9. The parties will make a serious attempt to resolve the disagreement by
>
> a. identifying underlying interests;
> b. isolating points of agreement and disagreement;
> c. exploring alternative solutions;
> d. considering compromises or accommodations; and
> e. taking any other measures that will assist in resolution of the disagreement."[476]

If the parties are not successful in their attempt to resolve the dispute, they will move to stage two of the dispute resolution procedure by which they can use facilitated processes. These facilitated processes include mediation, a technical advisory panel for questions of non-legal nature, a neutral evaluation conducted by one person jointly appointed by the parties and an elders advisory council in which elders are appointed by both parties. Having recourse to elders from a community is often used as an example of Aboriginal legal traditions. In this case, the appointment of elders is not limited to the Nisga'a Nation and can be from another First Nation council. The criteria for appointment of elders are defined as follows:

> "4. Preferably, the elders will be individuals who:
> a. are recognized in their respective communities as wise, tolerant, personable and articulate, and who:
> i. are often sought out for counsel or advice, or
> ii. have a record of distinguished public service; and
> b. are available to devote the time and energy as required to provide the assistance described in this Appendix."[477]

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[475] note 473.
[476] *Ibid*, ch Appendix M–1, s. 9.
[477] *Ibid*, ch Appendix M–5, s. 4.

If the use of facilitated processes does not lead to a solution, a party can deliver a notice to another party and refer the dispute to arbitration. In the case of arbitration, the arbitrator (or arbitral tribunal) will render a final and binding decision according to fair procedures outlined in the Nisga'a treaty. Moreover, these procedures encompass the legal traditions of the Nisga'a and will not be based solely on Western paradigms as the decisions "must be made in accordance with relevant provincial, federal, or Nisga'a law and the spirit and intent of the Nisga'a Final Agreement"[478].

(b) Nunavik Inuit Land Claims Agreement

The Nunavik Inuit and the Crees of EeyouIstchee have come to an agreement regarding their overlapping occupation and use of the marine areas and islands adjacent to Quebec in James Bay, Hudson's Bay, Hudson's strait and Ungava bay. Both the Nunavik Inuit and the Crees of EeyouIstchee have "final agreements" with the federal government, levelling the negotiating field. In the *Consolidated Agreement Relating to the Cree/Inuit Offshore Overlapping Interests Area*[479], the preamble recognizes the existence of Aboriginal rights and title for each party in the overlap area:

> "WHEREAS the Crees of EeyouIstchee and the Nunavik Inuit have certain overlapping aboriginal and other rights, titles and interests in certain marine areas and islands adjacent to the province of Quebec in James Bay and Hudson's Bay;"[480]

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[478]Catherine Bell, *supra* note 382 at 260.
[479]*Consolidated Agreement Relating to the Cree/Inuit Offshore Overlapping Interests Area*.
[480]*Ibid*, s Preamble.

The Consolidated Agreement provides harvesting rights to both parties and provides respect of customs and traditions, indicating that the rights must be exercised by each party in accordance with "their respective customs and traditions in a manner so as not to compromise each other's harvesting activities"[481]. The Agreement concerns only the overlap area in which three zones are set out: a Cree Zone, an Inuit Zone and a Joint Zone. In the Joint Zone, it is provided that there will be equal participation of the Cree and the Inuit in ownership, wildlife and management:

> "c. to identify a Joint Inuit/Cree Zone within this Overlap Area, and with respect to such Joint Zone to provide for:
> i. the joint and equal ownership of lands and the joint and equal sharing of other interests, benefits and revenues by the Crees of EeyouIstchee and the Nunavik Inuit;
> ii. the sharing of wildlife between the Crees of EeyouIstchee and the Nunavik Inuit in accordance with the harvesting interests of both groups;
> iii. the joint and equal participation of the Crees of EeyouIstchee and the Nunavik Inuit in the management of the lands, resources and wildlife, including joint and equal participation in regimes for wildlife management, planning, land and water management and development impact assessment in such zone;"[482]

As for the dispute resolution mechanisms provided in this agreement, the parties set aside the possibility to have recourse to the courts, unless it is necessary as a last resort, preferring instead to use cooperation, consultation and mediation by a neutral third party.

