Assembly of First Nations Submission to the House of Commons Standing Committee on Indigenous & Northern Affairs

Restitution of Land to First Nations, Inuit, and Metis Communities

June 29th, 2023

Introduction

The Assembly of First Nations (AFN) is a national advocacy organization that advances the rights and priorities of First Nations across Canada, as directed by First Nations-in-Assembly. This submission provides the House of Commons Standing Committee on Indigenous & Northern Affairs (INAN) with preliminary input on the restitution of land to First Nations.

First Nations have lived on and developed deep cultural, spiritual, and social relationships with their particular lands, territories, and resources since time immemorial. These relationships, which are rooted in the land itself, are inseparable from basic Indigenous and human rights, and give rise to a diversity of cultures, languages, laws, spiritual practices, medicines, economies, and ways of being. In this context, First Nations lands are not fungible commodities that can be easily replaced, and the return of land is a basic pre-condition to the exercise of rights, including the inherent right to self-determination.

What we now call Canada was largely formed through complex Treaty relationships between First Nations and successive colonial governments. Where a pre-existing Treaty did not exist, or was inconvenient, colonial governments would assert Crown sovereignty—which is based on a legal fiction, including the racist doctrines of *discovery* and *terra nullius*—and take First Nations lands and resources without consent.

Whether through broken Treaty promises, or outright theft, Canada's history is rooted in the dispossession of First Nations lands. The path to reconciliation begins with Canada returning First Nations lands to create the foundation for meaningful Nation-to-Nation relationships based on mutual respect and recognition.

Minimum Standards of Redress under Domestic and International Law

The Government of Canada has existing legal obligations to return lands to First Nations to fulfil commitments made in Treaties, agreements, and other constructive arrangements. The honour of the Crown is the principle that when acting on behalf of the sovereign, the Crown must always conduct itself with honour. This principle means that in all its dealings with Indigenous Peoples, the Crown must act honourably and stems from the "special relationship" between Crown and Aboriginal peoples.[1] Accordingly, the Government of Canada must fulfil its obligation to provide restitution in an honourable manner consistent with this relationship.

Additionally, the Government of Canada is obliged to provide restitution to First Nations for lands, territories, and resources that were taken, stolen, used, occupied, or damaged. Article 28 of the *United Nations Declaration on the Rights of Indigenous Peoples* (the UN Declaration) provides that:

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

[1] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 62.

> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.[2]

Article 28 affirms that First Nations have a right to redress for lands, territories, and resources unjustly taken from them. Importantly, neither the presence of third-party interests nor lack of possession can prevent an Indigenous group from exercising its right to redress.[3]

The *UN Declaration* further notes at Article 32 that states must provide effective mechanisms for just and fair redress for projects which impact Indigenous lands, territories, or other resources, including in connection with the development, utilization or exploitation of mineral, water, or other resources. Article 8 is also clear that states must provide effective mechanisms for the redress of any action which has had the effect of dispossessing them of their land, territories, and resources.

Article 37 of the *UN Declaration* is clear that the Crown must honour and respect the nation-to-nation relationship and Treaties that it has concluded with First Nations, noting that Indigenous peoples have the right to the recognition, observance, and enforcement of Treaties. Its preamble further recognizes that there is an urgent need for States to respect and promote the rights of Indigenous peoples affirmed in Treaties and that ultimately Treaties with Indigenous peoples could have international dimensions, noting that Treaties "are, in some situations, matters of international concern, interest, responsibility and character."

Canada has recently enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*[4] *(*the *UN Declaration Act),* emphasizing the import of the fundamental international human rights standards identified within the *United Nations Declaration on the Rights of Indigenous Peoples.*[5] The *UN Declaration Act*'s preamble details how the *UN Declaration* is the framework for reconciliation at all levels of Canadian society. The Government of Canada has an existing obligation under section 5 of the *UN Declaration Act* to take all measures necessary to ensure that the laws of Canada are consistent with the UN Declaration.[6]

The Meaning of Restitution

Restitution aims to return the affected First Nation to its original position. This consists of "the complete re-establishment of the original situation which existed before the wrong was committed".[7] The Inter-American Court of Human Rights confirmed that, for an Indigenous People dispossessed of its land, restitution to its original position consists of the return of the land.[8] Restitution in this context means

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[2] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007) at Article 28 ("UN Declaration").
[3] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, at paras 128, 138, 139.
[4] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ("*UN Declaration Act*").
[5] UN Declaration.
[6] *UN Declaration Act* at s. 5.
[7] Federico Lenzerini, "Reparations for Indigenous Peoples in International and Comparative Law: An Introduction" (2008), at 14.
[8] *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of August 24, 2010, Series C No. 214, at para 281.

restoring First Nations to their original position before being dispossessed of their lands, territories, and resources. Restitution also requires the Government of Canada to provide compensation for First Nations' loss of use over their lands, territories, and resources.

Restitution of unlawfully seized land is a remedy that is directly proportionate to the harm caused. Moreover, it recognizes the deep and lasting ties that First Nations have with their lands, territories, and resources. In this regard, the Inter-American Court of Human Rights recognized that land rights are inter-related, inter-dependent and mutually reinforcing with other fundamental human rights due to "the close relationship of indigenous peoples to their traditional lands and the natural resources relevant to their culture that are found there, as well as the intangible elements resulting from them."[9]

Where restitution is not possible or not a First Nation's preferred remedy, the Government of Canada is obligated to provide First Nations with just, fair and equitable compensation. Article 28 of the UN Declaration makes clear that "compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

Existing Mechanisms to Provide Restitution

Despite the Government of Canada's repeated commitments to return lands to First Nations, no effective mechanisms currently exist for land restitution in a fair and timely manner. The existing policy framework for the restitution of lands in Canada has remained relatively unchanged since the 1970s and includes the Comprehensive Land Claims Policy (CLCP), the Specific Claims Policy, and the Additions to Reserve Policy (ATR).

