

# **A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes**

**BC SPECIFIC CLAIMS WORKING GROUP**



**DISCUSSION PAPER**

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## Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes

### EXECUTIVE SUMMARY

Specific claims are an area of longstanding dispute between Indigenous Peoples and Canada. The cost of leaving specific claims unresolved is significant to both Canada and Indigenous communities. Structural weaknesses that have been identified with the specific claims process include: Indigenous laws and ways of assessing and repairing harm are excluded; Canada is in an inherent conflict of interest – it created and controls the system, and also seeks to resolve disputes under it; inadequate resourcing and prioritization; emphasis on mitigating risk rather than healing relationships; and an assumption of adversarial interests.

*A New Way Forward* proposes an approach based on Indigenous laws, as directed by the BC Specific Claims Working Group. The *United Nations Declaration on the Rights of Indigenous Peoples* and the Truth and Reconciliation Commission Calls to Action support an approach founded on Indigenous laws and Aboriginal Title recognition.

Agreements and accords among Nations (both pre- and post-contact) illustrate how Indigenous laws work to address disputes and past wrongs and create living agreements. Indigenous protocols and declarations reflect notions of “right relations” and the relationships between people and other beings across time and form the basis for the proposals here. Specific claims resolution should reflect that Canada and Indigenous Peoples are involved in an ongoing relationship, which must be tended to as a living agreement.

*A New Way Forward* advocates for an approach founded in Indigenous legal traditions, in which:

- Space for a plurality of Indigenous legal traditions;
- Resolution is ongoing;
- Expanded notions of resolution (compensation-resolution);

- A multi-perspective process is utilized, which incorporates Indigenous perspectives on how harm is defined and decision-making processes to address that harm;
- Shared (not imposed) deliberations and decision-making are used; and
- Expanded evidence is welcomed to support specific claims.

Indigenous legal traditions for resolving conflicts could be a powerful step in achieving a new relationship between Indigenous and non-Indigenous Canadians in the area of specific claims.

## INTRODUCTION

Specific claims reflect those instances where Canada did not honour its “fiduciary obligation to protect and preserve the Bands’ interests from invasion or destruction.”<sup>1</sup> Specific claims include lands that were not set aside (or reserved) that should have been; lands that were reserved but then cut off or taken; and other areas where Canada failed to fulfill treaty obligations or to protect resources.

The specific claims process has been plagued with difficulties and suffers from a serious lack of credibility with Indigenous communities. Created and controlled by Canada, the specific claims process is slow, under-resourced, and seen by Indigenous Peoples as biased and unfair. Indigenous laws are not reflected in the process or outcomes.

The BC Specific Claims Working Group (BCSCWG) of Indigenous leaders and technicians formed as a result of a Union of BC Indian Chiefs (UBCIC) resolution to advocate for the fair and just resolution of claims. *A New Way Forward* reflects a proposal of the BCSCWG to creatively and meaningfully include Indigenous laws and ways of reaching resolution in resolving specific claims.

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<sup>1</sup> *Guerin v The Queen*, [1984] 2 SCR 335 [“Guerin”] at 350.

## THE UN-LANDING OF INDIGENOUS PEOPLES: RESERVES REPLACE TITLE RECOGNITION

The *Royal Proclamation, 1763*<sup>2</sup> reserved all Aboriginal Title lands to Indigenous Peoples until it was addressed with the consent of Indigenous Peoples/Nations and gave the federal Crown the fiduciary responsibility to guard this interest.<sup>3</sup> Only after Aboriginal Title was addressed could the provinces acquire an unhindered interest in those lands. Specific claims arise because newcomers did not follow these laws and began to take Indigenous lands without consent.

As newcomer numbers grew, Indigenous Peoples were no longer seen as necessary military allies, and treaties came to be seen as too costly. To limit its fiduciary burden and satisfy newcomer demands for land, the federal Crown started to create reserve lands without the consent or agreement of Indigenous Peoples. Indigenous Peoples were forcibly removed from their Title territories to smaller reserve lands.

Reserve creation was a legal sleight of hand by the federal government to avoid the trust obligations to guard Aboriginal Title lands (until dealt with through treaty or other means) imposed by the *Royal Proclamation, 1763*. The creation of reserves displaced Indigenous Peoples from their territories and forcibly disrupted family, community, and Nation relationships, including with territory and resources. Reserves were created as a way to remove Indigenous Peoples from their Aboriginal Title lands and reflect a long-standing source of conflict between Indigenous Peoples and Canada.

In BC, the reserves created were smaller than in the rest of Canada. Cole Harris notes that Indigenous Peoples identified the small reserves as completely insufficient:

From the late 1860s, Native leaders [in British Columbia] had protested their small reserves in every way they could, claiming, fundamentally, that their people would not have enough food and that their progeny

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<sup>2</sup> RSC 1985, App. II, No. 1.

<sup>3</sup> *St. Catharines Milling and Lumber Company v The Queen*, 1887 UKPC 70, 14 App Cas 46.

had no prospects. In retrospect, they were right. The spaces assigned to Native people did not support them, although the mixed economies they cobbled together, the revised diets they ate, and the accommodations and settlements they lived in had allowed some of them to survive.<sup>4</sup>

BC is in a unique position because there are fewer historic treaties in BC, and reserves in BC were smaller and more likely to be cut back and not protected. BC “has a disproportionately high number of total claims (40-50 percent of all claims in Canada) and rejected claims, while unresolved claims continue to have significant, tangible impacts on communities.”<sup>5</sup>

While Indigenous Peoples were being removed from their Title territories through the reserve system, laws were simultaneously enacted to prevent Indigenous Peoples from advancing their rights through legal or political action. Indigenous Peoples were prevented from hiring lawyers to pursue land claims from 1927 – 1951,<sup>6</sup> and the potlatch prohibitions made gatherings where land claims or collective actions might be discussed illegal.