(c) Tsawwassen First Nation Traditional Territory Boundary Commission Act

In British Columbia, the Traditional Territory Boundary Commission Act established the Tsawwassen First Nation Traditional Territory Boundary Commission. The Commission

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[481] *Ibid*, s 4.1.
[482] *Ibid*, s 2.1c).

is responsible for all overlap issues arising from the boundaries provided in the Tsawwassen First Nation Treaty[483]. This Commission is composed of the Chief and two other members, and one of the members must have harvesting and natural resources knowledge[484]. The Act also provides that the traditions and practices of neighbouring first nations must be respected and honoured at all times, and that the commissioners must "do their utmost to develop and maintain relationships with them [the neighbouring first nations] based on the rights of each of those first nations"[485]. The Act makes reference to Aboriginal dispute resolution mechanisms, highlighting the importance of using a "consensus-based solution to problems of common concern"[486].

(d) Waitangi Tribunal

Although this thesis addresses only the overlapping claims problem present in Canada, the issue of overlapping Aboriginal claims is present in other countries which suffered from colonization, such as Australia and New Zealand.

In New Zealand, claims are addressed through a tribunal called the Waitangi Tribunal. This Tribunal was established in 1975, under the terms of the *Treaty of Waitangi Act*.[487] The Aboriginal peoples of New Zealand, called the Maori, can submit their claims on all matters relating to the Treaty of Waitangi, which is a one-page document consisting of

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[483]Laws of the Tsawwassen First Nation, *Traditional Territory Boundary Commission Act*.
[484]*Ibid*.
[485]*Ibid*.
[486]*Ibid*.
[487]*Treaty of Waitangi Act 1975*.

three articles signed in February of 1840[488]. The first article of the treaty provides the cession of sovereignty to the British Crown[489]. The second article "guarantees to the chiefs full, exclusive, and undisturbed possession of their lands, estates, forests, fisheries, and other properties they wish to retain. Maori land can be sold only to the Crown"[490]. The third article gives British-subject rights and privileges to Maori[491]. The purpose of the Waitangi Tribunal is to "inquire into and report on claims by Maori, that 'any statute or regulation, or any past or present Crown policy, practice, act or omission is, or was, inconsistent with the principles of the Treaty of Waitangi and is prejudicial to an individual Maori or group of Maori'(s.6)"[492].

The Tribunal works in a two-stage process. The first stage is an inquiry into the facts claimed. If the inquiry produces a positive result, i.e. the claim is well-founded; there can then be negotiation of a settlement[493]. If negotiations fail, the second-step is a process by which the Tribunal hears each party and emits recommendations[494]. The Tribunal can also refer claims to mediation[495]. A mediation process is provided in section 9 of the Second Schedule for the Treaty Waitangi Act, 1975 and is available for issues involving two or more claimant groups, as in the case of overlapping claims. The mediation is carried out by independent mediators and generally includes a mediator who is an elder

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[488]Morris Te Whiti Love, "The Waitangi Tribunal's Roles in the Dispute Resolution of Indigenous (Maori) Treaty Claims" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 128 at 128.
[489]*Ibid* at 129.
[490]*Ibid*.
[491]*Ibid*.
[492]*Ibid* at 135.
[493]*Ibid* at 134.
[494]*Ibid*.
[495]*Ibid*.

well-versed in traditional Maori practices and the Maori language[496]. As author Morris TeWhiti Love explains, the mediation process is important to resolve claims between Maori claimant groups in order to "resolve their differences and achieve the strength required for effective negotiation of a 'macro' treaty claim directly with the government"[497]. Mediation respects the principle of cultural awareness and mutual empowerment for all parties[498]. The following objectives are identified as the main goals of the mediation process; they resemble the objectives we are trying to attain throughout this thesis for the resolution of overlapping claims:

> "to provide a process that will assist Maori to come together as an effective body (or bodies) to prosecute and settle their historical treaty claims with the Crown
>
> to maintain an affordable, expert, and independent group of facilitators and mediators to achieve the first goal and to have that group available to groups of claimants as they move through the claim resolution process
>
> to improve the efficiency and credibility of the treaty settlement process by assisting groups to better self-manage their affairs, especially eventual treaty settlements."[499]

The mediation process is currently separate from the inquiry process undertaken by the Tribunal. However, the Tribunal is considering the possibility of having a "combined facilitation and settlement mediation process"[500]. The facilitation aspect of this process

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[496] *Ibid* at 142.
[497] *Ibid*.
[498] *Ibid* at 143.
[499] *Ibid*.
[500] *Ibid*.

would ensure that potential areas of conflict are identified and anticipated before the potential problem develops into an actual dispute[501].

