**Submission to the House of Commons Standing Committee on Indigenous and Northern Affairs**
**Restitution of Land to First Nations, Inuit, and Metis Communities**

**Submitted by the British Columbia Specific Claims Working Group**
**June 30, 2023**

## Who We Are

The British Columbia Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and specific claims technicians created via resolution by the Union of British Columbia Indian Chiefs (UBCIC) in 2013. The BCSCWG is tasked with advocating for the fair and just resolution of specific claims arising in BC through systemic reform to uphold the rights of First Nations as articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*.

## Introduction

This submission will outline the need for a robust provision of land return as an available remedy to First Nations under Canada's specific claims policy. The policy and associated legislation are currently undergoing a process of reform as Canada and the Assembly of First Nations engage in codeveloping an Independent Centre for the Resolution of Specific Claims (ICRSC) to finally address Canada's conflict of interest in specific claims resolution processes. As a corollary of its commitment to fairness and full independence from the federal government in the management and assessment of claims, the proposed ICRSC has as one of its foundational principles the integration of Indigenous laws and dispute resolution mechanisms, paving the way for foregrounding Indigenous worldviews and understandings of loss into a new process of redress, as well as expanding acceptable forms of restitution for those losses into a new resolution process. The expectation is that the issue of land return will be central to the development of available remedies under the ICRSC. The time-sensitive nature of these discussions makes it imperative that the House of Commons Standing Committee on Indigenous and Northern Affairs INAN devote significant consideration to land return as it relates to the resolution of specific claims.

## About Specific Claims

Specific claims are historical grievances brought against the federal government by First Nations when Canada fails to fulfill its lawful obligations as set out in statutes, treaties, agreements, or the Crown's reserve creation policies. There are hundreds of unresolved claims in British Columbia, which reflects First Nations' widespread dispossession through the illegal appropriation and alienation of their lands. These include the creation of and subsequent failure to protect Indian reserves, villages, and fishing areas; the systematic denial of rights to fish and access to water; and the illegal disruption and removal of sacred sites and grave sites.

These losses are the result of false, racist premises such as *terra nullius* and the doctrines of discovery and denial which provided colonial governments justification for appropriating valuable land for which they had no legal or moral right. Additionally, these governments imposed organized legal and land tenure systems designed to accelerate non-Indigenous settlement on Indigenous territories. Systems of land appropriation were legalized and exploited under the *Indian Act*, and illegal land appropriation routinely occurred in clear violation of the

minimal protections contained in colonial or federal laws. These acts of land dispossession ignored and later outlawed Indigenous laws, protocols, and systems of governance.

**The Land Return Remedy in Canada's Former and Current Specific Claims Policies**

First Nations enter the federal specific claims process seeking redress for historical injustices and are quickly frustrated by the process' systemic unfairness: Canada is in a conflict of interest in assessing claims made against itself and the process fails to include Indigenous laws and dispute resolution protocols in the resolution of claims. First Nations are also extremely critical of the barriers to land return that exist in the federal specific claims policy and in related legislation, barriers which result from the inherent unfairness in the process.

Canada's specific claims policy does officially include land return as a remedy for First Nations claimants. Its first iteration in 1982, *Outstanding Business: A Native Claims Policy*, provided explicitly for Indian bands to be compensated for unlawfully surrendered or otherwise taken lands, "either by the return of these lands or by payment of the current, unimproved value of the lands."[1] The importance of land return to First Nations was discussed in greater detail in Part 1 of the policy which reports:

> In the area of compensation, the general view expressed was that bands should be restored to positions held before loss. Many of the bands view claims not only as a means to restore or improve their land base but to obtain necessary capital for socio-economic development. Where non-Indians are occupying claimed lands, such lands should be returned to the bands concerned and, if necessary, the former occupants compensated by the government.[2]

The current policy, *Specific Claims Action Plan: Justice At Last*, introduced in 2007, retains the option of land return, but makes clear that, "If land changes hands, this can only happen on a willing-seller/willing-buyer basis."[3] First Nations point out that this effectively protects third party and Crown interests over First Nations' interests since the federal government is willing to buy out Indigenous land interests as compensation, but not third-party land interests.