## BROKEN TRUST: SPECIFIC CLAIMS

Even after reserves were created, they were subject to unilateral incursions and cutbacks. Specific claims arise where Canada (or its representatives) had the power and responsibility to reserve lands (or resources, such as water) for Indigenous Peoples, and did not. These claims include instances where:

- Lands were not set aside (or reserved) and should have been according to policy or promises, including village sites, fishing stations, graveyards, or grazing lands;
- Lands were reserved but then cut off, sold, or taken for other purposes; and

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<sup>4</sup> Harris, Cole, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia*, (Vancouver: UBC Press, 2002), at 291.

<sup>5</sup> General Assembly Resolution No. 2017-44 Re: *Creation of an Independent Process for Resolution of Specific Claims*, (September 27-29, 2017) Union of BC Indian Chiefs.

<sup>6</sup> Minister of Public Works and Government Services Canada [2009] *Indian Specific Claims Commission Final Report 1991-2009* [“ISCC Final Report 2009”] at 5, citing Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1879*, Research paper prepared for the Department of Indian and Northern Affairs (February, 1980).

- Other areas, such as the federal government’s failure to fulfill treaty obligations or protect promised access to water or fish.

The costs to Indigenous Peoples (and Canada as a whole) of not resolving specific claims in a way that builds respectful, equitable relationships stretches far beyond the risk of litigation and the economic costs of settling these claims. The social, cultural, and economic impacts on Indigenous Peoples are ongoing and considerable. Indigenous Peoples’ experience of unresolved claims over generations has been one of inequality, poverty, and disconnection.

Former Commissioner on Indian Claims Dr. Lloyd Barber noted that specific claims:

[A]re the most visible part of the much, much more complex question of the relationship between the original inhabitants of this land and the powerful cultures which moved in upon them. ... Satisfactory settlement of these obligations can help provide the means for Indians to regain their independence and play their rightful role as a participating partner in the Canadian future. The claims business is not less than the task of redefining and redetermining the place of Indian people within Canadian society. They themselves are adamant that this shall be done, not unilaterally as in the past, but with them as the major partner in the enterprise.<sup>7</sup>

Indigenous respondents in a UBCIC survey reported that the specific claims process is widely seen as ineffective and unfair:<sup>8</sup>

- “The old grievances remain – but more significantly, the impacts continue to cause damages, losses and suffering to communities.”
- “All of this means there is no hope for final and fair resolution of most specific claims. No resolution means ongoing alienation and dissatisfaction, and loss of hope that historical grievances will ever be addressed in good faith.”

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<sup>7</sup> ISCC Final Report 2009 at 7, citing Commissioner on Indian Claims, A Report: Statements and Submissions/Lloyd Barber/Canada Indian Rights Commission. Ottawa ON: Supply and Services Canada, 1977.

<sup>8</sup> These responses from UBCIC Specific Claims Survey, September 2013.

- “There is a lot of frustration over delays and the Crown changing its position regularly.”

The specific claims process has been plagued by allegations of conflicts of interest, at best, and structural racism, at worst. Canada created the system, writes the rules, appoints the decision-makers, and finances the process for Indigenous parties to bring complaints. The fairness of the specific claims process and its outcomes are in serious doubt. As the Indian Specific Claims Commissioners noted, the “First Nations’ greatest objections, however, concerned Canada’s inherent conflict of interest in the claims process, a process in which it was both a party and a judge – a serious flaw in the system.”<sup>9</sup>

The specific claims process is inadequately resourced, displaying a lack of genuine commitment on Canada’s part. The ISCC observed that the “low priority assigned to specific claims evident in the inadequate funding and staffing allocated to the process by the department, were made worse by a growing backlog and extraordinary delays in the processing of claims.”<sup>10</sup>

In 2014, James Anaya, then–United Nations Special Rapporteur on the rights of indigenous peoples, observed that Canada’s claims processes “have contributed to a deterioration rather than a renewal of the relationship between indigenous peoples and the Canadian state.”<sup>11</sup> An overarching weakness of Canada’s claims process was that “the Government appears to view the overall interests of Canadians as adverse to aboriginal interests, rather than encompassing them.”<sup>12</sup> Viewing Indigenous and Canadian interests as adverse

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9 ISCC Final Report 2009 at 9.

10 ISCC Final Report 2009 at 9.

11 Anaya, James, *Report of the Special Rapporteur on the rights of indigenous peoples*, Human Rights Council, Twenty-seventh session, agenda item 3, United Nations General Assembly, 2014 [“Anaya, 2014”]. Available at [http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada\\_AUV.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf). The Office of the Auditor General (OAG) concurred that Canada’s management of specific claims obstructs rather than facilitates access to justice for Indigenous Nations, and that the specific claims process is marked by inequalities, bias, and barriers to resolution. Office of the Auditor General of Canada, *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*, November 2016. Available at [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201611\\_06\\_e\\_41835.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html)

12 Anaya, 2014, at 16.



to each other, so that resolving specific claims is seen as a zero-sum game, rather than one where both parties benefit, blocks specific claims resolution.

The idea that the broken specific claims process actually worsens relations between Indigenous Nations and Canada is captured in a 2012 letter from Chief Larry Nooski of Nadleh Whut'en Indian Band, rejecting an offer by Canada to settle a claim (a very low, one-time, take-it-or-leave it offer) as “dishonourable” and an attempt to take advantage of the community’s poverty: “[W]e relied on Canada to administer and manage our lands to our best use and benefit. And then, when many decades later, Canada agrees that perhaps things could have been done better, the offer to settle raises instead a new grievance.”<sup>13</sup>

Unresolved specific claims remain a barrier to true reconciliation between Canada and Indigenous Peoples.

