The Work Ahead:

Eliminating Canada's Conflict of Interest to Create a Fair, Legitimate Process for Resolving Specific Claims

The BC Specific Claims Working Group Submission

to the AFN Engagement Session on an Independent Process

December 18, 2019

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Executive Summary

This submission by the BC Specific Claims Working Group (BCSCWG) reflects the views and interests of BC Indigenous Nations and their representative organizations relating to the development of a new, independent specific claims resolution process, articulated most recently at regional engagement sessions organized and facilitated by the Assembly of First Nations (AFN) in the fall of 2019.

In response to Indigenous Nations' past observations and analysis identifying the systemic inequalities and administrative and procedural barriers that characterize the specific claims process, the AFN invited those in attendance at the 2019 engagement sessions to share ideas on how to transform Canada's specific claims process into a legitimate, fair process for achieving justice for historical losses.

BC Nations participating in the engagement sessions highlighted the importance of righting the relationship between their Nations and Canada over the long term and stated unequivocally that to foster right relations, both dimensions of Canada's conflict of interest – its control of the management and assessment of claims and its reliance solely on Canada's system of common and civil law used to assess and adjudicate claims - must be completely eliminated from all parts of the process.

In the context of political and legal frameworks adopted by Canada which mandate fair, independent, transparent, and open mechanisms of redress for Indigenous peoples' historical land-related losses, BC Nations at the engagement sessions called for the creation of an independent institutional body to manage and assess claims in accordance with the human rights standards articulated in the *UN Declaration on the Rights of Indigenous Peoples*. They also insisted that a new assessment process be developed that recognizes the authority of Indigenous laws and fully incorporates Indigenous laws and legal protocols into mechanisms for redress.

To this end the BCSCWG has outlined guiding principles for the integration of Indigenous legal systems into a new specific claims resolution process based on comments made by participants at the engagement sessions and interview with community members about their own legal protocols and dispute resolution mechanisms. These principles – legal pluralism, ongoing resolution, comprehensive understandings of loss, community-derived forms of restitution, shared deliberations and decision-making, and culturally specific forms of evidence – constitute the foundation of our key recommendations for a new independent process.

Our key recommendations are twofold based on the views of BC Nations participating in the engagement sessions:

1. The creation of an independent institutional body to assume responsibility for all aspects of the administration and management of specific claims, including but not limited to: funding, access to information, facilitating collaboration, evaluating claims, facilitating resolution through negotiations, mediation, or adjudication, ensuring accurate communication and transparent reporting. This body must be comprised of an equal number of representatives from Canada and Indigenous Nations.
2. In developing this body, priority must be given to convening an advisory committee made up of Indigenous legal experts (scholars, community experts) to give full consideration and make recommendations regarding the integration of Indigenous laws into a new independent claims resolution process.

We suggest a possible underlying framework for how a new independent body might operate, with the overall aim of fostering right relationships between Indigenous Nations and the Crown.

Introduction

This submission reflects the views and interests of BC Indigenous Nations and their representative organizations relating to the development of a new, independent specific claims resolution process, articulated most recently at regional engagement sessions organized and facilitated by the Assembly of First Nations (AFN) in the fall of 2019.

In response to Indigenous Nations' past observations and analysis identifying fundamental systemic inequalities plaguing the specific claims process, as well as the myriad administrative and procedural barriers that exist as a result,[1] the AFN invited those in attendance at the 2019 engagement sessions to share ideas on how to transform Canada's specific claims process into a legitimate, fair process for achieving justice for historical losses.

Participants highlighted the importance of righting the relationship between their Nations and the Crown but expressed skepticism toward the federal government's public rhetoric around its reconciliation agenda. Although advancing reconciliation is the stated objective of Canada's claims resolution policy and legislation, in practice reconciliation is a narrowly circumscribed aim which validates the logic of settler supremacy and eschews restructuring institutions with Indigenous Nations as truly equal partners. As one participant put it, "Reconciliation is a one-way street"; indeed, effectively relegating Indigenous Nations to the status of 'stakeholders' invested in the claims resolution process belies Canada's public commitment to work in partnership with Indigenous peoples on a Nation to Nation basis to reform the process. Too often the decisions around reform are relegated to Canada's labyrinthine bureaucratic networks, and Canada rationalizes the incremental nature and pace of change in the name of pragmatism and balancing competing interests. As those attending the engagement sessions made clear, "Nation to Nation" entails accepting the full authority of Indigenous Nations as sovereign self-determining governments who have an equal part in deciding how to restructure the process.

The requirements of a Nation to Nation relationship have been communicated to Canada repeatedly, perhaps most thoroughly in the 1996 Report of the Royal Commission on Aboriginal Peoples and is outlined in the *UN Declaration on the Rights of Indigenous Peoples*. However, the overwhelming sentiment amongst participants is that while Canada now concedes that Indigenous peoples have constitutionally protected and internationally affirmed human rights after decades of denial, in practice the federal government is less willing to act in accordance with what is right, particularly what is right as understood by Indigenous Nations, leaving the colonial power imbalance firmly entrenched. The BCSCWG takes the question "What is right?" as central to any conceptualization of a new independent process. As legal scholar Mark Walters writes, "To ask what is right between people seems to involve asking what it is that they should do in