The 2008 *Specific Claims Tribunal Act* (SCTA) provides that Specific Claims Tribunal decisions are limited to monetary awards capped at $150 million, which amounts to a legislative barrier to land return and dovetails with the restrictions placed on land return set out in the specific claims policy.

**Failure of the Current Process to Support Land Return as Restitution**

While land return is an available remedy under the policy, it is rare that claim settlements resulting from negotiations result in lands returned to First Nations. Rather, First Nations are under immense pressure to accept one-time cash payments. In negotiations, Canada emphasizes one-time financial payments as the preferred and most expedient settlement option and the means to facilitate the purchase of private lands "on a willing-seller/willing-buyer basis." The

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[1] Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy, Specific Claims*, 1982, p. 31.
[2] Ibid, p. 16
[3] Indian and Northern Affairs Canada, *Specific Claims: Justice At Last*, 2007, p. 3.

negotiation process itself is also notoriously lengthy; over time, land prices increase, often prohibitively impairing the ability of First Nations to buy back lost lands. The timeline of negotiations also dictates that First Nations must await the final resolution of a claim to receive compensation, even if lands become available for purchase during the negotiation process, which can also result in lost opportunities to buy back lands.

Canada also encourages First Nations to purchase lands under the Addition to Reserve (ATR) and Treaty Land Entitlement (TLE) policies, rather than through negotiation under the specific claims policy. First Nations are highly critical of the ATR policy since it prioritizes non-Indigenous property owners, makes insufficient land allocations, does not transfer non-contiguous lands to Indian reserve status, and creates obstacles to land selection through conflicts with provincial and municipal governments who claim easements and subsurface rights on desired lands. Similarly, there are significant barriers regarding TLE policies, including significant delay, discrepancies across regions for resolving third-party interests, as well as failures to set aside all selected reserve lands.

These processes are largely ineffective and reflect how Canada views its obligations to First Nations while at the same time lauding the reconciliatory objectives of the current specific claims process. In practice, however, Canada affirms that the policy's primary objective is to provide an avenue for the federal government to discharge its obligations to First Nations under Canadian law and relieve itself of liability by paying off its financial debts.[4] Restitution to First Nations is provided in the form of monetary compensation almost exclusively, despite First Nations' insistence for decades that land return must be included as an accessible remedy for Canada's historical wrongdoing, in order to revitalize their communities and advance true reconciliation with the Crown.

**Centrality of Land Return to First Nations**

First Nations continue to demand restitution for the illegal disposition of their lands. In 2022, the UBCIC passed a resolution to seek funding and support to advocate "for a new independent process to include land back."[5] In 2019, the AFN held regional dialogue sessions on First Nations' visions for an independent specific claims process. The sessions established several key principles, including the need to integrate Indigenous laws and dispute resolution mechanisms, remove arbitrary limits on compensation, and provide restitution of lands. The resulting AFN Specific Claims Reform Proposal on an Independent Centre for the Resolution of Specific Claims (ICRSC) recommends the expansion of resolution approaches to "incorporate Indigenous systems of restitution for what was fully lost in the breach of lawful obligations. This may result in the return of land, revenue-sharing, compensation for loss of cultural knowledge connected with the breach or multi-year financial settlements."[6]

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[4] See https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629.

[5] UBCIC Resolution # 2022-18, Calling for the Restitution of Land as a Remedy in Specific Claims Resolution, June 2-3, 2022.

[6] Assembly of First Nations, *Specific Claims Reform Proposal on an Independent Centre for the Resolution of Specific Claims (ICRSC)*, 2021, p. 13.