#### NOTHING ABOUT US WITHOUT US: NEED TO INCLUDE INDIGENOUS LAWS

Indigenous Peoples’ calls for justice are reflected in the demand, “Nothing about us without us.” Recognition of Indigenous laws is necessary to move from a specific claims resolution process that is imposed on Indigenous Peoples toward a process that is owned by (and considered just by) all.

A just specific claims process cannot arise from processes of exclusion. Inclusion is a cornerstone of justice, and a revised specific claims process needs to involve and reflect Indigenous Peoples and Indigenous justice paradigms in both its creation and operation.

The strongest call for revision of the specific claims system is for it to reflect Indigenous laws and legal orders, echoing the calls of the Truth and Reconciliation Commission (TRC)

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<sup>13</sup> Chief Larry Nooski, “Re: Grand Trunk Pacific Railway (GTPR) Hospital on IR No. 1 – Specific Claim. Letter to Martin Labelle, Assistant Negotiator, Aboriginal Affairs and Northern Development Canada. February 1, 2012. Nadleh Whut'en Indian Band.

and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) to end the existence of Indigenous laws and ways of assessing and repairing harm.

The Supreme Court of Canada (SCC) emphasized that a “just resolution” of specific claims is an essential part of Canada’s national reconciliation project: *Williams Lake Indian Band v. Canada* (AANDC)<sup>14</sup>. Reconciliation will not be possible in specific claims absent Indigenous laws recognition. In 2015, then–Chief Justice Beverley McLachlin spoke of the need for “concepts of Indigenous justice and the legal processes of achieving justice” to be incorporated in Canadian justice discussions as a matter of access to justice.<sup>15</sup>

The UNDRIP and the TRC *Calls to Action* echo the calls for Indigenous laws recognition.

## UNDRIP

The UNDRIP recognizes the rights of Indigenous Peoples as human rights<sup>16</sup> and outlines international standards and a commitment by nation states to recognize Indigenous Peoples’ individual and collective rights. The UNDRIP articulates the principles of Free, Prior and Informed Consent (FPIC) and the right of Self-Determination, which can guide the development of a new approach to specific claims.

The UNDRIP calls for Indigenous laws and legal orders to be reflected in decision-making, including dispute resolution mechanisms built between Indigenous Peoples and state governments. Article 27 speaks directly to land claims resolution processes:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied

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<sup>14</sup> 2018 SCC 4.

<sup>15</sup> Chief Justice Beverley McLachlin, Keynote Address (delivered at the Canadian Institute for the Administration of Justice 2015 Annual Conference, *Aboriginal Peoples and Law: ‘We Are All Here to Stay’*, Saskatoon, 16 October 2015) [unpublished]

<sup>16</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The UNDRIP is a declaration passed by a majority of the UN General Assembly in the form of a resolution in 2007.

or used. Indigenous peoples shall have the right to participate in this process.

Other UNDRIP articles suggest a new approach to specific claims:

- Article 8 (2b) affirms that: “States shall provide effective mechanisms for prevention of, and redress for, any action which has the aim or effect of dispossessing [Indigenous Peoples] of their lands, territories or resources.” Conflict resolution should reflect “the customs, traditions, rules and legal systems of the indigenous peoples concerned.”
- Article 28 (1) refers to land claims and identifies the “right to redress” by either “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.”
- Article 40 speaks more directly to mechanisms of resolution, requiring rights of “access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States,” requiring that such processes “give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”

In *Tsilqot’in Nation v British Columbia*, the SCC said that decisions which impact Indigenous Peoples’ territories must be made with the meaningful participation of Indigenous Peoples.<sup>17</sup> The goal is Indigenous consent. The *Tsilqot’in* decision is in accord with the direction of the UNDRIP.

## THE TRUTH AND RECONCILIATION COMMISSION

The TRC called for a national process of reconciliation that would reflect a commitment to “coming to terms with events of the past” – the history of destructive colonial policies,

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<sup>17</sup> 2014 SCC 44 [“*Tsilqot’in*”]

including those which prohibited Indigenous laws, established residential schools, and the reserve system – to establish “a respectful and healthy relationship among people, going forward.”

A first step of reconciliation is truth telling about the past. In the context of specific claims, this truth telling must address the active role the legal system played in dispossessing Indigenous Peoples and then silencing the ability of Indigenous Peoples to fight that dispossession:

[The] legal system has played an active role in the destruction, denial or limitation of First Nations cultural practices. The operations of the criminal justice system, whether intentional or not, have resulted in significant over-incarceration rates of First Nations peoples. This is coupled with their almost total invisibility at the most senior levels of policy-making and decision-making in the administration of justice.<sup>18</sup>

Reconciliation requires questioning what it means that Indigenous Peoples did not form the Canadian legal system, including the specific claims process flowing from that system, and that Indigenous legal values and ways of achieving justice are actively excluded from that system.

The TRC Call to Action #57 calls for all levels of government to provide training to public servants about the history and continuing legacy of IRS and UNDRIP, which would “require skills- based training in intercultural competency, conflict resolution, human rights, and anti-racism.” In specific claims, this would require governments to examine the structural and systemic racism that both lead to specific claims and is reflected in the process and a commitment to redirect existing staff on a new course.

TRC Call to Action #42 calls upon Canadian governments to recognize and implement Indigenous justice systems. The TRC calls for “recognition and integration of Indigenous

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<sup>18</sup> St. Lewis, James, “Virtual Justice: Systemic Racism and the Canadian Legal Profession” in *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 1999) at 69, as cited in Ardith Walkem, “Building Bridges: Improving Legal Services for Aboriginal Peoples”, *Legal Services Society of British Columbia*, October 7, 2007, at 1.

laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements,” which echoes the UNDRIP’s call for integration of Indigenous laws in processes of rights recognition and redress.<sup>19</sup> The TRC also calls for full adoption and implementation of the UNDRIP (Call to Action #48).