[1]The AFN has held specific claims dialogue sessions on several occasions, most recently in 2017. Indigenous Nations identified underfunding at all stages of the process, Canada's conflict of interest, adversarial and paternalistic approach, and misleading and dishonest communication in numerous strident critiques of the policy and process. See for example BC Specific Claims Working Group, *On a Human Rights Foundation: Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations' Historical Losses*, Submission to the AFN-INAC Joint Technical Working Group on Specific Claims, July 24, 2017. These criticisms have been made for decades by Indigenous Nations, independent expert bodies, legal scholars, and the federal government itself. See Indian Specific Claims Commission, *Final Report 2001-2009: A Unique Contribution to the Resolution of First Nations' Specific Claims in Canada*, 2009; Jane Dickson, *By Law or In Justice: The Indian Specific Claims Commission and the Struggle for Indigenous Justice*, Purich Books, 2018; Standing Senate Committee on Aboriginal Peoples, *Negotiation or Confrontation: It's Canada's Choice*, Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process, December 2006; Office of the Auditor General of Canada, *Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada*, Fall 2016.

relation to each other, an inquiry that looks forward towards establishing just relationships."[2] The BCSCWG insists that the imperative to work toward establishing just relationships must lie at the heart of a new process.

With the aim of establishing just relationships, participants spoke about the need to supplant an adversarial, biased, rigid, and obfuscating system with one characterized by equality, flexibility, and openness to foster right relations between Indigenous Nations and the Crown over the long term.

To this end, they stressed the need to develop an independent process that:

1. Removes the federal government as the institutional body that oversees the management and assessment of Indigenous Nations' specific claims; and
2. Is equally founded upon the diversity of Indigenous worldviews, dispute resolution practices, and legal protocols.

Our submission therefore involves the following components:

- A discussion of Canada's conflict of interest in the current process and the need for an independent institutional body to administer and manage a new claims resolution process;
- Support for the equal inclusion of Indigenous legal systems in a new process;
- A review of what participants have articulated as fundamental principles that characterize an approach to specific claims resolution founded on Indigenous legal traditions, while acknowledging and respecting the diversity of legal orders amongst BC Indigenous Nations;
- Implications for a new specific claims resolution process that adheres to these principles;
- Recommended actions that promote the realization of these principles in practice.

In this way, we hope to follow "what is right" to achieve justice for Indigenous Nations and foster right relations with the Crown.

About the BC Specific Claims Working Group

The BC Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and specific claims technicians, created via resolution by the Union of BC Indian Chiefs (UBCIC) in 2013 and tasked with advocating for the fair and just resolution of BC specific claims and advancing specific claims as a national political agenda item. Throughout our work, we emphasize the historical uniqueness of colonization in BC and the need for a process that addresses the distinctive challenges of claims resolution in this province. Of the 472 claims now in progress in Canada, over half (51.5 percent) are in British Columbia. Furthermore, BC has the highest percentage of claims that remain unresolved after going through the process: 53 percent of rejected claims and nearly 40 percent of closed claims.[3] BC Nations are also deeply concerned about the resolution of their large value claims (currently defined as claims over $150 million) in a manner that is fair and transparent. The current claims process is clearly failing BC Nations.

[2] Walters, Mark D., "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain Be Judicially Enforced Today?" in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, Edited by John Borrows and Michael Coyle, University of Toronto Press, 2017, p. 189.
[3] Canada, Crown and Indigenous Relations and Northern Affairs, *National Summary on Specific Claims* and *Summary of Specific Claims by Province*. Accessed online December 6, 2019 at http://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx.

Finding a process that works for the claims of BC Nations is essential and urgent, as unresolved claims have real, ongoing impacts on communities. The federal government's approval of the Trans Mountain pipeline expansion project will also result in a significant increase in BC claims. Further, BC Nations and organizations have been at the forefront of claims reform for decades and have experience and insight that are essential to developing just processes for claims resolution. The BCSCWG is committed to working with Indigenous Nations, partner organizations, and government to advance the just and timely resolution of specific claims.

Methodology

For this submission, we draw primarily from four sources:

1. Notes and transcripts recorded during three AFN regional engagement sessions on developing an independent specific claims process that took place in the fall of 2019 (in Vancouver, BC on October 8, Fort St. John, BC on October 9, and Oshweken, ON on October 24);
2. *Our Laws Arise from the Land: A New Way Forward*, an online resource created in 2019 by the BCSCWG to support Indigenous Nations interested in utilizing Indigenous laws and legal protocols to resolve historical land related grievances;
3. Follow-up interviews with participants of the BC engagement sessions and Indigenous legal scholars conducted in the fall of 2019; and
4. Reports, submissions, letters, and direction previously drafted or endorsed by BC Nations and the BCSCWG.

The AFN regional engagement sessions were attended by people representing a cross-section of BC Nations and organizations. The stated intent of the sessions[4] was to share ideas on how to develop a new specific claims resolution process that would explicitly align with Article 27 of the *UN Declaration on the Rights of Indigenous Peoples*, which articulates that processes to resolve Indigenous peoples' land related grievances must be fair, independent, impartial, open, and transparent, and include Indigenous laws and cultural traditions. Each regional engagement began with a screening of *Our Laws Arise From the Land*, a short video on the importance of incorporating Indigenous laws into specific claims resolution processes, and continued with facilitated break-out sessions on five topics: funding approach; research and development; resolution (negotiation and mediation); adjudication; and implementation and reconciliation. Each topic was oriented around pre-selected focus points and questions to guide discussion, including questions about how participants' Indigenous legal systems and dispute resolution mechanisms could shape a new process throughout.

