LAND BACK
RESTITUTION OF LANDS POLICY IN SPECIFIC CLAIMS RESOLUTION

PREPARED FOR THE SPECIFIC CLAIMS IMPLEMENTATION COMMITTEE

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Executive Summary

Specific Claims are the mechanism through which Indigenous peoples in Canada may resolve several types of land claims, including unfulfilled treaty obligations, loss of lands or damage to lands due to federal administration of these lands and assets, or the "illegal disposition of Indian land."[1] The mandate for Specific Claims was introduced in the 1973 *Statement on Claims of Indian and Inuit People* by the federal government of Canada, which recognized the "lawful obligations" for these claims as the "basis of Government policy."[2]

This lawful obligation has always included the return of land. In 1982, the Specific Claims policy was further detailed in *Outstanding Business: A Native Claims Policy*. It

[1] Indian and Northern Affairs Canada, *Outstanding Business: A Native Claims Policy,* Ottawa: Canada, p. 179.
[2] "Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," Communiqué (Ottawa: Department of Indian Affairs and Northern Development), August 8, 1973, p. 1.

provided explicitly for bands to be compensated for unlawfully surrendered or otherwise taken lands, "either by the *return of these lands* or by payment of the current, unimproved value of the lands."[3] This remedy remains consistent in the policy to this day.[4]

Yet, the remedy and principle of land return is undermined by other aspects of the policy and through the negotiation process. Though explicitly provided for as a remedy, the Crown's emphasis for Specific Claims settlement has been on monetary compensation. The land return remedy is also in conflict with components of the policy that protect Third Party and Crown interests over First Nation interests. A clear, fair, and transparent transfer of land from either Crown or Third Parties is further frustrated by bureaucracy and poor supports and planning. These inconsistencies have yet to be fully and satisfactorily resolved.

Since the introduction of the Specific Claims policy in 1973, there have also been significant changes in the legal landscape regarding Aboriginal rights, therefore to the meaning of "lawful obligation" that guided the policy in earlier eras. These changes include federal legislation that enshrines the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), British Columbia's Declaration on the Rights of Indigenous Peoples Act (DRIPA), and the growing case law that has determined the scope and content of the Section 35(1) constitutional rights of Aboriginal peoples, introduced in 1982. Centring Indigenous law and governance to determine just remedies for land claims is also key to aligning Crown policy and negotiating mandates with Aboriginal rights. This principle is also enshrined in the Truth and Reconciliation Commission's Calls to Action.

[3] *Outstanding Business,* p. 184, section 3(1), *emphasis added.*
[4] See: Crown Indigenous Relations and Northern Affairs Canada, Specific Claims Policy and Access Guide, Accessed on January 24, 2023. https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629. See also, INAC, The Specific Claims Policy and Process Guide, 2009, Ottawa, Canada.

This policy brief and proposal will recommend a path forward towards a Specific Claims policy that honours the Crown's lawful obligations for breaches, violations, and unfilled obligations to Indigenous peoples regarding their lands. The resolution to these claims must align with principles of Indigenous justice and governance to guide the process to fair restitution and redress.

In particular, this proposal recommends Specific Claims policy reform that incorporates a tripartite spectrum of land return options for First Nations. First, reforms are recommended for the process of land transfer from Third Parties. These recommendations consider the constitutionality of Aboriginal lands compared to private and commercial property rights, as well as new models to expand the current willing seller / willing buyer framework for land return under the Specific Claim policy. We recommend (1) establishing a Specific Claims Trust fund; (2) drawing from the contingent liability monies to secure this funding; and (3) updating the compensation framework for Specific Claim lands.

Second, we recommend a policy approach that involves provincial non-assertion of regulatory and legislative authority, paired with co-management regimes and shared jurisdictional arrangements for Specific Claim lands. This policy recommendation explores models of co-management and an expanded notion of compensation through resource revenue sharing.

Finally, we examine the legal entitlements of First Nations through title and treaty legal frameworks. The legal and political liabilities of provincial and federal governments have implications for the Specific Claims policy, both in the act of denying the assertions of Indigenous jurisdiction on these lands prior to a declaration of title, or in the failure to engage in a renewal of treaty relations.