## INDIGENOUS LAWS ARE ALREADY PART OF CANADA’S CONSTITUTIONAL FABRIC

Indigenous laws are part of Canadian constitutional and common law.<sup>20</sup> Indigenous laws and legal orders are ancient. Recognition of Indigenous laws in Canada is a different matter. “The first Europeans to arrive in North America recognized Indigenous legal traditions and often followed Indigenous laws. Aboriginal laws, protocols and procedures provided the framework for the first treaties between Aboriginal peoples and the Dutch, French, and British Crowns.”<sup>21</sup>

Indigenous laws do not look the same as what many consider to be law. They are not primarily recorded in statutes or books (though some Indigenous Peoples may choose to reflect their laws in this way). Many are exercised in an active practice and taught through experience, reflecting the lands and territories which gave rise to them. Indigenous laws are widely concerned with relationships and how people interact with each other and their living worlds, and often talk about interrelationship and interdependency between humans and other living beings. “Indigenous laws manifest themselves through social experiences that involve people communicating with one another about how to best conduct relationships and resolve disputes.”<sup>22</sup>

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19 Truth and Reconciliation Commission, 2015, Calls to Action, 45(iv).

20 See for example: *R. v Van der Peet*, [1996] 2 SCR 507, *Connolly v Woolrich*, (1867), 17 RJRQ 75, *Campbell v BC AG*, 2000 BCSC 1123, *Casimel v IBCB*, (1993) 30 BCAC 279(CA).

21 Justice Within: Indigenous Legal Traditions, (2006) Law Commission of Canada, at 1.

22 Borrows, John, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10, as cited in *Padding Together* at 29.

Denying that Indigenous laws and legal orders exist, or actively trying to suppress them, has been the focus of the Canadian colonial project. The challenge for Canadian governments is how to recognize Indigenous laws after so many years of active denial. Addressing this history of denial will require conscience and active effort.

## INDIGENOUS WORLDVIEWS OF LOSS AND RESOLUTION

Indigenous laws are often concerned less with rights than with relations (not only amongst humans but also with the living world) and question “what is the *right action*?” or “what is the *right way of deliberating* or thinking about this?” in light of the need to consider, reflect, and maintain relationships. This principle is reflected in Kukpi7 Ron Ignace’s statement that our laws tell us: “How to be great and good.” Canadian/Western law may be more concerned with “rights” and questions such as: “What I am entitled to?” “Where am I protected from interference?” or “What am I obligated to do?”

Many Indigenous Peoples share the worldview (defined differently within their own territories and according to the life the territory is shared with) of seeing the land and water, animals, fish, birds, and plants which live upon it as living, imbued with spirit, and existing in a reciprocal relationship with Indigenous Peoples. A failure to create or protect reserves interfered with and displaced a broader web of relationships, and a just resolution of specific claims cannot result unless that broader range of relationships is considered.

In the context of criminal law, Rupert Ross has observed that Indigenous Peoples’ relational way of understanding justice calls for a different form of resolution for violations or instances where the law is broken. Ross gives an example of a young man who broke into an elderly couple’s house and stole a bottle of liquor worth less than \$40. The house itself was not damaged. The loss the elderly couple mourned was not the \$40, but rather their sense of safety in their own home and their relationship with others in the community, as they became distrustful of other young people.

As Indigenous notions of justice may revolve more around relationships than property, even when property (theft) was an issue, the injury to relationships left unaddressed often “remained long after the property-centered case was declared ‘closed.’”<sup>23</sup> To achieve resolution in this context, it was necessary to define “the crime in the same way that victims experience it, as causing an enduring injury to central relationships in their lives,”<sup>24</sup> such that one impact of the crime that needed to be addressed was the victims’ “capacity for maintaining or creating healthy relationships.”<sup>25</sup>

## KEY PRINCIPLES FOR A SPECIFIC CLAIMS FRAMEWORK THAT REFLECT INDIGENOUS LAWS

The specific claims process must be inclusive of Indigenous notions of justice and ways of achieving justice. A revised 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. As Professor Napoleon notes, an “Indigenous law resurgence will make a symmetrical relationship possible with Canadian law – leaving behind the colonial asymmetry which denied and disregarded Indigenous legal traditions.”<sup>26</sup>

Key principles which members of the BCSCWG directed be reflected in a specific claims model follow. These principles are built upon Indigenous inter-tribal protocols as examples of Indigenous laws resolving conflict.

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23 Rupert Ross, Discussion Paper: *Exploring Criminal Justice And The Aboriginal Healing Paradigm*, at p. 4 (accessed online, August 29, 2018, at: [http://www.lsuc.on.ca/media/third\\_colloquium\\_rupert\\_ross.pdf](http://www.lsuc.on.ca/media/third_colloquium_rupert_ross.pdf)) [“Rupert Ross”].

24 Rupert Ross, at p. 4.

25 Rupert Ross, at p. 4.

26 Napoleon, Val, “What is Indigenous Law? A Small Discussion” (University of Victoria, Indigenous Law Research Unit).

## 1. SPACE FOR A PLURALITY OF INDIGENOUS LEGAL TRADITIONS

Each Indigenous Nation has its own laws and legal systems. Given the variety of Indigenous Nations and legal traditions, a revised specific claims process must accommodate a variety of legal traditions.