3.2 Comprehensive Approach: Indigenous Legal Lodge

(a) Introduction

The review of current procedures in Chapter 1 and the review of Aboriginal dispute resolution and legal traditions in Chapter 2 have allowed us to determine which elements must be included in a successful dispute resolution system addressing overlapping claims. In order to be successful, we have determined that the dispute resolution system must: (a) include Aboriginal legal traditions, such as the importance of peace, harmony and the recourse to elders, (b) be flexible enough to adapt to different situations, and (c) promote the internal strength of Aboriginal communities by demonstrating Aboriginal authority.

A fourth criterion remains to be discussed. This fourth element is the capacity for the chosen mechanism to integrate into the Canadian legal process, as the issue of overlapping claims exists within two, or more, sources of law. Aboriginal title, and Aboriginal rights, can be negotiated with the provincial, territorial and federal governments, or can be determined by the Court system. Considering this reality, overlapping claims evolve "at the interface of two normative systems"[502] in a legal

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[501] *Ibid*.
[502] Vivian Alison, "Conflict management in the native title system: A proposal for an Indigenous Dispute Resolution Tribunal." (2009) 93 Australian Law Reform Commission Reform Journal 11.

context implemented by the Canadian legal system under which answers may be suggested by making reference to Aboriginal laws and legal traditions.

Throughout the history of Canadian case law, Aboriginal customs and legal traditions, have been recognized, and in some cases, affirmed by Canadian courts[503]. The survival of Aboriginal legal traditions is a result of the *complex settlement rule* which has been applied by Canadian courts. The complex settlement rule recognizes "the introduction of English law for colonists as their birthright, but (...) also recognize[s] the continuity of some indigenous law for aboriginal peoples retaining a distinct national identity"[504]. An early case which applied the complex settlement rule is *Connolly* v. *Woolrich*, in which Justice Monk recognized the survival of Aboriginal legal traditions related to marriage:

> "(...) [W]ill it be contended that the territorial rights, political organization as such it was, or the laws and usages of Indian tribes were abrogated - that they ceased to exist when these two European nations began to trade with aboriginal occupants? In my opinion it is beyond controversy that they did not - that so far from being abolished, they were left in full force, and were not even modified in the slightest degree ..."[505]

More recent cases have also adhered to the complex settlement rule and have recognized that Aboriginal laws continue to apply. For instance, in *Calder* v. *British Columbia*, Justice Hall quoted Lord Mansfield's decision in the English case *Campbell v. Hall*[506], in which he outlined six principles of law which apply to territories which have been

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[503]John Borrows, *supra* note 274 at 633.
[504]Mark D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992) 17 Queen's Law Journal 350 at 376.
[505]*Connolly v Woolrich*, [1867] 17 RJRQ 75 (Quebec Superior Court) confirmed in (1869), 17 R.J.R.Q. 266 (Quebec Queen's Bench)
[506]*Campbell v Hall (1774), Lofft 655, 98 ER 848 (KB)*, at 895.

conquered[507]. The fifth principle is of particular interest to us, as it focuses on the survival of legal traditions (also known as the "Doctrine of Continuity"[508]). After quoting this principle, Justice Hall states the following: "*A fortiori* the same principles, particularly Nos. 5 and 6, must apply to lands which became subject to British sovereignty by discovery or by declaration"[509]. Justice Hall therefore endorses, but in *obiter* only, the continuity conception of Aboriginal rights, and thus, the survival of Aboriginal law.

Similar comments can be made about Justice Mahoney's decision in *Baker Lake* who, as we have seen in Chapter 1, determined that there are four elements which must be demonstrated to establish proof of Aboriginal title. When discussing the first element, that is, that those claiming the Aboriginal title be members of an organized society, Justice Mahoney makes reference to the applicability and survival of a previous legal regime:

> "While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives

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[507] *Calder v. British Columbia (Attorney General)*, *supra* note 41.
[508] Mark D. Walters, *supra* note 489 at 407. The fifth principle reads as follows: "The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror (...)". The term 'Doctrine of Continuity' was coined by Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (Doctor of Philosophy, University of Oxford, 1979) [unpublished]. See also: Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983). See also: Mark D. Walters, "Golden Thread of Continuity: Aboriginal Customs at Common Law and under the Constitution Act, 1982, The" (1998) 44 McGill LJ 711.
[509] *Calder v. British Columbia (Attorney General)*, *supra* note 41 at 389.

> aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before."[510]
>
> [emphasis added]

In her dissenting opinion in *R. v. Van der Peet,* Justice McLachlin (as she then was) indicates her opinion that Aboriginal rights must be recognized because of their source in legal orders which are independent of British law, stating that "Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question"[511].

