

# OUR LAND IS OUR FUTURE

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## Transformative Change in Resolving Specific Claims

April 12, 2023, via Zoom

8:30 am – 3:30 pm

### *Meeting Summary*

#### **Welcome and Introduction**

This meeting was opened with a prayer from Elder Amelia Washington. BCSCWG Chair Chief Dalton Silver asked BCSCWG members to introduce themselves and offered opening remarks.

#### **Opening Remarks (Chief Dalton Silver, BCSCWG Chair)**

BCSCWG Chair Chief Dalton Silver made introductory remarks providing an overview of the BC Specific Claims Working Group (BCSCWG) and the ongoing and increasing barriers First Nations face to fairly settle specific claims with the federal government. There have been some unilateral changes the federal government has been implementing while claiming to work together. There is a need for transparency from the federal government. Chief Silver emphasized the issue with putting the onus on BC First Nations to prove their claims, though title has never been ceded as recognized by landmark Supreme Court decisions. Chief Silver called for the federal government to make the UNDRIP adoption meaningful and transparent.

**Click for more information on: [The BC Specific Claims Working Group](#)**

BCSCWG Chair Chief Dalton Silver highlighted that the BCSCWG's work has been spearheading progressive work in Canada. He recognized the work of the BCSCWG members. In particular, he recognized and thanked former Kukpi7 Judy Wilson for her service and time with the BCSCWG and her contributions to recognition of title in BC.

## Housekeeping

### Review of Agenda

BCSCWG Technical Lead Jody Woods provided an overview of the day's agenda. Agenda items include:

1. Status of the Co-Development of an Independent Process
2. Understanding Historical Losses and the Costs of Not Settling Specific Claims
3. Legal Updates
4. Resolving Specific Claims: Land Back as a form of resolution in the Specific Claims Process
5. Informal Access to Information

**Click to view full meeting agenda: [April 12, 2023 Transformative Change in Resolving Specific Claims Meeting Agenda](#)**

### Status of the Co-Development of an Independent Process

#### Presenter(s):

**Aaron Asselstine, Director, Lands, Assembly of First Nations**

**Jesse Donovan, Senior Policy Analyst, Lands, Assembly of First Nations**

AFN Director of Lands Aaron Asselstine acknowledged Regional Chief Prosper, who was not able to attend. He highlighted two substantive issues for claim reform: (1) financial framework ("the cap"), and (2) recognition of Indigenous laws and legal traditions within all aspects of the specific claims process. The federal government has been open to including Indigenous perspectives throughout the process, however no tangible steps have been taken to incorporate those. He also highlighted the need for First Nations to drive those discussions. He then discussed the limitation that the \$150M places on First Nations as they have no access to the Tribunal if their claim exceeds that value. He specified that only giving First Nations one Crown-led process to address specific claims contravenes the UNDRIP. The proposed timeline for the co-development process started in Fall of 2022 with the establishment of the Specific Claims Implementation Working Group and ends in the Spring of 2025. Next steps include co-development and joint legislative drafting process, and implementation.

**Click to view: Presentation: [AFN-Canada Specific Claims Co-Development](#)**

### Discussion

1. Has Canada considered the transfer of property that may become available for purchase as part of the negotiation of a specific claim to eliminate the tax burden on the First Nation. In other words, have the federal government purchase the property and transfer it to the First Nation with an additional cash amount as a settlement for the outstanding claim?
  - a. AFN Land Director, Aaron Asselstine, responded that including land as part of the settlement is in the work plan to be raised as an important aspect of the co-development of an independent process. He said right now, Addition to Reserve

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(ATR) is the main process which involves land as part of compensation. However, it is a long process, burdened with lots of bureaucracy. He also acknowledged that it is clear that First Nations prefer land as a settlement, as cash is just a proxy. While the Tribunal can only award cash, there is no policy reason to not include land as part of the negotiation process. He mentioned First Nations are willing to work on creative settlement solutions.