Indigenous legal orders are “embedded throughout social, political, economic, and spiritual institutions,” often “inseparable from spiritual, social, political and economic domains of life.”<sup>27</sup> This means that the legal traditions and ways of achieving justice for different Indigenous Nations vary. The specificity and variety of Indigenous laws and ways of achieving justice must be honoured, or the risk is duplicating errors of the current system.

This Secwepemc story, told by Kukpi7 Ron Ignace, illustrates legal pluralism and respect for each other’s laws:

A long time ago, maybe 5,000 years ago, the Wutémkemoc, a group of Coast Salish people sometimes called “transformers” ventured up the Fraser River. They met Sk’elép, who was sitting on a rock watching them as they approached. They tried to t’ult (transform) him with their powers, but were able only to change his tracks into stone. Therefore, the marks of Sk’elép’s feet may be seen on this rock at the present day.

Sk’elép sat with his chin resting on his hand and stared at them while they were trying to transform him. When they failed, he cried out to them, “You are making the world right – so am I. Why try to punish me when I have done you no harm? This is my country. Why do you come here and interfere with my work? If I wished, I could turn you into stone, but as you have likely been sent into the world, like myself, to do good, I will allow you to pass, but you must leave this country as quickly as you can. We should be friends, but must not interfere with each others’ work.”<sup>28</sup>

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<sup>27</sup> Napoleon, Val, “Thinking About Indigenous Legal Orders” (2007), online: [http://fngovernance.org/ncfng\\_research/val\\_napoleon.pdf](http://fngovernance.org/ncfng_research/val_napoleon.pdf), as cited in Paddling Together at 29.

<sup>28</sup> From a stspetékwle as recorded by ethnologist James A. Teit, 1895 and 1915, reproduced in “Yiri7 re Stsq’ey’s-kucw Our Laws and Customs”.



This story outlines principles of non-interference across legal traditions and directions for how to respect the jurisdiction of other Peoples.

A revised specific claims process must be flexible to reflect what is important to each nation or community. Space must be made to incorporate various Indigenous legal traditions within specific claims policies and processes, and a robust legal pluralism will be required.

**2. RESOLUTION IS ONGOING**

A revised specific claims process should craft solutions that reflect the ongoing nature of the relationship between Indigenous Peoples and Canada that was harmed by the breach of trust. This means that the range of resolution open for consideration must extend beyond a “one-time payment and legal release” model.

In Indigenous law, an agreement or settlement may be just the starting point – implementation happens through the establishment and tending of an ongoing relationship – that addresses the past harm and moves forward on a different basis. The Numbered Treaties’ reference to the notion that the agreement entered will last “as long as the sun shines, the grass grows and the river flows” shows the intent that the agreements be living.

Different ideas of resolution or settlement are reflected in Canadian versus Indigenous legal worldviews:

Canada	Indigenous Peoples
<ul style="list-style-type: none"><li>• Once an agreement is reached, the process is over – certainty has been achieved.</li></ul>	<ul style="list-style-type: none"><li>• Reaching an agreement is just the beginning.</li><li>• The actual content of a settlement is found in how the parties keep their word and implement the</li></ul>

<ul style="list-style-type: none"> <li>• Canada’s goal in the specific claims process is to settle, resolve, and then move on.</li> </ul>	<p>agreement as part of their ongoing relationship.</p>
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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. This arrangement would be more likely to achieve reconciliation.

### 3. EXPANDED NOTIONS OF RESOLUTION (COMPENSATION-RESTITUTION)

Canada narrowly defines the “lawful obligations” it will address and excludes “acceptance of claims on moral or equitable grounds”<sup>29</sup> as well as areas of non-financial damage Indigenous Peoples identify. Many claims or impacts important to Indigenous Peoples are excluded, and a new revised specific claims process must listen and respond to the truth of the Indigenous experience.

Wrongs create enduring relationships between those who have been harmed and those who caused the harm. For Indigenous communities, the breach giving rise to a specific claim may have impacts beyond the subject matter of the specific claim. Indigenous communities or individuals may be impacted in areas such as:

- Feelings of safety or dignity;
- Ability to be self-sufficient (traditional economy or food sovereignty);
- Ability to meet their own legal obligations to their members or other forms of life;
- Loss of culture or languages tied to specific areas or resources; and

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<sup>29</sup> ISCC Final Report 2009 at 8.

- Damaged relations with both the federal government and newcomers who may continue to benefit from the breach.

Western society quantifies land in monetary terms, and Canada frames specific claims compensation and settlement in terms of money. An accounting of Indigenous loss must be assessed in light of the disruption of Indigenous Peoples' relationship with their territory, resources, and culture.

Losses from an Indigenous perspective go beyond merely financial to include a disruption of relationships and ability to uphold obligations and include socio-cultural and environmental impacts. Actions (or inactions) giving rise to specific claims interfered with the cultural flow of Indigenous Peoples on the land. As Indigenous cultures are tied to lands and resources, failure to reserve or protect land impacted language, spirituality, and the ability to teach new generations about cultural beliefs and laws. Indigenous Peoples' relationship with their territories and other beings that share that territory – animals, plants, trees, streams, whole watersheds and ecosystems – were disturbed when lands were not reserved, or cut off. Traditional economies were interrupted.

Looked at from a relational perspective, the currency which can compensate a specific claim is not money alone. It is necessary to broaden notions about quantification of loss, compensation and restitution to ensure outcomes are meaningful to Indigenous Peoples.

Reconciliation requires seeing the path to repair from an Indigenous perspective. Assessing damages from the lens of the interrelationship between people and the land will lead to settlements that include compensation for a fuller set of damages (not just monetary losses, but losses to culture). Indigenous Peoples' connections to specific areas may have meanings not understood across cultures. Cutting off access to a place Indigenous Peoples are connected to over generations, or the creation of reserves in places that Indigenous Peoples did not historically live, are all actions with potentially deep and abiding impacts beyond financial.