In the recent case of *Mitchell v. M.N.R.*[512], the Supreme Court of Canada also made comments recognizing Aboriginal law:

> "European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as right..."[513]

Chief Justice McLachlin pursued her reasoning by indicating that Aboriginal legal traditions continue to exist in Canada unless they have been extinguished in one of three ways: "(1) they were incompatible with the Crown's assertion of sovereignty, (2) they

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[510] *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, *supra* note 43 at 559.
[511] *R. v. Van der Peet*, *supra* note 30, para 247.
[512] *Mitchell v MNR*, [2001] 1 SCR 911.
[513] *Ibid*, para 10, per McLachlin C.J. (speaking for Gonthier, Iacobucci, Arbour and LeBel JJ.; Binnie J. wrote a concurring opinion co-signed by Major J.).

were surrendered voluntarily via the treaty process, or (3) the government extinguished them"[514].

As Borrows has stated, "First Nations legal traditions are strong, dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law concerning Aboriginal communities"[515]. It is time that we make an effort to achieve this recognition of Aboriginal legal traditions when addressing overlapping claims. Unfortunately, the theoretical recognition of Aboriginal legal traditions by the Supreme Court is just that, theoretical, the court never having resorted to such legal traditions to solve a case. Furthermore, these Aboriginal legal traditions are nowhere to be seen in the practical and political application of policies relating to Aboriginal peoples[516].

In fact, in the case of overlapping land claims, the government continues to turn a blind eye to Aboriginal perspectives, imposing instead a Western method of resolving the claims, failing to consider that an artificial solution will not withstand the test of time. As Mark Walters explains, the "reality in aboriginal communities will continue to diverge from the letter of Canadian law"[517].

Author Vivian Alison presents the disputes between Aboriginal communities as being intra-cultural and inter-cultural in nature[518]. They are intra-cultural in that their resolution must be undertaken by the "application of cultural norms in a culturally appropriate

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[514]*Ibid*.
[515]John Borrows, *supra* note 274 at 663.
[516]John Borrows, *supra* note 277 at 196.
[517]Mark D. Walters, *supra* note 489 at 409.
[518]Vivian Alison, *supra* note 502.

environment", and inter-cultural in that the "question raised by the dispute is externally imposed"[519]. Thus, Alison concludes, "it seems appropriate that an Indigenous dispute resolution tribunal should embody intra-cultural and inter-cultural sensibilities and may include Indigenous and non-Indigenous expertise"[520].

In Canada, the cohabitation of two officially recognized systems of law, civil law and common law, enable it to fall within the definition of a bi-juridical state. As Justice Bastarache has stated, "[b]ijuralism in Canada is more than the mere 'co-existence' of the two legal traditions. It involves the sharing of values and traditions"[521]. Considering that Canada has adopted the complex settlement rule and has already recognized a plurality of legal orders (civil law and common law) and, combining a pluralistic approach by which the function of law must be perceived as "a means for facilitating human interaction"[522] with the idea that more attention must be focussed on "the social processes from which rules can emerge and become effective as law without receiving the imprimatur of any explicitly legislative organ of government"[523], we contend that it is logical to recognize a third legal order of law, composed of Aboriginal legal traditions, as a legal order within Canada. Canada could then be referred to as multi-juridical instead of bi-juridical state[524]. As Professor Borrows explains:

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[519] *Ibid*.
[520] *Ibid*.
[521] Justice Michel Bastarache, "Bijuralism in Canada" in *Bijuralism and Harmonization: Genesis* (Ottawa: Department of Justice, 2000) at 25.
[522] Lon L. Fuller, *supra* note 268 at 89.
[523] *Ibid* at 95.
[524] John Borrows, *supra* note 277 at 198.

> "[t]here are sound arguments that Indigenous legal traditions are compatible with the Crown's assertion of sovereignty, were not surrendered by treaties, and were not extinguished by clear and plain government legislation, if reconciliation is the lens through which the courts interpret the parties' relationships. Indigenous legal traditions certainly fit into Canada's Constitutional framework without threatening peace, order and good government[525].
>
> (...)
>
> Canada's balanced, somewhat decentralized, federal state is one of the country's great strengths. It makes it possible to reconcile diversity with unity. It creates the potential for experimentation in the 'social laboratory' that each constituent part of our federation encourages. The more explicit recognition of Indigenous legal traditions could lead to useful experimentation and innovation in solving many of Canada's pressing problems. Furthermore, the affirmation of Indigenous legal traditions would strengthen Canadian democracy by placing decision-making authority much closer to the people within these communities. Aboriginal peoples would be better served in the federation if they had the recognition and resources to refine law in accordance with their perspectives. This is important because central and provincial governments are more remote from Aboriginal peoples, physically and culturally. They also tend to be less responsive to the Aboriginal electorate than Aboriginal governments would be if they could exercise greater responsibility for their own affairs. A greater recognition of Indigenous legal traditions could provide some counterweight to the bi-culturalism and bi-elitism that sometimes infects Canada's policy."[526]