The critical significance of land return to First Nations and to advancing reconciliation was underscored almost three decades earlier by the 1996 *Royal Commission on Aboriginal Peoples* (RCAP), which stated:

> Expanding the Aboriginal land and resource base is not just about honouring past obligations or paying a moral debt to Aboriginal people. It is about laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada's enormous land mass, of mutual reconciliation and of peaceful co-existence. Without it there can be no workable system of Aboriginal self-government.[7]

The call for effective mechanisms for land restitution to First Nations has been consistent and longstanding.

**Restitution for Specific Claims Must be Informed by Indigenous Laws**

Canada's specific claims policy and negotiation mandates must align with First Nations' rights as articulated in Articles 18 and 27 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) which emphasize the need for redress and restitution pertaining to Indigenous lands, territories, and resources to unfold through the decision-making authorities and procedures of their own "laws, traditions, customs and land tenure systems." The UN Declaration also emphasizes the importance of land restoration in Articles 26 and 28, which underscore the right of Indigenous peoples to their lands and to redress for confiscated and occupied lands through return or compensation for lands traditionally owned by them.[8] These clauses are entrenched in federal law under the *United Nations Declaration on the Rights of Indigenous Peoples Act* and in provincial law through British Columbia's *Declaration on the Rights of Indigenous Peoples Act*.

Indigenous laws and governance must inform the development and implementation of appropriate remedies for Canada's historical wrongdoing, including land return. Nlaka'pamux legal scholar (now Justice) Ardith Walpetko We'dalx Walkem writes that reconciliation requires seeing beyond monetary compensation for the resolution of claims because it means seeking justice beyond a narrow form of damage. She points out how being cut off from land has long-term intergenerational impacts on Indigenous peoples, including to their legal orders. Each of these legal orders are situated within a specific territory and draw their distinction and diversity from these places. Therefore, the specific claims policy must address the specific injustice of this disruption. Disruptions to Indigenous governance and law cannot necessarily be compensated through monetary settlements because they represent intangible harms to Indigenous obligations to all living beings within a territory. Walkem writes, "As Indigenous cultures are tied to lands and resources, failure to reserve or protect land [has] impacted language, spirituality, and the ability to teach new generations about cultural beliefs and laws."[9]

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[7] Royal Commission on Aboriginal Peoples*, Report Volume 2, Restructuring the Relationship*, 1996, p. 285.
[8] United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, 2007.
[9] Ardith Walkem, *A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes*, 2018, p. 17.

Land is not only integral to Indigenous self-determination, but it is also vital to the maintenance and continuity of Indigenous language, culture, and nationhood. The lack of an effective land return process through the current specific claims policy violates Indigenous law, section 35(1) rights, international rights to self-determination protected through the UN Declaration, and is a breach of the honour of the Crown and principles of reconciliation.

**Conclusion and Recommendations**

Widescale reform of the specific claims policy is needed and strengthening the provision for restitution of land must be a fundamental component of this reform.

We recommend overall that the INAN committee expand its study on restitution of land to hear from First Nations rights and title holders and those engaged in the specific claims process to discuss the full spectrum of land return options for First Nations seeking resolution of their specific claims. These options must be explored and developed in full partnership with First Nations and their representative organizations, and include but are not limited to:

- Reforming the process of land transfer from third parties, giving full consideration to the constitutionality of Aboriginal lands compared to private and commercial property rights, as well as new models to expand the current willing seller/willing buyer framework for land return under the specific claims policy. This could involve establishing a specific claims trust fund, drawing from the contingent liability monies to secure this funding, and updating the compensation framework for specific claim lands.

- Developing a policy approach that involves provincial non-assertion of regulatory and legislative authority, paired with co-management regimes and shared jurisdictional arrangements for specific claim lands, including the exploring models of co-management, and an expanded notion of compensation through resource revenue sharing.

- Giving paramountcy to First Nations' legal entitlements through title and treaty frameworks.

Further engagement should explore all possible options raised by First Nations rights and title holders.