- Indigenous laws are reflected through language, culture, and traditions tied to particular lands at different times of the year. Some laws can only be exercised at certain times of the year because – for example – that is when the berries grow or the salmon return or the people gather. Some laws may be held by the hunters or fishers closest to a resource, and who are best suited to manage that resource. Language, culture, and legal loss may be among the impacts of a failure to set aside, or honour a reserve creation.
- The loss of a fishing station may have weakened a community’s traditional economy and disrupted the ability to pass teachings, laws, and language related to the fishery across generations. Money alone would not restore that damage; an assessment of how it might be possible to restore what was lost is needed, including asking how to support the recovery of skills, language, and teachings tied to that particular fishing spot.
- The failure to reserve longstanding village or permaculture sites may have resulted in loss of life (due to starvation or despair) and the break-up of social and cultural units if people could not be self-sustaining on a new, and less known or productive, land base. Resolution might have to both account for the loss of life and despair of the community – but should also turn to the continuing impacts in the community, including diaspora of members and subsequent generations who could not remain.

Principles of restitution must consider how Indigenous Peoples may be restored as far as possible by having the damage repaired not just compensated.

#### 4. A MULTI-PERSPECTIVE PROCESS IS UTILIZED REFLECTING INDIGENOUS WORLDVIEWS

In the context of a dispute or negotiation to settle a specific claim, Indigenous Peoples may identify the “parties” to a case or claim differently than the Western legal system. For example, if the habitat of an animal was harmed by a failure to set aside lands, Indigenous Peoples may see it necessary to discuss that and to seek reparations for that loss. Within

this worldview, many Indigenous Peoples consider that human needs should be determined after other elements of the living world. Humans have obligations to that world which were disrupted by a failure to create or protect a reserve.

Indigenous accords provide examples of how Indigenous Nations resolved disputes between each other in the past and reflect Indigenous legal systems at work. Indigenous inter-nation law illustrates ways to resolve disputes across interests and different legal systems. Indigenous laws about shared or migratory resources illustrate Indigenous protocols to resolve conflict of laws.

A powerful lesson from many Indigenous legal approaches is an inclusive understanding of the perspectives that must be considered in decision-making.

**SYILX ENOWKIN’WIXW**

The Syilx Enowkin’wixw is “a consensus-based practice that teaches us how to come together to find common ground. It provides an approach to discussions that reduces conflict and ensures all views are heard.”<sup>30</sup>

The Four Food Chiefs story<sup>31</sup> of the Syilx outlines these varied perspectives:

<p>Skemxist (Bear)</p> <ul style="list-style-type: none"> <li>• Tradition-oriented</li> <li>• Knowledge keeper/teacher</li> <li>• Contemplation/thinking</li> <li>• Ties everything into culture</li> </ul>	<p>Ntyxtix (Salmon)</p> <ul style="list-style-type: none"> <li>• Action-oriented</li> <li>• Just do it</li> <li>• Finds what through barriers</li> <li>• Efficient</li> </ul>
<p>Spitlem (Bitter root)</p> <ul style="list-style-type: none"> <li>• Relationship-oriented</li> <li>• Aware of all the connections</li> <li>• Inclusive</li> </ul>	<p>Siya? (Saskatoon)</p> <ul style="list-style-type: none"> <li>• Innovation/creative-oriented</li> <li>• Thinks we CAN do it</li> <li>• Nothing is impossible</li> </ul>

<sup>30</sup> “Go Back to the Root” as cited in Nxwalxwaltetat “That Which Gives Us Life” (2013) Okanagan Nation Alliance at 4.  
<sup>31</sup> Nxwalxwaltetat “That Which Gives Us Life” (2013) Okanagan Nation Alliance at 1-2.

<ul style="list-style-type: none"> <li>• Takes others into consideration</li> </ul>	<ul style="list-style-type: none"> <li>• Thinks outside the box</li> </ul>
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Enowkin’wixw refers to the way decisions are made, and the consideration that must be given to the impacts of decisions on other living beings. This approach includes a process where “[p]articipants were asked to identify which of the Four Food Chiefs best represented their own tendencies. Discussion groups were then formed based on the different perspectives. The process of sitting in discussion with like-minded thinkers helps reduce tension and encourages everyone to share their thoughts. This is how everyone’s voice gets heard and all perspectives are given equal respect and inclusion.”<sup>32</sup>

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#### ETUAPT MUNK – TWO-EYED SEEING

The model of ‘Two-Eyed Seeing’ has been championed in the Maritimes to reach a decision-making model which incorporates both Indigenous and Western ways of knowing and deliberating.

Two-Eyed Seeing” as a guiding principle encouraging that we learn to see and use the best in both the Aboriginal and the non-native worlds and knowledge systems. The principle is exceedingly relevant in numerous arenas, e.g. education, environment, and economic development – wherever there is a desire to “take down the boundaries” between the mainstream and the Aboriginal community while working respectfully with our differences and commonalities for the benefit of all people and our Earth Mother.<sup>33</sup>

The Bras d’Or Lakes Collaborative Environmental Planning Initiative (CEPI), involving multiple levels of Mi’kmaq and Canadian governments in shared decision-making, follows the “Two-Eyed Seeing” process which incorporates “a weaving back and forth between

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<sup>32</sup> “Go Back to the Root” as cited in Nxwalxwaltantat “That Which Gives Us Life” (2013) Okanagan Nation Alliance at 4.