As such, through an understanding of Lon L. Fuller's theory and Mary Ellen Turpel's framework of parallel legal systems, it can be argued that Aboriginal law and Canadian law can coexist and be compatible with each other. Moreover, it has been said that Aboriginal legal institutions and laws:

> "can be received by analogy into the Common law to bridge the gap between Aboriginal and non-Aboriginal laws. They can be used in a culturally appropriate way to answer many of the contemporary challenges Canadian courts encounter. The incorporation of such a broad base of

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[525] John Borrows, *supra* note 282 at 112.
[526] *Ibid* at 194.

> legal principles would make the law truly Canadian and, as a result, more equitable and fair"[527].

This thesis therefore suggests that the proposed dispute resolution framework be separate from the existing justice system, without operating entirely outside of it. A dispute resolution mechanism operating within a dominant legal system cannot prescind the existence of this system:

> "a framework that overtly legitimises Indigenous authority is not in itself sufficient. Existing at the interface of Indigenous and non-Indigenous law, it is crucial that the tribunal have legitimacy within both Indigenous and non-Indigenous communities as a respected institution of Indigenous systems of law."[528]

In light of the foregoing elements, we respectfully submit that the Indigenous Legal Lodge, developed by Professor Val Napoleon and a team of researchers, could be a viable solution to address overlapping claims.

The Indigenous Legal Lodge ("ILL") was first proposed by Val Napoleon in 2007[529]. It was developed while working on a Governance Research Initiative regarding Treaty 8 communities. Treaty 8 covers land which includes the northeast portion of British Columbia, the north of Alberta and a part of the Northwest Territories[530]. The ILL stems from an overlap dispute between the LheidliT'enneh treaty and the southern boundaries of Treaty 8. The Aboriginal groups on which the LheidliT'enneh treaty overlaps are the West Moberly, Halfway, Doig, Fort Nelson, Prophet River and Saulteau First Nations, who, according to Napoleon, no longer wished to bring the overlapping issue before the

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[527]Borrows, *supra* note 274 at 653.
[528]Vivian Alison, *supra* note 502.
[529]Val Napoleon, *supra* note 267.
[530]*Ibid* at 1.

courts[531]. Therefore, these First nations agreed to establish an "Indigenous Legal Lodge" to resolve their boundary dispute.

(b) Inclusion of Aboriginal Legal Traditions

As Napoleon explains, "[t]he theory underlying the Indigenous Legal Lodge is that it is possible to develop a flexible, overall legal framework that indigenous peoples might use to express and describe their legal orders and laws so that they can be applied to present-day problems"[532]. Napoleon sets out the purpose of the ILL as follows: the framework "must be able to do two things: (1) reflect the legal orders and laws of decentralized (i.e., non-state) indigenous peoples, and (2) allow for the diverse way that each society's culture is reflected in their legal orders and laws"[533]. The completion of both objectives will "allow each society to draw on a deeper understanding of how their own legal traditions might be used to resolve contemporary conflicts"[534].

The objectives of this project were to "research, record and articulate the customary laws"[535] of these communities, including their leadership structures, their consensus-building mechanisms and their rules relating to boundary disputes. The researchers indicate that the Aboriginal nations possessed mechanisms and processes to address conflict: "history has shown that external boundaries have always been the sites of

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[531]*Ibid*. These First Nations represent five different cultural groups: Dene-Zaa, Cree, Saulteau, Carrier and Sekani. The West Moberly and Saulteau First Nations had previously sought an injunction to delay the ratification of the treaty but it was denied. See *Chief Allan Apsassin et al. v. Attorney General (Canada) et al.*, *supra* note 178.The treaty agreement was rejected by the community in 2007.
[532]Val Napoleon, *supra* note 267 at 2.
[533]*Ibid* at 1.
[534]*Ibid*.
[535]Karen Aird & Diane Abel, *Indigenous Legal Lodge: A Proposed Model for Addressing Indigenous Conflict* at 3, online: http://gsdl.ubcic.bc.ca/collect/firstna1/index/assoc/HASH5be7.dir/doc.