2. A concern was raised that the current legislation is founded in racism. A new piece of legislation should be drafted to effectively address the ongoing challenges of settling specific claims. The Tribunal needs qualified First Nation members who understand the history and issues, and the legislation should provide for such appointments to be easier to make. Also, the need to conduct a legal analysis of how UNDRIP affects claim negotiation, and the legislation was raised.
  - a. The AFN has identified the issue of lack of Indigenous judges on the Tribunal as well as the need to include Indigenous laws and legal order to be included in the overall process. AFN has planned to raise this issue with the federal government. AFN's reform proposal is to open up Tribunal judicial appointments to provincial and federal judges.
3. A comment was made regarding the conflict of interest that exists in the valuation of the land. Specifically, the valuation is done in-house by the federal government. For example, land that had timber is more valuable, and it has been a point of disagreement between First Nations and the federal government. The valuation should be conducted independently and incorporating Indigenous values and laws.
  - a. Jesse Donovan agreed that this conflict is a significant issue to be addressed. BCSCWG Technical Lead Jody Woods shared the experience of a First Nation in the prairies that had an issue with the valuation of land and traditional medicines, and the negotiation process looked to a valuation protocol that was done in China to value land with traditional Chinese medicine.
4. How are claimants supposed to know the value of their claim for assessing whether they want to engage with the tribunal, if they're unable to afford the experts required to assess that value until they enter the specific claims process?
  - a. Jesse Donovan responded that the scope of the questions is beyond his expertise but acknowledge that the funding for claims should be available from the outset and funding must be managed independently from Canada.
5. A comment was made regarding the issues around having mediators not release pertinent information to First Nations before the process starts, it results in violating First Nations right to access the information.
6. A question was asked about the status of the ATR policy process.
  - a. Aaron Asselstine responded that the process has been challenging as there are different perspectives from First Nations, from wanting to reform the policy to

totally repealing it.

7. Who are the Indigenous members of Council of Experts in Indigenous Laws mentioned by AFN?
  - a. Jesse Donovan from AFN answered that the inaugural meeting was set for the week of April 17, 2023, and the names of the members have not been released publicly yet. Thus, he would seek their consent before releasing the names, out of respect for the members.
8. Will the Tribunal Act be amended so that claims over \$150 million would have access to the tribunal?
  - a. The cap is going to be addressed in the co-development process.
9. A question was raised about the AFN Co-development Mandate.
  - a. The mandate is public and was read in the meeting.
  - b. More information on the AFN Specific Claims Policy Reform can be found: [Specific Claims Policy Reform | Assembly of First Nations \(afn.ca\)](#)

## Understanding Historical Losses and the Costs of Not Settling Specific Claims

### **Presenter:**

**Rachel Singleton-Polster, Independent Contractor**

Rachel Singleton-Polster's presentation focused on the cost of not settling specific claims. This research project is a response to the issue of the specific claims process not recognizing other non-monetary significant losses that First Nations experience as a result of delaying or denying adequate settlement. A key question asked to research participants was "What can money not buy back?" Rachel Singleton-Polster read quotes from participants and identified emergent themes. The themes include: (1) Injustice of stolen land; (2) Human and time cost of research; (3) Intergenerational loss of trust in leadership; (4) Losses to personal integrity, own sense of self; (5) Loss of Indigenous laws associated with the lands; (6) Industry taking over lands while a claim is still in dispute including sacred sites; (7) Loss of Indigenous place names; (8) Loss of languages and oral history; (9) Access to food sites; (10) Climate change and biodiversity; (11) Land use tainting; (12) Disproportionate effect on women and children; (13) Intergenerational loss of knowledge and confidence; and (14) Fair and just redress.

**Click to view: [Presentation: The Cost of Not Settling Specific Claims](#)**

### *Discussion*

1. A participant added the issue of preemption of lands by the federal agents to their friends and relatives. These agents were supposed to protect Indigenous territories and represent First Nations. What value can be put to betrayal and violation of fiduciary duty?
2. It was noted by multiple participants that as First Nations lose Elders, they lose much of the historical knowledge and information regarding the land. It is vital to record the

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stories and knowledge of the Elders.

## Legal Updates

### Presenter:

**Nicole Talpalaru, Associate, Mandell Pinder**

Nicole Talpalaru noted that the *Restoule* decision is an important decision going to the Supreme Court of Canada with important implications on specific claims. UBCIC is leading a coalition of First Nations to apply for leave to intervene. She also provided an update on the four decisions released by the Tribunal in the last year- two out of BC and two out of SK:

- The first decision, *Kwakiutl*, Vancouver Island, involved Treaty interpretation. The Tribunal found the claimant failed to establish that it was the common intention of the parties to the Treaties to exclude Suquash village from the transfer. Tribunal focused on the intention of the parties at the time. It is important to really document full extent of site usage to increase the likelihood of the Tribunal finding in First Nation's favour.
- The second decision, *Kahkewistahaw*, found no breach in pre-surrender fiduciary, statutory or Treaty duties, only post-treaty breach. Tribunal does not have jurisdiction to decide on duty consult. The Tribunal found that Canada breached its fiduciary duty prior and after the surrender on the issue of trespass. The Nation is seeking judicial review at the Federal Court of Appeal.
- The third decision, *Metlakatla*, the Tribunal found that Canada's fiduciary duty does not arise from the *Indian Act*, instead, it arose from the *Royal Proclamation of 1973*. This decision also highlighted the importance of establishing strong use of the land as it relates to the value of the land.
- The last decision was *Saulteaux*, the Tribunal found no breach of fiduciary duty. The Nation is seeking judicial review at the Federal Court of Appeal. This decision provides guidance on the use of direct comparison approach vs. subdivision development approach to historical land valuations.