<sup>33</sup> Bartlett, C, and Marshall, A, *Two-Eyed Seeing: "taking down the boundaries" between Mi’kmaq Traditional Knowledge and the mainstream*. AAEDIRP (Atlantic Aboriginal Economic Development Integrated Research Program), 2010. *Let’s Work Together: A Conference on Creating Meaningful and Sustainable Employment for Atlantic Aboriginal People*. Dartmouth, NS, 16-18 February 2010. WikiProceedings at: <http://aaedirpletsworktogetherconference.wikispaces.com>.

the perspectives represented (Indigenous and Western) and not domination or assimilation.”<sup>34</sup>

## WAIKATO RIVER SETTLEMENT

Indigenous laws’ concern with the relationship between humans and their living world (including spiritual or supernatural beings) may require that those features of the living world also be considered. The *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act*<sup>35</sup> in New Zealand, for example, recognizes the different relationship of the Māori with their territory and reflects an understanding of the value and meaning of seeing that territory as a separate living being. With respect to the relationship of the Waikato-Tainui to the Waikato River, the agreement notes:

Respect for te mana o te awa (the spiritual authority, protective power, and prestige of the Waikato River) is at the heart of the relationship between the tribe and their ancestral River. Waikato-Tainui regard their River with reverence and love. It gave them their name and is the source of their tribal identity. Over generations, Waikato-Tainui have developed tikanga (values, ethics, governing conduct) which embody their profound respect for the Waikato River and all life within it. The Waikato River sustains the people physically and spiritually. It brings them peace in times of stress, relief from illness and pain, and cleanses and purifies their bodies and souls from the many problems that surround them. Spiritually, to Waikato-Tainui, the Waikato River is constant, enduring and perpetual.<sup>36</sup>

## 5. SHARED (NOT IMPOSED) DELIBERATIONS AND DECISION-MAKING ARE USED

Negotiation, from many Indigenous legal perspectives, does not mean each party merely puts their mind to a proposed final agreement or settlement; rather, it is a process by which the parties work together to craft a lasting relationship and path forward. Negotiation processes for a revised specific claims process must be developed to ensure

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<sup>34</sup> Paddling Together at 60.

<sup>35</sup> 2010, No. 24, online: <http://www.legislation.govt.nz/act/public/2010/0024/latest/DLM1630002.htm>.

<sup>36</sup> As cited in Paddling Together at 52.

the parties are able to participate meaningfully. Barriers to participation – whether financial or related to cultural understanding or other issues – must be identified and removed.

There are varied examples of Indigenous legal and governance mechanisms which could inform a restructured specific claims process which distributes (rather than imposes) decision-making.

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### FIRST NATIONS COURT

First Nations courts provide an example where Indigenous approaches are incorporated into an essentially non-Indigenous court process. These courts are an example of hybrid areas of jurisdiction where “[e]fforts have been made to identify opportunities to reflect the values and ways of doing things of the Indigenous communities who participate. Indigenous Elders and community members (and where possible lawyers and judges) are part of these courts. This flexibility offers the opportunity to develop innovative solutions that incorporate Indigenous values or ways of making decisions.”<sup>37</sup>

A new specific claims process could build in procedural requirements and mechanisms to view resolution and consideration of the specific claim from different points of view, which would include other life (the animals, fish, plants, and so forth).

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### NEW ZEALAND WAITANGI TRIBUNAL

The integration of Māori laws and protocols into proceedings at the Waitangi Tribunal in New Zealand provide an example of how Indigenous laws and legal proceedings can be integrated into processes for redress of historical grievances here in this country. The Waitangi Tribunal was established in 1975 as a standing commission of inquiry. Its role is to “make recommendations on claims brought by Māori relating to legislation, policies,

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<sup>37</sup> Walkem, Ardith, “Our Law is a Living Tree: With Roots in Indigenous Landscapes, Cultures and Traditions”, Presentation to the Seminario Internacional Independencia Judicial (Guatemala City) at 7.



actions or omissions of the Crown that are alleged to breach the promises made in the Treaty of Waitangi.”<sup>38</sup> The tribunal’s primary responsibility is to “investigate whether Crown-Māori relations are proceeding in accordance with the intentions of the [1840 Treaty of Waitangi].”<sup>39</sup>

Māori and non-Māori leaders and Elders sit together with tribunal members to investigate historical grievances and listen to claimant communities and the Crown.<sup>40</sup> Half the tribunal members are Māori, and at any given hearing, at least one presiding member must be Māori.<sup>41</sup>

A revised specific claims process must involve Indigenous Peoples as decision-makers and reflect Indigenous protocols.

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## DECLARATIONS TO SIR WILFRED LAURIER

The Indigenous declarations to colonial governments illustrate Indigenous proposals for how to resolve ongoing disputes between Indigenous Peoples and newcomers. The Laurier Memorial outlines features of a mutually respectful relationship that the Indigenous Peoples envision: a relationship of host non-interfering to guests.

When they first came among us there were only Indians here. They found the people of each tribe supreme in their own territory, and having tribal boundaries known and recognized by all. Their country of each tribe was just the same as a very large farm or ranch (belonging to all the people of the tribe) from which they gathered their food and clothing, etc. ... Thus, fire, water, food, clothing, and all the necessaries of life were obtained in abundance from the lands of each tribe, and all the people

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38 Waitangi Tribunal, 2018. “About the Waitangi Tribunal.” Available at: <https://www.waitangitribunal.govt.nz/about-waitangi-tribunal/>

39 Ray, Arthur, 2017. The Waitangi Tribunal and New Zealand History. Chapter 5 in *Aboriginal Rights Claims and the Making and Remaking of History*. Montreal, QC: McGill-Queen’s University Press, page 144 [“The Waitangi Tribunal”]. Ray writes: “To reconcile the issues about ongoing state and chiefly sovereignty... the tribunal developed the basic principle that British Colonial officials and the Māori chiefs who signed the treaty intended to establish a permanent partnership for the development of New Zealand” (page 161).