negotiations in accordance to each indigenous group's laws and political structures"[536]. Such mechanisms and processes include those based on kinship and marriage, rather than simply relying on common or civil law and their use or occupancy criteria[537] : "Rather than focus on the legal rights of each party flowing from historical use and occupancy, the ILL will focus on social and political relations between parties, i.e., marriage, kinship, being neighbours, trade, and other arrangements, both historic and modern"[538]. These relations will be analyzed in order to determine the ongoing obligations of each party. This approach is described by the group as being "far more inclusive" since it will not simply try to determine who has a stronger legal right between the two parties. It will also avoid the fears voiced by some Aboriginal groups, such as those of the Coast Salish, that the "bilateral kin group as a significant and powerful social order will be dismantled and replaced by a patchwork of municipal-like self-governments with limited jurisdictions over their lands and territories"[539].

The structure of the ILL is comprised of various members sitting for a minimum of five days, including three members from a neutral indigenous group with no interest in the overlap dispute, a legal expert in Canadian law, three facilitators who can understand and apply indigenous legal traditions and individuals from each aboriginal group who can

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[536]*Ibid* at 2.
[537]Nadasdy, *supra* note 357. Nadasdy explains that, in the case of the Yukon administrative bands, mapping a band's traditional territory based on historical use and occupancy is "extremely problematic' since some members of immediate families became members of different administrative bands and since "intermarriage among members of different bands was also common", p. 511-512. See also Thom, *supra* note 285. Thom refers to the use of kin networks as a sort of "passport" in order to navigate boundaries, p. 188.
[538]Karen Aird & Diane Abel, *supra* note 535 at 5.
[539]Thom, *supra* note 285 at 194.

inform the panel on their interpretation of the land issue[540]. The facilitators' role is not directed at determining the strength of a historic claim. Their role is one of reconciliation of relationships[541].

The ILL would have some independent power to inquire into overlap disputes, but will also be responsible for hearing the information which is brought forward by each party. In order to achieve a mutually beneficial agreement, the ILL will work with each party and discuss various optional agreements. Recommendations and decisions made by the ILL would be non-binding. Instead, Napoleon suggests that a process be set out for the affirmation of the decision by "every generation and witnessing at a public gathering" every ten years[542].

As for the outcome of the panel hearing, instead of focussing on historic use of occupancy, as is the case in federal policies and Canadian case law analyzed in Chapter 1, the recommendations would be focused on the "interests, relationships and reconciliation" between the parties. The researchers list several possible outcomes including shared jurisdiction over the overlap area, nation-to-nation treaty for the overlap area, priority use in certain areas and joint management arrangements. The shared jurisdiction approach could be particularly interesting for nomadic groups who may have been accustomed to sharing the land with other groups. As one elder from the White River First Nation in Yukon explains, there is no need for them to trace a line between an overlap group: "We should share the land with each other. We are one First Nation. We

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[540]Val Napoleon, *supra* note 267 at 6.
[541]*Ibid* at 9.
[542]*Ibid* at 11.

are Indian on our land. We should share our land now, together"[543]. As researcher Paul Nadasdy reports, this may be a common occurrence for certain groups: "In fact, a common theme in all of the overlap talks I examined - from 1990, 1995 and 2002 - was that it was the government that had imposed the need for a line, and that if it were left up to the First Nations they would just continue to share the land"[544].

(c) Flexibility and Adaptability

Author Jessica Dickson analyzed the key strengths of the ILL by interviewing five indigenous stakeholders and by "linking their narratives to the composition and framework of the ILL as the basis for exploring its strengths and limitations"[545]. Dickson identified the key strengths of the ILL, the first being the flexible framework of the ILL which is drawn from the Indigenous legal orders. She also underlines the rejection of the "one size fits all model" as being another key element of the ILL.

This characteristic of the ILL is especially important considering the potential conflict between the legal traditions of two different Aboriginal groups[546]. The chosen dispute resolution mechanism must be flexible enough to work with these potential conflicts and still arrive at a viable solution for all parties involved.

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[543]Nadasdy, *supra* note 357 at 517.
[544]*Ibid*.
[545]Jessica Dickson, *supra* note 436 at 6.
[546]See section 2.4(b)(iv) : third concern.