**Click to view: [Presentation: Legal Update](#)**

## Discussion

1. A question was raised about court cases that speak to the role of three governments involved- First Nations, Federal and Provincial, specifically in BC.
  - a. Nicole responded that cases involving specific claims in which the province's actions are involved, the federal government is responsible for the province's actions. For the most part, in Tribunal cases the focus is on Canada's obligations. She further stated that cash compensation is not adequate redress. It is vital that the process being co-developed focuses on land back.
2. A participant asked whether land back was still available through the comprehensive claims process, even after settlement of a specific claim.
  - a. Nicole responded that since the specific claims settlement agreements are made without prejudice to Aboriginal title, then if the agreement did not include land

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back, a comprehensive land claim is still available.

## Resolving Specific Claims: Land Back as a form of resolution in the Specific Claims Process

### Presenter:

**Shiri Pasternak, Associate Professor, Toronto Metropolitan University**

Shiri Pasternak presented on the barriers to land back as a redress to specific claims, and how to address them. The barriers are: (1) Prioritizing non-Indigenous property rights over Indigenous constitutional rights; (2) Limiting the land that can be bought back; (3) Rising cost of land during negotiations; and (4) Provinces continue to issue leases and mining licenses during negotiation, as well as the tension with municipalities as third parties. Similarly, specific claims “off ramp” policies such as ATR and TLEs are also inadequate. A more robust land restitution specific claims policy is needed. She presented three main reforms that may address the barriers to land back in specific claims. These three proposed reforms were created on a spectrum- from least to the most radical change to the current process. In terms of the land transfer from third parties, she suggested a recognition that in Canada there is no absolute ownership of land, and even Crown lands have restrictions. Thus, Indigenous constitutional rights can be recognized in this context as no less important than third party rights. She also suggested establishing a specific claims trust fund that can speed up the process by making the funds immediately available to buy land and updating the compensation framework for specific claims. Another proposed approach is non-assertion and co-management that can offer communities to undertake baseline studies to assess the historic impacts and develop management plans, accordingly- including resource revenue sharing model. The last reform proposed was expanding compensation from the time of infringement. Lastly, she presented the compatibility of this proposal with the proposal for the Independent Centre for Specific Claims.

**Click to view: [Presentation: Land Back: Restitution of Lands in the Specific Claims Policy](#)**

### *Discussion*

1. Has there been any discussion on the issue of the federal or provincial government obtaining intervener status when it comes to private property sales? Would any of those governments be willing to intervene to purchase those lands in support of a specific claim?
  - a. Dr. Pasternak agreed with the participant regarding the offloading of purchase and tax burden to the First Nation. She shared the model used with a specific claim by the Mohawks of the Bay of Quinte in which the bank acted as the intervener and money was allocated in the settlement agreement to account for this role. She suggested that it may be worth considering financial institutions to act as interveners.
  - b. The participant stated that in BC the government’s role is important as BC is an unceded territory. Dr. Pasternak agreed and clarified that the financial institution model may work for some Nations even in BC, but not all.

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2. Alternatively, if neither level of government is willing to act an intervener, then when the First Nation buys the property would there be an opportunity to receive those tax dollars back once the land is transferred back to reserve as an ATR?
  - a. Dr. Pasternak recognized that taxation should be considered as a resource revenue sharing for unreturned lands, as well as lands returned that don't become status lands should not be subject to taxation. Taxation in general is a topic that she committed to look into more carefully.
3. Has rescinding the Doctrine of Discovery created any influence on specific claims or the overall reconciliation effort?
  - a. Rescinding the Doctrine of Discovery should impact specific claims, like s. 35, UNDRIP and other developments in case law. There is a strong argument for bringing in all possibilities for land restitution within the policy including the rebuke of the doctrine of discovery.
4. The issue of consent is often handled using the *Haida* standard, not the Nation at hand standards or needs.
  - a. Considering some of these land return policies we can work on a description of strength of claim that be part of the process in order to strengthen the threshold of consultation for communities around resource development and extraction.
5. The federal “blanket” model of buying lands through the province does not work in BC
  - a. The buyback policy is completely misaligned with the concept and reality of Aboriginal title unceded lands and should be a factor considered in writing the policy.
6. How can First Nations get proper redress for the benefits the federal government has obtained from one-sided leases of Indigenous lands prepared by Indian agents, in a time when First Nations were not allowed to retain counsel?
  - a. A specific formula is needed to address those benefits.