Our Laws Arise from the Land: A New Way Forward is a web-based resource developed by the BCSCWG that features a discussion paper and video on key principles related to integrating Indigenous laws into claims resolution processes, as well as a series of short video interviews conducted in the summer of 2019 with Indigenous community members on their territories who are considering how to move forward articulating their own laws.[5]

Engagement session follow-up interviews addressed the practical considerations and implications of an independent claims resolution process through the lenses of each interviewee's experience with their Nation's legal protocols and dispute resolution processes.

[4] Assembly of First Nations, *AFN Regional Engagement Sessions: Developing and Independent Specific Claims Process, Topics For Discussion*.
[5] The website will be publicly accessible in January 2020 at https://www.ourlawsarisefromtheland.org.

Overall, we aim to reflect the views articulated by the BC claimant community. This report will be distributed to BC Indigenous Nations; we also invited BC Nations to make their own submissions and created a toolkit to assist with this. Our analysis of the input of BC Indigenous Nations clearly leads us to conclude that reform of the specific claims process must include fundamental, structural changes that will ultimately result in a fully independent and fair process that is inclusive of Indigenous laws.

The Two Dimensions of Canada's Conflict of Interest

Participants in each of the engagement sessions clearly articulated that the historical loss and damage of lands and resources have significant, ongoing effects on their communities and that unresolved claims perpetuate systemic inequality. Continuing with the current claims resolution process or indeed introducing minor modifications that fail to eliminate Canada's conflict of interest from the entirety of the process implicitly sanctions this inequality, perpetuates injustice, and maintains a colonial relationship based on an imbalance of power. The federal government has often rationalized minimal actions as necessary steppingstones toward substantive change; however, the minute temporary changes quickly become embedded as policy without follow-up or transformative change.

Canada's conflict of interest is two-pronged: first, it extends to the entirety of the management and assessment of claims, giving it control over access to funding, records, negotiations, and adjudication; second, the assessment and adjudication of specific claims follows a strictly western common law tradition and excludes Indigenous legal systems and protocols.

Conflict of Interest in the Management and Assessment of Indigenous Specific Claims

Participants in the engagement sessions reiterated what has been articulated in submissions and reports for decades,[6] that in the current process, Canada is in conflict of interest as it controls:

- Access to funding for the research and development of claims, negotiations and adjudication by the Specific Claims Tribunal, including when and if an Indigenous Nation will be funded and what costs are considered eligible;
- Access to information related to individual claims, claims policy decisions and public reporting:
    - transparent and equal access to information about Indigenous Nations claims; while Indigenous Nations are required to disclose the entirety of the legal basis for their claims, Canada does not disclose in full its reasons for accepting or rejecting claims;
    - access to a majority of historical records required by Indigenous Nations to substantiate their claims, since CIRNAC retains control over all departmental records they regard as having "business value" to the department, despite recognition by the Federal Court and human rights instruments affirming Indigenous peoples' right of access to information;[7]
    - transparent and consistent access to information about policy changes, decisions or actions that impact access to justice, such as recent changes in negotiation funding;
    - transparent and equal access to information about Canada's costs to resolve individual claims;
    - transparent, accessible and correct information about the status of claims in that Canada's public reporting on the success of the process is inconsistent with both its own publicly available data and the experiences of Indigenous Nations.

[6] See note 1, this submission.
[7] See National Claims Research Directors, "The Impacts of Bill C-58 on First Nations' Access to Information: A Discussion Paper Following the Review of Bill C-58 by the Senate Committee on Legal and Constitutional Affairs," March 20, 2019.

- Access to negotiations, since Canada alone assesses the validity of Indigenous claims based on legal reviews conducted by the federal Department of Justice and reviewed by the Specific Claims Branch;
- Access to adjudication by the Specific Claims Tribunal in that Canada tightly delimits what claims may be heard there (for example, it excludes claims with an estimated monetary settlement value of over $150M) and Indigenous Nations consistently report that funding to access the Tribunal is inadequate;[8]
- Compliance with checks on accountability in that Canada consistently fails to fulfil its own policy or legislative commitments, such as meeting the three-year deadline to assess claims or the recommendations made by the Office of the Auditor General of Canada, which audited the Justice At Last program in 2016.[9]

Overwhelmingly, BC Nations insisted that a new process must be administered by an independent institutional body, governed according to the human rights standards articulated in the *UN Declaration on the Rights of Indigenous Peoples*. Participants said that at a minimum, Indigenous peoples and their representative organizations must be agents who are equally involved in developing and administering this body, its terms of reference, its governance and operational structure, implementation oversight, and determining who carry out its functions. This new body would take on the responsibility of administering all funding necessary to support the resolution of claims, would adhere to the human rights principles articulated in the UN Declaration to ensure equal access to information, and would be responsible for all administrative data related to the claim resolution process.