(d) Promotion of Internal Strength

The ILL recognizes and confirms that Aboriginal communities do not need to rely on foreign dispute resolution systems in order to address problems within and between communities. In fact, "it draws from the particular human and cultural resources within communities" which, in turn, makes it more "representative and inclusive than other processes"[547]. Dickson explains that since the ILL decisions are based on a variety of elements such as marriage, kinship and trade, it "promotes decision-making based on more fluid expressions of Indigenous citizenship and nationhood and, in effect, land management"[548].

4. Conclusion of Chapter 2

The Indigenous Legal Lodge is an interesting approach to the resolution of overlapping claims as it provides a flexible framework allowing Aboriginal peoples to use their cultural context in order to resolve overlapping claims in the manner which they see most fit. Rejecting a one-size-fits-all approach, the Indigenous Legal Lodge can adapt itself whether the groups were nomadic, semi-nomadic, strewn across provincial lines or waterways. It will be crucial that the appropriate individuals are identified to sit on a lodge, in order to ensure the best process possible. It is our opinion that the Indigenous Legal Lodge could be comprised of different participants depending on the overlap situation and the groups involved. Therefore, a new Lodge could be constituted for each

[547]Jessica Dickson, *supra* note 436 at 81.
[548]*Ibid*.

overlap situation. For instance, the members for an overlap dispute in British Columbia would not be the same as for a dispute in Québec.

In their article *Two Approaches to the Development of Native Nations*, authors Stephen Cornell and Joseph P. Kalt outline the "Nation-Building Approach" which is built upon an assertion that Aboriginal peoples have rights to govern themselves[549]. A number of the characteristics presented by this nation-building approach are found in the Indigenous Legal Lodge.

The first characteristic of the nation-building approach is that Native nations should assert decision making-power[550]. In the case of overlapping claims, it is generally accepted that First Nations should be responsible for making decisions regarding overlapping claims. If they are provided with all or most of the decision-making power, Aboriginal groups will be able to create tailor-made solutions to specific overlapping claim situations. Another important characteristic provided in the nation-building approach is that Aboriginal political culture should be present in mechanisms used to address Aboriginal issues. As the authors explain, one of the problems that Aboriginal groups face is their "dependence on institutions that they did not design and that reflect another society's ideas about how decision making and dispute resolution should be organized and exercised"[551]. As demonstrated throughout this paper, that is precisely the crux of the issue regarding the resolution of overlapping claims. It is also part of the

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[549]Stephen Cornell & Joseph P Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Miriam Jorgensen, ed, *Rebuilding Native Nations Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007) 3 at 18.
[550]*Ibid* at 19.
[551]*Ibid* at 24.

explanation as to why Aboriginal groups continue to have recourse to said institutions in the face of overlapping claims and why they are not employing their legal traditions as discussed throughout this paper. The answer to this problem is complex and will vary depending on the overlapping situation. Indeed, a common explanation to this question is offered by some Aboriginal intellectuals as stemming from colonization[552]. As Youngblood Henderson explains, the colonial education system and its Eurocentric approach have taught Aboriginal peoples to "not believe in anything, to ignore each other or to care only for themselves. We were forced, and have become accustomed, to being something different from what we are or thought we were"[553]. Author Val Napoleon explains that the damage that has been done to Indigenous peoples' conflict management systems explains why conflict has increased and has become destructive[554].

However, other reasons have been evoked by authors explaining why Aboriginal peoples are in some cases reticent to use their own legal traditions. For instance, the recourse to Courts can also be explained by the fact that leaders want to remain accountable to people in the community who have "become separated from traditional ways"[555]. Another reason which explains why Aboriginal groups have recourse to courts rather than to their own dispute resolution mechanisms is the presence of power imbalance between Aboriginal nations, especially in the case of overlapping claims where one

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[552] See for an example of this intellectual approach: Henderson, *supra* note 274.
[553] *Ibid* at 18. Youngblood Henderson does not, however, assign the blame only to the colonizers. He indicates that Indigenous peoples must accept their complicity with colonization in order to move away from it. As he indicates, if the complicity is accepted as a "shame", "we will understand that it is up to us, and ultimately to us alone, to do something about it", p. 19.
[554] Val Napoleon, *supra* note 5 at 12.
[555] Catherine Bell, *supra* note 382 at 247.

group has negotiated an agreement with the Canadian government and another has not. In this case, the group who has not come to an agreement will often feel as though they have been cheated and may feel that the Crown has not fulfilled its duty towards them. Legally speaking, the judicial recourse is to attack the government's actions in Federal court by judicial review. In this case, traditional dispute resolution may not provide the desired outcome.