## Informal Access to Information

**Moderated by BCSCWG Technical Lead Jody Woods**

**Presenter(s):**

**Minister Marc Miller, Minister of Crown-Indigenous Relations Canada**

**Darlene Bess, Chief of Finances, Results and Delivery Officer, CIRNA**

**Sam Macharia, Corporate Secretary, CIRNA**

**Tammy Martin, Director of Access to Information and Privacy, CIRNA**

**Remy Payette, Director of Information Management ISC, CIRNA**

**Stefan Matiation, Director General of Specific Claims**

## Background

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BCSCWG Technical Lead Jody Woods gave a background on the BCSCWG engagement Crown-Indigenous Relations Canada on this issue and the risks that disclosure of information requirements poses for fairly resolving specific claims and the research funding available for First Nations. UBCIC has sent letters to Ministers Miller and Lametti (Minister of Justice) raising these concerns. Minister Miller responded affirming the importance of creating a working group to address these issues.

**Click to view: [November 4, 2022 NCRD Full Disclosure: Canada's Conflict of Interest in Controlling First Nation's Access to Information](#)**

**Click to View: [February 15, 2023 National Claims Research Directors Open Letter to Minister Marc Miller and Minister David Lametti re: Calling on Canada to Withdraw New, Egregious Information Access to Information Requirements that Compromise First Nations' Access to Justice](#)**

**Click to view: [March 31, 2023 Response to NCRD letter from Minister Miller's office](#)**

#### *Discussion*

1. A question whether the Truth and Reconciliation Commission Report has been used in the work done to approach the *Privacy Act*.
  - a. It has not been used but it could be an approach to be considered. She also highlighted that UBCIC and First Nations only were given 6 weeks to engage with the *Privacy Act* process with no resources to do so.
  - b. Assistant Deputy Minister and Chief Finances, Results and Delivery Officer, Darlene Bess responded that she will look into the timeframes of the consultation as it sounds like the time given was not enough.
2. A participant asked whether UBCIC sent with the letters written to the Ministers the *Full Disclosure* document prepared on November, 2022 with the eight recommendations.
  - a. The full document was sent with the letters. She also mentioned that no response was received from the Minister of Justice, David Lametti, raising a question of accountability.

#### *Minister Marc Miller*

Minister Miller reaffirmed his commitment to ensure that the specific claims process becomes more efficient as opposed to creating more barriers, and said he was confident that the issues that have come up with the streamlining process within the *Privacy Act* can be addressed by working together. He kept his presentation brief to open the discussion to attendees.

#### *Discussion*

BCSCWG Technical Lead Jody Woods moderated the discussion. Attendees made the following comments and questions:

1. There is a need for extra and adequate funding to respond to the new process being imposed by the *Privacy Act*. He also asked about timeframes regarding transfer of property to reserve lands,

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as the current timeframes are as long as six years.

- a. Minister Miller stated that there have been tax developments he is eager to move forward with. However, he recognizes that there are some interests that can work as a barrier such as municipalities losing a tax base. He encouraged participants to raise these topics in specific claims ongoing work.
2. Attendee referred to the Minister's response letter dated March 31st, 2023, to the National Claims Research Directors in which the Minister expressed confidence that "our teams can work together to ensure the process continues to meet everyone's needs". He then asked the Minister if he could commit to implementing the eight recommendations included in the November 4th, 2022, document sent to the Minister.
    - a. Minister Miller said he could not commit because he did not have the document on hand, and he needed to make sure he could follow through with what he committed to. He committed to going back to the document and reviewing the recommendations. He recognized that there are concerns with conflicts of interest and data sovereignty, and there are challenges on how to address them because of the inherent system in which both parties must work within. He reiterated that the *Privacy Act* is governing authority and work has to be done within its mandate.
  3. A question arising from the chat asking the Minister to clarify the statement in his letter to the NCRD about what 8(2)(k) approval form will be used to process requests until the issue can be addressed by the working group, the old form in place until January 2023, or the most recent form imposed in January 2023.
    - a. Minister Miller responded that they would consider what was working and not working before and proceed accordingly, and then, "fine tune" any existing amendments intended to move faster with the working group.
    - b. ADM Darlene Bess clarified that no changes will be made until discussions on moving forward are held when the working group is reconvened.
    - c. BCSCWG Technical Lead Jody Woods reminded the Minister and his staff that the working group has still not received the records on the stalled claims or any communication, thus, as of now, these claims are being barred from accessing justice.
  4. An attendee asked when the access to information process changed, the justification given by CIRNAC staff for this change that poses numerous challenges and conflict of interest issues, was that the process was not in compliance with the *Privacy Act*. However, this does not make sense as entities governed by the *Privacy Act*, like the Library Archives of Canada, do not have this process in place for researchers to request information. Researchers are not asked questions like: "who is party to the claim involved", "who else that is likely named on the council resolution is going to be accessing those records". These questions are not ever raised when departments other than CIRNAC are evaluating the release of records. The question to the Minister was: what was the instruction that the department received that prompted the inclusion of the new questions on the 8(2)(k) forms to allow researchers to get access to file lists? Other departments have stated that nothing has changed, and their processes are *Privacy Act* compliant.
    - a. Minister Miller said he also understood that nothing had changed. Minister Miller