Conflict of Interest in the System of Laws Used to Assess and Adjudicate Claims

BC Nations emphasized that even if Canada no longer controls access to fair claims resolution through its unilateral management and assessment of claims, it remains in a conflict of interest since the system of rules and norms governing the process, the one granted the authority and institutional validity to make policy and legislation, and render judicial decisions, is Canada's legal system. They repeatedly pointed out that claims resolution excludes Indigenous Nations' own laws and dispute resolution mechanisms. Cowichan legal scholar Sarah Morales notes that, substantive differences aside, any process intended to foster reconciliation between Indigenous Nations and Canada is by its very nature fundamentally flawed if it fails to respect each party's legal traditions:

> By failing to consider Indigenous legal traditions within the dispute resolution process itself, Canada is choosing to overlook the colonial history of its past land policy practices and is embedding the racism and structural inequalities … into [the] process of reconciliation."[10]

Further, participants at the engagement sessions commented that the Canadian justice system fails to reflect their Nations' principles and values. They frequently described it as a colonial tool that continues to be imposed upon them without their consent; they noted that it is the instrument that has enabled the dispossession of Indigenous peoples of their lands, prohibited them from seeking remedies, and authorized the suppression of their own legal traditions. Additionally, participants cited multiple negative experiences

[8] This has also been reported by the Chair of the Specific Claims Tribunal. See Specific Claims Tribunal of Canada, *2017-2018 Annual Report*.
[9] Office of the Auditor General of Canada, *Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada*, Fall 2016.
[10] Morales, Sarah, "(Re)Defining 'Good Faith' through Snuw'uyulh," in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, Edited by John Borrows and Michael Coyle, University of Toronto Press, 2017, p. 278.

with the Canadian legal system, a system at odds with their own values and customs and as such has inflicted multiple harms on their communities.

With the objective of righting the relationship between Indigenous Nations and the Crown, BC Nations emphasized that the adoption of Indigenous legal systems to resolve historical grievances is central to the legitimacy of any new process. As Anishinaabe legal scholar John Borrows states, "A process that mirrors the norms and beliefs of only one of the parties is unlikely to be seen as legitimate by the other, or produce outcomes which both parties consider fair."[11] A fair process designed to consider historical losses through the lens of legal obligations and redress must account equally for Indigenous understandings of loss, lawful obligations, and valid forms of redress. This means that a new process must do more than make minor, symbolic gestures toward the inclusion of Indigenous systems of law while leaving the colonial structure of the old claims process intact. The harms associated with such an approach would be significant, as we discuss below. Rather, Indigenous systems of law must be fully and equally integrated in all parts of a new process.

Frameworks that Mandate an Independent Process and Integration of Indigenous Laws

The integration of Indigenous laws into a new independent process is an enormous challenge; however, several political and legal frameworks adopted by Canada - The UN Declaration, TRC "Calls to Action", and ICERD - all affirm participants' views that processes for redress must be free from discrimination and that Indigenous laws and legal authority must be recognized and included in these processes.

The *UN Declaration on the Rights of Indigenous Peoples* (UN Declaration) is accepted internationally and domestically as the minimum standard that must inform a state's conduct in its relationships with Indigenous peoples.[12] The principles of equality, justice, and fostering right relations articulated so strongly by BC Nations are given expression in the UN Declaration, which affirms Indigenous peoples' right of redress for historical losses of lands and resources. Indigenous peoples' right to self-determination, the requirement to obtain their free, prior, and informed consent on matters concerning their territories, resources, and legislative or administrative measures that may affect them, and the requirement to consult and cooperate with Indigenous peoples through their own representative institutions in accordance with their own laws and customs – also explicitly affirmed in the UN Declaration - must constitute the foundation of any legitimate process of redress.

The Truth and Reconciliation Commission's "Calls to Action" call on Canada to "adopt and implement the UN Declaration on the Rights of Indigenous Peoples as a framework for reconciliation." Further, the TRC recommends that Indigenous laws and legal traditions be recognized and integrated in "processes involving Treaties, land claims, and other constructive agreements." The recognition and inclusion of Indigenous laws and legal traditions within the specific claims process was a point raised repeatedly during the engagement sessions.

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[11] Borrows, John, "Canada's Colonial Constitution," in *The Right Relationship: Reimagining the Implementation of Historical Treaties*, Edited by John Borrows and Michael Coyle, University of Toronto Press, 2017, p. 20.

[12] Canada formally adopted the UN Declaration without qualification on May 10, 2016. Its attempts to introduce federal legislation to harmonize Canadian laws with the UN Declaration through Bill C-262 were hampered by the government's refusal to elevate the bill to the status of a government bill, which would have given it priority in the Senate and made it less susceptible to delays. The newly elected Liberal minority government has again committed to enshrining the UN Declaration into Canadian law.

Specific claims reform is an international human rights issue related to racial discrimination. Article 5(a) of the International Convention on the Elimination of Racial Discrimination (ICERD) stipulates that States must guarantee the right of everyone to equal treatment before all institutions and bodies administering justice. Participants in the engagement sessions repeatedly identified the unequal treatment that permeates the structure of the specific claims process, describing Canada's paternalistic and discriminatory behaviour in all aspects of the process, particularly in negotiations. A 2017 submission from the UBCIC to ICERD notes that "the specific claims process has been plagued by institutionalized conflict of interest" and that Indigenous Nations "seek a truly independent process through which their claims can reach resolution."[13]

Former BC Court of Appeal Chief Justice Lance Finch, in his 2012 paper titled "Duty to Learn" sets out the Canadian jurisprudence which has clarified "the courts' obligation to take into account the Aboriginal legal perspective," highlighting that "Canada was, and remains, a multi-jural nation, in fact, if not in law."[14]

What is particularly noteworthy about the former Chief Justice Finch's remarks is his framing of the relationship between recognizing the authority of Indigenous laws and the aim of reconciliation, writing that "in the purely legal context, we must find ways to achieve reconciliation by finding space for the Canadian legal order within the pre-existing legal landscape," and that "it is a matter of attempting, in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical, and cultural." He writes that reconciliation must be conceived as a "two-way street" or risk imbalance and the injustice that follows. Crucially, he shifts the onus of learning and adapting to settler society and its legal institutions:

> How can we make space within the legal landscape for Indigenous legal orders? The answer depends, at least in part, on an inversion of the question: a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves.[15]

Justice Finch is careful to heed the warning articulated by John Borrows that:

> In practice, there are enormous risks for misunderstanding and misinterpretation when Indigenous laws are judged by those unfamiliar with the cultures from which they arise. The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality.[16]

This view has been articulated by Indigenous legal scholar Dr. Judith Sayers who has cautioned that "People cannot honour difference if they cannot understand it."[17] Indeed, the risks to Indigenous peoples themselves are manifold if Indigenous legal experts are not central to the conceptualization and formulation of the legal aspects of a new process. However, the "duty to learn" remains incumbent upon Canada; the challenge of working with Indigenous Nations, their representative organizations, and legal experts to realize an independent process for the resolution of historical claims that accounts equally for Indigenous laws must not be circumvented out of fear or complacency. As Nlaka'pamux lawyer Ardith Walkem states, "A revised

[13] Union of BC Indian Chiefs, 2017, "Canada: Implementation of an Independent Process for the Resolution of Specific Claims." Submission to the UN Committee on the Elimination of Racial Discrimination, 93rd session.
[14] Honourable Chief Justice Finch, Lance, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," p.4. Paper prepared for the Continuing Legal Education Society of British Columbia, November 2012.
[15] Ibid.
[16] Ibid.
[17] *Candice Servatius v School District 70 (Alberni) and Attorney General of British Columbia* (2019), SCBC S-79991 (Written Submissions of the Intervenor The Nuu-Chah-Nulth Tribal Council).

specific claims process incorporating Indigenous ways of resolving conflicts could be a powerful step in achieving a new relationship between Indigenous and non-Indigenous Canadians."[18]

Guiding Principles for the Integration of Indigenous Legal Systems

Participants spoke repeatedly about the need for a new approach to specific claims resolution founded in Indigenous legal traditions to foster right relations. Respecting the diversity of legal traditions, they emphasized that a new process that reflects Indigenous legal principles must be predicated on the following:

- Creating equal space for a plurality of Indigenous legal traditions
- Recognizing the ongoing nature of resolution
- Foregrounding Indigenous worldviews and understandings of loss
- Expanding acceptable forms of restitution
- Undertaking shared deliberations and decision-making
- Expanding what constitutes valid evidence

Each of these features is explored below.

Creating Equal Space for a Plurality of Legal Traditions

Participants stressed that a new process must possess the flexibility to accommodate a rich diversity of legal traditions and dispute resolution mechanisms. Those attending the engagement sessions and the individuals we interviewed discussed the distinctiveness of their Nation's traditions since they are rooted in the specificity of land, water, plant and animal life of their territories, and thoroughly woven into the cultural, spiritual, economic, and political ways of life. As one participant stated, "There is a connection to the land that First Nations have which is reflected in our law and that connection needs to be part of specific claims."

Participants from Vancouver Island, the Fraser Valley, Lower Mainland, as well as the southern, central and northeastern interior reflected this view. Overwhelmingly they reinforced the need for diversity of each Nation's laws to be respected with respect to resolving their claims. As one participant commented, "I feel like the specific claims Tribunal and the specific claims process needs to build space and time into that process to allow for the Indigenous community to design what the process itself would look like based on their own Indigenous laws." Participants dismissed an approach to claims resolution based on the administrative ease of a 'cookie-cutter' method in favour of developing mechanisms for resolving historical disputes that are recognized as legitimate by the Nation bringing forward the grievance. They stressed that "[Communities] should be empowered to utilize their own laws and legal processes to make determinations."

Recognizing the Ongoing Nature of Resolution

Participants repeatedly stressed the requirement to recognize the interrelatedness of their Nations with Canada, and the permanence of the relationship between them by virtue of the harm done, its magnitude and scope. As such, participants focused on the importance of healing the relationship between their Nations and the federal government over the long term as a central aspect of claims resolution. One participant stated that "the government says, and everyone acknowledges, that this is an ongoing relationship. Our relationship will always be ongoing and that's the way these agreements should be laid out."

[18] Walkem, Ardith, "A New Way Forward," August 2018, p. 13.

In contrast to an approach which strives for an expedient, discrete result to achieve mythical "certainty", such as the current process' one-time payment and legal release model, participants suggested that fostering right relations between their Nations and Canada positions the negotiated concrete form of restitution as a starting point; importantly, resolution of historical grievances happens by being attentive to the ongoing relationship: addressing the past harm and moving forward on a different basis. As one participant characterized it, "When I think about the problem, it's not just about, okay, how do we solve past wrongdoings, but also how do we move forward in a more respectful way that provides recognition of overlapping sovereignties … of Indigenous law and Crown law." Another remarked, "We have to find a way…to turn this into a collaborative process, a process where we're trying to restore balance as opposed to fighting each other."

One interviewee spoke about their community's dispute resolution process, and how its emphasis on building relationships could inform the resolution of specific claims: "They are really meant to restore relations between those families or those individuals or those communities that have been harmed or hurt or have harmed or hurt each other. Recognizing that we are all relations or that there is a strength in having good relationships with one and other. So, this is what this process has to look at. It has to be looked at as something that fosters a relationship."