Other reasons can be as simple as one nation disposing of a more important financial or human capacity than another nation, and using this unequal balance of power to mobilize courts in a strategic fashion in the course of negotiations. Conversely, recourse to the courts, however expensive, may be a means of establishing a level playing field for nations with fewer resources. To avoid such recourse altogether to State courts, a financial intervention by the federal and the provincial governments is essential.

We believe that Aboriginal groups must be given the opportunity to develop decision making mechanisms which reflect their culture, traditions and world-views all the while addressing the contemporary problem of overlapping claims[556]. This development should also have success in reducing the recourse to the Canadian court system, if it is done in a manner which is respectful of all cultures and traditions and in a manner which provides an equal balance of power. It is our opinion that the Indigenous Legal Lodge provides the opportunity for Aboriginal groups to achieve this.

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[556]Stephen Cornell & Joseph P. Kalt, *supra* note 549 at 25.

Conclusion

This thesis sought to identify a renewed framework for the resolution of overlapping claims between Aboriginal groups in Canada. In doing so, we have established two significant conclusions. The first is that the existence of overlapping claims in Canada is the direct product of Canadian and provincial policies and legal requirements which have been developed by governments and courts alike over the past century. The second is that, in order to be morally compelling, the chosen dispute resolution mechanism addressing overlapping claims as well as the outcome of this mechanism must reflect Aboriginal legal traditions.

The first chapter introduced the reader to the Western notions of exclusivity first implemented in the reserve system and further established by way of judicial decision-making and the adoption of several government policies. A review of recent case law and current overlap cases demonstrated that courts employ an incorrect approach when attempting to resolve overlapping claims. This flawed approach is mirrored by federal and provincial policies which contribute to generate power imbalances between Aboriginal groups and do nothing to address the underlying normative considerations of overlapping claims.

Furthermore, an argument was developed regarding the Crown's duty to consult and the implementation of non-derogation provisions in treaties, demonstrating that consultation followed by a non-derogation provision does not offer real protections for Aboriginal groups. As was demonstrated, this method used by the federal and provincial

governments favours certain Aboriginal groups to the detriment of others and, consequently, can jeopardize the Aboriginal rights and title of overlapping groups.

The focus of the second chapter was to first provide an intellectual foundation for our proposal of an alternative approach to the resolution of overlapping claims. This intellectual foundation is grounded in Lon L. Fuller's famous theory that law must be perceived as a means for facilitating human interaction. The other element of Fuller's theory is that law must be perceived as morally compelling in order for it to be efficient. The same can be said, as we have argued, for dispute resolution mechanisms. In the first part of our analysis, an examination of Aboriginal legal traditions allowed us to determine that the Supreme Court's current understanding of the exclusivity requirement must be reassessed if we are to achieve a successful resolution of overlaps. Exclusivity must be removed as the sole criterion for evaluating land occupation of Aboriginal groups in determining Aboriginal title. As demonstrated, boundaries and exclusive use of territories is not conceptualized by Aboriginal groups in the same manner as Westerners. The single boundary line is not representative of Aboriginal societies.

In the second part of our analysis, a review of Aboriginal dispute resolution mechanisms and values led us to argue that Aboriginal groups should be provided with the tools required to address overlapping claims situations in order to advance in the treaty negotiation process and thus prevent litigation. We suggested that these tools be provided in the form of conflict resolution mechanisms integrating Aboriginal legal traditions and perspective on issues such as land and exclusivity, so that a viable dispute resolution process may be elaborated. It is high time that Aboriginal legal traditions, social customs

and world-views, cease to be ignored. In the words of the Chief Justice of Canada: "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered"[557].

We concluded our second chapter by providing examples of successful dispute resolution mechanisms which are based on Aboriginal legal traditions. This examination led us to suggest a solution which we believe could be successful in meeting all of the criteria identified throughout this thesis. This approach was identified as the Indigenous Legal Lodge, a dispute resolution body first conceptualized and developed by Val Napoleon. The Legal Lodge would allow not only a reflection of Aboriginal legal orders, but would also be flexible enough to provide viable solutions to a host of different overlapping situations, by allowing Aboriginal groups to draw upon their own legal traditions to resolve conflict.

The purpose of this thesis has been to demonstrate that both the legal and political approach to overlapping land claims in Canada is in need of important reforms. I hope that the conclusions I have drawn after extensive research will trigger normative and juridical discussions on the matter.

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[557] *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 191, para 25.

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