recognized he is not confident that he has a good grasp of how this process came about but he is committed to get to the bottom of it and work to resolve it. He mentioned that the idea is not to increase delays to the process, in fact, he said is the opposite.

5. Minister Miller committed to work of this issue of accessing of information and come up with a way that facilitates the disclosure of requested information from CIRNAC is streamlined, whether it entails a complete reform of the specific claims process or any other innovative ideas on how to address the existing inequities affecting First Nation communities. He mentioned that CIRNAC assisted a Nation in the purchase of land while the settlement was finalized.; he said he is looking to systemize this approach to protect property of choice from disappearing by the time the settlement agreement is finalized.
6. What were CIRNAC's policy reasons for restricting record access from the requesting First Nation that provided the initial authorization via council resolution to release information. What are the policy reasons for not allowing the use of the records for other claims? Why do the 82K forms require details on the obligations being researched?
  - a. CIRNAC Corporate Secretary Sam Macharia responded that the question posed is very nuanced and it is best addressed when the working group is reconvened as the technical experts would be positioned to answer it and look for solutions.
  - b. BCSCWG Technical Lead Jody Woods agreed that certain details can be addressed within the working group. However, the question of the broader policy reason as to why First Nations rights to information is being infringed, which is affecting aspects beyond specific claims such as their ability to govern, still stands and is not technical.
  - c. CIRNAC Director of Access to Information and Privacy Tammy Martin responded that it is important to reconvene the informal process for accessing records for claims researchers. She mentioned that in 2017, it was agreed that a BCR and an 82K form was needed to begin the process, but based on the concerns raised, this process has not been working.
7. Since it seemed like the Minister had no knowledge of the document sent to him on November 4<sup>th</sup>, 2022, has the Minister's staff briefed him on the contents of the document? As well, was the Minister aware of the commitment he made of working together when he sent the response letter.
  - a. Sam Macharia stated that the Minister was briefed on all documents and the reference to "working together" was specific to reconvening the working group.
8. To what extent, if any, has the government of Canada been having conversations with the government of British Columbia in regard to specific nature and issues of claims in BC?
  - a. Director General of Specific Claims Stefan Matiation explained that the discussions vary depending on the type of claim and the role the province vs. the Crown may have played. He mentioned his department is willing and interested in engaging the provinces, and when they do, the conversations are guided by s. 35.
  - b. A participant raised the importance of government staff both- provincial and federal- to be knowledgeable on Indigenous rights as often the BC government does not

communicate with general public that certain decision made by First Nations are within their constitutional rights, and simply pass on blame to the First Nation.

- c. Another concern was raised with the loss of traditional and historical knowledge being lost due to Elders passing away, while claims are taking a long time to settle.
  - i. Stefan Matiation responded that this is an issue to be addressed in the reform work that is ongoing.
  
9. A comment was made to remind the CIRNAC staff that they represent Canada and the honour of the Crown, and the main issue centers around the duty of full disclosure and right to free prior and informed consent under the UN declaration.
  
10. Assistant Deputy Minister and Chief Finances, Results and Delivery Officer, Darlene Bess wrapped with a recognition that she has a better understanding of the frustration with the current process. She committed to reaching out to Morgan Chapman to discuss further the points she made about the Archives Canada process. Also, she suggested that when research directors are in Ottawa on May 17, 2023, it would be a great opportunity to meet and discuss further, and committed to send an invitation to reconvene this discussion.

### **Closing Remarks**

BCSCWG Chair Chief Dalton Silver summarized the main concerns raised in the meeting, thanked everyone for participating and highlighted the progress made.

The meeting closed with a prayer from Elder Amelia Washington.

### **Adjournment**

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