Ardith Walkem cites the example of the Fish Lake Accord between the Secwepemc and Syilx as an agreement whose specific purpose is to maintain good relations over time:

> Indigenous protocols, such as the Fish Lake Accord between the Secwepemc and Syilx, have built in mechanisms to renew the agreement, and to bring new generations into the agreement, over time. The practice of renewing historic intertribal accords over time with the intent of breathing new life into agreements or settlements in a structured way could inform specific claims resolution.[19]

Foregrounding Indigenous Worldviews and Understandings of Loss

Participants were clear that a new specific claims resolution process must put Indigenous worldviews at the centre, particularly their understandings of the losses they have experienced as a result of the territorial dispossessions which have given rise to their claims. Currently the specific claims process only recognizes discrete losses of land and assets (resources, monetary assets) due to Canada's legal breaches of Canadian laws or treaties and accounts these losses in economic terms. However, participants were emphatic that a new process must account for the full extent of Indigenous Nations' losses as they continue to experience them.

Participants talked about losses of territory and resources, but also of the trauma of forced removal and the severed relationships that occurred as a result of territorial dispossession. One community member described the results of the loss as "heartbreaking", stating it "has affected the health [of the community] physically, spiritually and mentally."

Another participant spoke at length about her community's interrelationships with the plant and animal lifeforms, and all elements of the living world - that existed prior to losing an important territorial site. As Ardith Walkem writes, "A powerful lesson from many Indigenous legal approaches is an inclusive understanding of the perspectives that must be considered in decision-making," citing as an example the

[19] Walkem, Ardith, "A New Way Forward," August 2018, p. 16.

Syilx *Enowkin'wixw*, a practice that "refers to the way decisions are made, and the consideration that must be given to the impacts of decisions on other living beings."[20]

Community members we interviewed in the summer of 2019 talked about the loss of fishing grounds resulting in significant cultural loss due to an inability to pass important teachings on to children and grandchildren. One participant, describing the extinction of a particular species of fish as a result of the illegal alienation of an important fishing spot, said "We'll never have that back to teach our children."

Several participants spoke about how the dispossession of land has severed peoples' connections with their legal systems since these arise from relationships with particular sites and the forms of life that exist there; the losses were described as being especially acute since people were prevented from upholding their own legal obligations to the land, plants, animals, and spirit world. Participants also cited losing access to language, cultural knowledge and skills associated with resources such as plant life, water, and fish, and important ceremonies during which their own laws were foregrounded and shared.

Expanding Acceptable Forms of Restitution

Participants agreed that forms of restitution must align with the aim of fostering right relations, stating they must be broadened beyond monetary compensation for discrete economic losses. They discussed the importance of Indigenous communities being central to any determination of appropriate means of restitution for the full range of the historic losses they experienced, including economic, political, and cultural losses. They emphasized that Indigenous Nations must be able to define for themselves what constitutes meaningful restitution since the losses experienced are culturally specific, having had devastating impacts on their ability to maintain relationships and share teachings with future generations.

They agreed that a new process must expand acceptable forms of restitution beyond monetary compensation and must strive to restore the loss where possible. Examples brought forward included restitution in the form of land, developing systems of revenue-sharing for resources unlawfully taken from Indigenous lands, as well as funding in support of language, cultural, or legal revitalization programs. One Elder highlighted the connection between restitution of land and cultural survival, stating, "Language and culture come from the land. In order to ensure that our ways are carried into the future, the lands we have been on since time immemorial must be protected, we must be able to live on the lands so that our stories, songs, and laws live on." Participants also stressed that calculations of loss must be made in accordance with the value system of the Nation who experienced the loss.

One participant spoke about her Nation's blanketing ceremonies as a potential way to apply Indigenous systems of justice and restitution to the resolution of specific claims, explaining "that is what you are trying to do with that process of blanketing, to hold [a person] up and recognize what went wrong. And I think in all of these processes there needs to be something akin to blanketing to recognize that this was a wrong that occurred, that there were immense losses suffered as a result and that we must try to restore the soul of these communities."

Undertaking Shared Deliberations and Decision-Making

Many participants spoke about the meaning of negotiation as they understand it from the perspective of their own traditions. They echoed what Ardith Walkem has described as "a process by which the parties work together to craft a lasting relationship and path forward."[21] One example given by Walkem is the

[20] Ibid, pp. 19-20.
[21] Ibid, p. 21.

Waitangi Tribunal in New Zealand "in which Māori and non-Māori leaders and Elders sit together with tribunal members to investigate historical grievances and listen to claimant communities and the Crown. Half the tribunal members are Māori, and at any given hearing, at least one presiding member must be Māori."[22]

Attendees at the engagement session highlighted the need to ensure that their Nations are able to participate meaningfully and agreed that a new process must be sensitive to and take action to remove the multiple barriers (financial, cultural) that prevent them from doing so. They cited examples of their own Indigenous legal and governance mechanisms that could inform a new process, one which features shared, rather than imposed, decision-making. As one participant described, "One of our legal principles is the value towards the autonomy of each of the houses, and so in this way, by focusing on collective agreements, and on consent to that collective agreement, that's a really healthy view of power relationships…one that doesn't require domination over the other in order to obtain or achieve a resolution. Canada and Indigenous Nations can have shared jurisdiction."

Expanding What Constitutes Valid Evidence

Participants discussed the need for a new process to expand what is considered valid evidence to support a claim. Ardith Walkem, writing about the disparities in the current process, points out that "the Crown decides the standard of proof that will be required to establish a claim, weighing documentary evidence over Indigenous oral traditions and ways of recording events or agreements. When the written record is given greater weight in specific claims assessments, Indigenous Peoples are at a considerable disadvantage."[23]

Participants consistently indicated that valid supporting evidence must include forms of Indigenous knowledge and history and must respect Indigenous forms of truth-telling, evidence sharing, and oral history. They also talked about the need for evidence sharing to occur in their own languages if desired. One Elder stated that "Without using the language it is very difficult to describe Indigenous culture, laws, or history."