40 Waitangi Tribunal, The New Approach Revisited: A Discussion Paper on the Waitangi Tribunal’s Current and Developing Practices. Available at: <https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-The-new-approach-revisited.pdf>.

41 The Waitangi Tribunal, at 146 and 148.

had equal rights of access to everything they required. You will see the ranch of each tribe was the same as its life, and without it the people could not have lived.<sup>42</sup>

Indigenous Peoples outlined a situation of mutual respect and non-interference. They advocated for mutual respect for their decision-making jurisdictions. A model of mutual respect should be incorporated into a revised specific claims process.

## 6. EXPANDED EVIDENCE IS WELCOMED TO SUPPORT SPECIFIC CLAIMS

The Indian Claims Commissioners noted, “The burden upon First Nations to prove their allegations is heavy, especially in light of the evidentiary difficulties associated with proving facts that may have occurred a century ago.”<sup>43</sup> The Crown decides the standard of proof that will be required to establish a claim, weighting 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.

A transformed specific claims framework must view Indigenous knowledge as “complementary – not competing.”<sup>44</sup> Doubt about the validity of information provided by Indigenous Peoples is a significant barrier to the resolution of specific claims. Written history or records are assessed above information passed through “oral” cultures. There is a tendency to “dismiss Aboriginal knowledge as subjective, anecdotal, and unscientific.”<sup>45</sup>

While oral history can be introduced in the specific claims process, it is still not assessed on the same level as written or historical sources. The unequal status of oral evidence

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42 Laurier Memorial at 1.

43 ISCC Final Report 2009 at 9.

44 Freeman, Milton. 1979 Traditional Land Users as a Legitimate Source of Environmental Expertise. In Nelson, G. (ed) *The Canadian National Parks: Today and Tomorrow-Conference 11, Ten Years Later*. Waterloo, Canada: Waterloo University Studies in Land Use, History and Landscape Change. As cited in Sallenave at 4.

45 Sallenave, J. “Giving Traditional Ecological Knowledge Its Rightful Place in Environmental Impact Assessment” [“Sallenave”] at 6.

reflects an area of structural racism within the specific claims process. There is a need for the specific claims process to “receive oral history evidence” and other evidence from community members.<sup>46</sup> The ISCC emphasized that “a First Nation’s oral tradition and oral history provide important sources of information to supplement the written record of a claim.”<sup>47</sup> The process must honour “traditional” knowledge and ways of knowing and ways of deliberating. The ISCC noted that, “there may be opportunities to work cooperatively with Canada and First Nations to further refine that process and thereby lend even greater weight to the testimony of elders and other key members of aboriginal communities.”<sup>48</sup>

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## SPOTTED LAKE

The Syilx (Okanagan) efforts to save Spotted Lake illustrate the importance of oral evidence. Spotted Lake, a medicine lake and of tremendous spiritual significance, was held under provincial law by private owners who periodically threatened to mine it for minerals. The Syilx maintained their responsibility to guard Spotted Lake and consistently opposed development and requested that the area be made into a reserve.<sup>49</sup>

An Elder remembered a story he was told and gave evidence about Syilx communities over 100 years ago – having heard of the reserve creation policy to set aside “fenced” lands – had gathered together from multiple communities and created a very large fence around the area. Each community contributed people or fencing materials, collectively pooling resources. Even though Spotted Lake was fenced, the area was not reserved. The fence subsequently disappeared (in some places it was removed by newcomers; in others, it fell into disrepair). Decades later, Syilx oral evidence about the fence built by the communities led to the area being protected and ultimately moved into reserve status.

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46 ISCC Final Report 2009 at 23.

47 ISCC Final Report 2009 at 22.

48 ISCC Final Report 2009 at 55.

49 Okanagan Tribal Chiefs, 1979 Statement on Spotted Lake, See: <https://www.syilx.org/about-us/syilx-nation/spotted-lake-2/>

As observed by legal counsel Louise Mandell, QC:

Oral history gave us an opening to argue that the land should have been set aside as a reserve in the first place – That the governments had notice that Spotted Lake was not available for pre-emption – The fence was also evidence of ownership under Okanagan law, meeting the test to prove title and also evidence of the sacredness of the lake, and the stewardship laws protecting Spotted Lake against trespass. The Okanagan made clear by the fence that people other than the Okanagan were trespassers at Spotted Lake under Okanagan law. Although we resolved the case without having to prove title in Court, the fence evidenced laws about trespass.

## CONCLUSION

Systemic bias against Indigenous specific claims continues Canada's history of denying Indigenous Peoples' Title to lands. Resolution of specific claims usually places little to no emphasis on repairing the Crown-Indigenous relationship damaged by the actions giving rise to the breach. Specific claims reflect broken promises, yet the specific claims process is adversarial, driven to achieve certainty and final settlement, rather than healing ongoing relationships. An emphasis on mitigating risk and final settlement precludes settlement options that might actually heal the relationship between Canada and Indigenous Peoples. An approach based in Indigenous laws could shift the adversarial focus of specific claims to one more likely to result in true reconciliation.

There is a need to transform the specific claims model through processes or protocols developed with Indigenous Nations as equal partners that respond to Indigenous Peoples' direction for how Indigenous laws can be integrated into the specific claims process – and how this inclusion can be pluralistic, creating space for a diversity of Indigenous traditions.

A revised specific claims process will require expanded ideas about quantification of loss, compensation and restitution, and an openness to new remedies beyond money. Indigenous Peoples must be actively involved in the design and implementation of a

revised independent specific claims process that incorporates Indigenous laws and ways of bringing resolution to disputes.

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