Comprehensive Land Claims Policy

The CLCP provides the framework to negotiate Modern Treaties in Canada and applies where no Treaty previously existed. Under the CLCP, First Nations can exchange 'uncertain' land rights for legally recognized lands and associated rights. First Nations have consistently rejected the CLCP because it seeks to extinguish First Nations land rights, and prioritizes certainty for federal, provincial, and territorial governments and resource development. The CLCP fails to meet the minimum standards under the UN Declaration, is inconsistent with Canadian jurisprudence, and has not been formally repealed despite the Government of Canada distancing itself from the Policy.

Specific Claims Policy

First Nations claims against the Government of Canada for the Crown's breaches of historical obligations are guided by the Specific Claims Policy. The Specific Claims Policy's federal policy objective is to discharge the Government of Canada's lawful obligations through negotiated settlements with First Nations.[10] Numerous attempts were made to reform the Specific Claims Policy, which places the Government of Canada in a conflict of interest—Canada is responsible for assessing claims against itself based on its own legal advice. In addition, specific claims settlement agreements typically only provide redress in the form of cash, but rarely include land, making it ineffective as a tool for restitution. Like the

[9] *Ibid* at para 85.
[10] Government of Canada, "The Specific Claims Policy and Process Guide" (2021), accessed online at https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629.

CLCP, the Specific Claims Policy falls well short of the minimum standards for redress and restitution contained in the UN Declaration.

Additions to Reserve

The primary mechanism in Canada for achieving restitution through the legal recognition of First Nations lands is by creating a Reserve. Parliament can create a Reserve through legislation but has done so on very few occasions.[11] The preferred approach for the Government of Canada is the ATR Policy and process, which uses non-statutory authority under the Royal Prerogative to create a Reserve under both Section 91(24) of the *Constitution Act, 1867* and the *Indian Act*.

The federal ATR Policy allows First Nations to submit proposals to convert fee simple lands into reserve lands under the *Indian Act* by Ministerial Order. The ATR process is deeply bureaucratic, involving several hundreds of steps, has no clearly expressed service standards or guidelines, is constrained by regular delay (including a massive backlog), and does not guarantee the creation of a Reserve as an outcome. Indigenous Services Canada (ISC) recently published data that shows that over 700[12] priority ATR proposals are at various stages of completion. Over 80% of ATR proposals flow from a legal obligation to create a Reserve[13] and, on average, take 2-8 years to complete.

First Nations made several efforts to reform the ATR Policy and process, and the Government of Canada has recognized many of the challenges. At a 2022 AFN Special Chiefs Assembly, Minister of Crown Indigenous Relations Marc Miller noted to the First Nations-in-Assembly that "the (ATR) process is largely broken, glacial in its pace, and a terrible way to get land back." Taken together, the failed ATR process and the Government of Canada's unwillingness to use legislative means to create Reserves leaves unanswered the question of whether Canada is in fact willing to create Reserves as a means of restitution.

Obtaining Restitution Through the Courts

Canadian courts are not a viable alternative to the existing policy framework for restitution. First Nations seeking restitution through the courts face significant challenges, including the unjust application of technical defenses, such as provincial statutes of limitation and doctrine of laches, which make suing the Government of Canada and the provinces exceedingly difficult. To prove title in court, First Nations must rebut the presumption that Canada owns the land by virtue of the assertion of Crown sovereignty. Despite the landmark victory in *Tsilhqot'in Nation v. British Columbia*, where the Tsilhqot'in Nation proved existence of Aboriginal Title, First Nations continue to experience difficulties in meeting the stringent test to prove existence of Aboriginal Title in court. These challenges are compounded by the lengthy and costly process of litigation.

[11] In 2001 the Government of Canada passed the *Kanestake Interim Land Base Governance Act* which created lands reserved for the Mohawks of Kanestake under section *91(24) of the Constitution Act, 1867*, but not a reserve under the *Indian Act*.

[12] According to ISC, there were over 1300 priority ATR proposals in October 2022. As of May 2023, ISC indicated this number was 700. During this period, fewer than 50 ATR proposals were completed, suggesting that the number of priority proposals reported is not consistent with the number of actual proposals submitted.

[13] Such as a specific claims settlement agreement or a Treaty Land Entitlement Agreement

Ultimately, no fair and effective ways exist for First Nations to achieve restitution of land through law or policy in Canada. The Government of Canada must take immediate steps to overhaul its policy framework to recognize and return First Nations lands and to ensure judicial processes are a viable alternative for First Nations. A functioning and accessible legal system incentivizes good faith negotiations through flexible, open, and transparent processes to recognize, return, or replace First Nations lands.

Conclusion

The Government of Canada is bound by international law and domestic law to provide adequate and effective restitution to First Nations who have been dispossessed of their lands, resources, and territories. The Government of Canada must cooperate fully with First Nations to determine the particular forms that this restitution will take. By failing to provide effective mechanisms capable of providing restitution to First Nations, the Government of Canada is currently in a position of non-compliance with the UN Declaration and fundamental norms of customary international law. As the Government of Canada implements the UN Declaration, it must work jointly with First Nations to design and implement policies, programs, and mechanisms to ensure that restitution is available to First Nations in a fair and timely manner.