Interviewees agreed and added that is it vital to recognize and accept as valid Indigenous forms of legal expression, such as visual art, stories, and songs. In recognition that each community has its own laws, its own rigorous methods to substantiate and legitimize evidence, and that a new independent process must accommodate legal plurality, they discussed the importance of Indigenous Nations being able to determine how evidence will be shared, and who should be invited to witness the evidence sharing. Speaking of her own Nation's dispute resolution system, an engagement session participant stated: "It is so important for our community members to bear witness to our laws being drawn upon, our stories and our versions of law being respected and shared." Bearing witness is an example of how some Indigenous Nations legitimize legal proceedings and evidence. One Coast Salish interviewee provided the following example:

> For evidence sharing, communities should be empowered to utilize their own laws and legal processes to make determinations on who are the appropriate speakers from their community, recognizing the knowledge and gifts that different sectors of their community have. So, I think it should take place in the community and I think those individuals should just be given the floor and the amount of time necessary that they need to tell the story. Because often times when I think of dispute resolution processes that happen in the Coast Salish world, the first thing that happens is that the individuals involved usually hire a speaker and the speaker tells that family's story or

[22] Ibid, p. 23.
[23] Ibid, p. 24.

> connects that family to the issue at hand…I think those aspects of protocol which I view as legal procedure, legal process, are so important to follow in order for an Indigenous community to see the process itself as legitimate.

Another interviewee spoke about the forms their Nation's laws take and their relationship to evidence:

> "One area of the *adaawk* [Gitxsan oral history] is looking at it as a legal body and a source of explicit and implicit laws. …You can think of it as an ethic of how to live a good life, you could look at it as a source for art. So, there's a lot of different ways in which *adaawk* is expressed. You could express it through like a story, a narrative, you can express it through visual formats, like paintings or sculptures, things like that. You could express it through songs, which have lyrics that are drawn from the *adaawk* that are passed down through the *wilp* [Gitxsan House system]. Or you can look at it in terms of dances, which are like the historical dances that re-enact important events from our history. And so, all those different mediums of presenting the information are all interconnected and I think that that's where a focus on written evidence is very limiting."

A number of participants underscored the importance of witnessing. As one Coast Salish participant stated, "I've talked about that, giving space for the proper protocols to be followed and allowing communities to submit evidence according to their own legal traditions. I've talked about the use of speakers in big houses and the calling of witnesses, how important that is within the Coast Salish culture to call witnesses to serve as a record for what is said and what is decided. That would be beautiful to build into this. To hold everyone accountable to the specific claims process to what is being said and what is being done about it." A new specific claims process must permit Indigenous Nations to determine the way evidence is shared, where and how it is brought forward, and who may witness it. One participant cautioned that the time and place of evidence sharing may relate directly to the content and context of the claim. For example, if the claim is about loss of a fishing site, those hearing the claim must visit the specific site during the fish run to witness the event.

Participants expressed a general sense of concern and fear about protecting Indigenous knowledge. Participants called for Indigenous ownership over all community-based evidence and stressed the importance of protecting and maintaining jurisdiction over evidence shared by Elders, knowledge-keepers, and community members.

The guiding principles articulated above point the way forward toward a new claims resolution process that puts righting the relationship between Indigenous Nations and the Crown at the centre.

Recommendations

The aim of righting the relationship between Indigenous Nations and Canada must be at the foreground of a new process for claims resolution.

We note that the engagement sessions were structured to focus on how a new independent process should look and operate and that the sessions more often than not tended toward general principles rather than concrete mechanics. In this section, we contemplate a structure for a new independent process based on the principles discussed at the engagement sessions, not as a fixed or prescriptive solution, but as possible armature that reflects feedback received at the sessions and in the course of previous advocacy.

Our working model follows from two overarching recommendations:

1. BC Nations participating in engagement sessions were clear that an independent body (IIB) should be responsible for all aspects of the administration and management of specific claims and that this body should be comprised of an equal number of representatives from Canada and Indigenous Nations.

2. In developing this body, priority must be given to convening an advisory committee made up of Indigenous legal experts (scholars, community experts) to give full consideration and make recommendations regarding the integration of Indigenous laws into a new independent claims resolution process. This advisory committee could transition to a permanent advisory committee to provide structural guidance and oversight to the IIB when it is in operation. The role of the permanent advisory committee could include ensuring, on an ongoing basis, that specific claims resolution processes:
    - fully consider Indigenous legal principles and dispute resolution mechanisms
    - ensure IIB members honourably carry out the "duty to learn"
    - ensure transparent and accurate public reporting

Below we discuss responsibilities that should be assumed by a new independent body to facilitate claims resolution with practical recommendations included.

Management and Assessment of Claims

To initiate a claim, a First Nation would notify the independent body, who would then notify Canada. The independent body would then assume full responsibility for:

1. Allocating funding for all processes related to claim resolution;
2. Ensuring equal access to information, particularly Crown records;
3. Facilitating collaboration where the Nation feels this is in their interest;
4. Evaluating claims and making recommendations;
5. Facilitating resolution through negotiations, mediation, or adjudication;
6. Ensuring both parties are fully informed of the independent body's processes and tools;
7. Ensuring accurate, transparent communication and reporting about the claim at all stages of the process.

1. Allocating Funding for All Processes Related to Claims Resolution

Funding available to First Nations must be adequate to support all activities related to the resolution of their claims, based on priorities identified by Indigenous Nations. Funding must be guided by principles that create balance and fairness. Funding should be administered on a multi-year basis to both parties to account for adequate planning and budgeting. The total budget available for claims resolution must be sufficient to ensure equal and fair distribution of funds to all Nations wishing to participate in the process:

- Research and development. The independent body would allocate funding to Indigenous Nations and Canada, on an equal, transparent basis. Funding would be available for all claims research activities involving archival, institutional, and community-based research, as well as working with professional and community-based experts, including experts in Canadian and Indigenous laws, to develop the claim. Funding would be allocated to meet the needs of Indigenous Nations capacity building associated with research skills development within communities;
- Claim evaluation. The independent body would allocate funding to Indigenous Nations and Canada for all activities associated with the evaluation of claims through mediation, negotiation, community-based hearings, or adjudication;

- Indigenous law resurgence. The independent body would provide funding for Nations to undertake work to recover their laws, ceremonies, and protocols in order to resolve the grievance according to their own protocols;
- Reporting. The independent body would provide transparent reporting on its funding, including funding provided to Canada.

2. Ensuring Equal Access to Information, particularly Crown Records

The independent body would work with the Treasury Board Secretariat, Department of Justice, the Indigenous advisory committee and Indigenous technicians to develop a separate access to information and privacy (ATIP) mechanism specifically to facilitate the resolving of historical claims. This mechanism must adhere to the standards articulated in the *UN Declaration* to ensure First Nations' rights of access to information held by the Crown.

The new ATIP system must adhere to community protocols to control and protect Indigenous knowledge shared for the purpose of claims resolution.

3. Facilitating Collaboration

The independent body would assume responsibility for facilitating any collaboration a Nation may wish to undertake in the process of resolving its claim. Requests from Canada to work collaboratively with a Nation – for example, in the area of research, would also be facilitated by the IIB.

4. Claim Evaluation

BC engagement session participants indicated that claim evaluation should be focused on research and evidence rather than legal arguments. One possibility is that for each claim the independent body would assign a Claim Resolution Committee (CRC) to stay with the claim until it is resolved, ensuring an equal number of Indigenous appointees on the Committee with expertise in dispute resolution. The CRC would be responsible for:

- Developing a full understanding of the claim;
- Participating in community visits to see the impacted lands or losses;
- Ensuring evaluation and assessment principles determined by the Nation's own dispute resolution: mechanisms feature prominently in the evaluation;
- Ensuring equal disclosure of information between parties and making recommendations to the IIB.

5. Facilitating resolution through negotiations, mediation, adjudication or other mechanisms

Based on recommendations received by the CRC, the independent body could assume full responsibility for facilitating resolution through negotiations, mediation, or a Nation's own dispute resolution mechanism. The independent body could:

- Manage and make available a jointly agreed upon roster of mediators
- Assist both parties in identifying negotiators
- Identify experts
- Assist in managing legal costs

- Call on expertise in Indigenous dispute resolution, to assist in determining forms of restitution, with the values and priorities of the Nation bringing forward the grievance at the centre. The independent body would ensure timeliness, information sharing, good faith conduct.

6. Ensuring Both Parties are Fully Informed about the IIB's Processes and Tools

The IIB would introduce both parties to the full scope of its processes and tools as soon as a First Nation initiates a claim proceeding.

The IIB would also have a public education component to educate the general public about its mandate, principles, and roles.

7. Ensuring Accurate and Transparent Communication and Reporting

The IIB would assume responsibility accurately and transparently communicating to a First Nation and Canada about the status of claims. This includes overseeing reporting and disclosure of evidence between parties, ensuring accuracy in communication between the parties and in public reporting.

Systems of Laws Used to Assess and Adjudicate Claims

A new process must give equal weight to Indigenous worldviews and community perspectives and understandings when evaluating claims, including, but not limited to the following:

1. Determining the nature and scope of historical losses. This should include undertaking community visits if requested by a Nation, and hearing testimony given by community members. Nations should decide when in the process this should occur.
2. Determining breaches of lawful obligation.
3. Conducting community hearings so that Nations may bring forward evidence according to their own laws and protocols.
4. Adopting Indigenous dispute resolution mechanisms to resolve the claim
5. Accepting forms of restitution beyond financial compensation, as deemed appropriate by the Nation bringing forward the grievance, in accordance with the Nation's protocols
6. Ensuring shared decision-making occurs at all stages characterized by non-adversarial negotiations desired to foster right relations
7. All forms of community knowledge should be accepted. Equal weight should be given to non-written forms of evidence, such as oral history. Elders and community members must be provided ways to share their knowledge in their own language, with translators provided.

Conclusion

BC Nations have stated that the overarching objective of specific claims resolution must be fostering right relations between their Nations and Canada. Central to righting the relationship is removing Canada's conflict of interest from the process entirely, and reconceiving of a new process that adheres to the human rights principles articulated in the UN Declaration, including incorporating Indigenous legal systems and protocols into the process. The challenge is considerable but the groundwork is being undertaken by communities who insist that transformative change is the only way forward. We have outlined guiding principles to legitimate a new process based on the work of BC Nations, and offer a potential structure to begin the work ahead. This work and its results must be founded on equality, fairness, and independence, to set Indigenous Nations' relationship with Canada on the path of justice.