PART 1: THE PROBLEMS WITH THE LAND RETURN MANDATE OF THE SPECIFIC CLAIMS POLICY

The Changing Landscape of "Lawful Obligations"

Centring Indigenous law and governance to determine just remedies for land claims is key to aligning Crown policy and negotiating mandates with Aboriginal rights. This principle is supported by domestic law and legislation that enshrines international law. Articles 18 and 27 of UNDRIP emphasize the need for redress and restitution pertaining to Indigenous lands, territories, and resources to unfold through the decision-making authorities and procedures of their own "laws, traditions, customs and land tenure systems." UNDRIP also emphasizes the importance of land restoration in Articles 26 and 28, which underscore the right of Indigenous peoples to their lands and to redress for confiscated and occupied lands *through return* or compensation for lands traditionally owned by them.[5]

These clauses are entrenched in federal law that adopt UNDRIP through Bill C-15[6] as well as in pending Bill C-262.[7] Already in force in British Columbia's Declaration on the Rights of Indigenous Peoples Act (DRIPA), Article 11(2) provides that, "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[8]

[5] United Nations General Assembly, Declaration on the Rights of Indigenous Peoples, 2007. Accessed online January 25, 2023, *emphasis added*. https://canlii.ca/t/9m2s.
[6] *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* received royal assent on June 21, 2021.
[7] *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* was last considered at Senate on June 11, 2019. As of Feb. 2, 23, the bill is in third reading in the Senate.
[8] Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44. Accessed online on January 25, 2023. https://canlii.ca/t/9m2s

In the courts, the rights of Aboriginal peoples to exercise their law and to self-govern have been recognized as *inherent* rights. In other words, in the time since the Specific Claims policy was introduced in 1973, the Supreme Court has found that Aboriginal rights are vested in Indigenous nations, even despite First Nations' exclusion as a formal head of power under the *British North America Act*.[9] For instance, the *Campbell* court found that Indigenous self-governance is not a delegated authority, recognized at the discretion of the Crown, but rather establishes part of the "underlying values" of the Constitution.[10]

Other key decisions and legal scholars support this perspective. Chief Justice McLachlin of the Supreme Court of Canada wrote that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty."[11] In a more recent case, the Federal Court reaffirmed that, "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."[12] Aboriginal law expert Kent McNeil writes that, "Indigenous law exists in much the same way the common law does" – as a "living law" that may be "presented through testimony by Elders, knowledge-keepers, and other experts."[13] Therefore, incorporating Indigenous law into Specific Claims remedies is consistent with the jurisprudence on Aboriginal rights. It is also consistent with the principle of Honour of the Crown, which must be engaged when the Crown is dealing with Indigenous peoples.[14]

Through the Truth and Reconciliation Commission the Canadian government has also committed to a process of reconciliation with Indigenous peoples. As part of a call for a new Covenant of Reconciliation, the Commission stipulated the need for,

[9] *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333 [*hereafter "Campbell"*].
[10] *Campbell,* para 81.
[11] *Mitchell v MNR*, 2001 SCC 33 (CanLII) at para 10. Cited in, Kent McNeil, "Indigenous Law, the Common Law, and Pipelines" (April 8, 2021), *ABlawg*.
[12] *Pastion v. Dene Tha' First Nation*, 2018, FC 648.
[13] McNeil, "Indigenous Law, the Common Law, and Pipelines," p. 4.
[14] *Chemainus First Nation v British Columbia Assets and Lands Corporation*, [1999] 3 CNLR 8 (BCSC) at para 26; *Gitanyow First Nation v Canada*, [1999] 3 CNLR 89 (BCSC) at para 7, and *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73, at paragraphs 17 and 19.

"the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements."[15] Changes to Specific Claims remedies is a key place to initiate this process, since it could provide a resolution to the injustice of land loss and dispossession through the recognition of Indigenous laws and governance.

As legal scholar Ardith Walpetko We'dalx Walkem writes, the Supreme Court of Canada found that a "just resolution" of Specific Claims constitutes an "essential part of Canada's national reconciliation project."[16] Reconciliation requires seeing beyond monetary compensation for Specific Claims resolutions, Walkem writes, because it means seeking justice beyond a narrow form of damage. Rather, she points out how being cut off from land has long-term intergenerational impacts on Indigenous peoples, including to their legal orders. Citing legal scholar Val Napoleon, she writes that this is because these laws are "embedded throughout social, political, economic, and spiritual institutions," often "inseparable from spiritual, social, political and economic domains of life."[17]

Each of these legal orders are further situated within a specific territory and draw their distinction and diversity from these places. Therefore, the Specific Claims policy must address the specific injustice of this disruption:

> There is a need to transform the specific claims model through processes or protocols developed with Indigenous Nations as equal partners that respond

[15] Call #45, Truth and Reconciliation Commission, 2015, Calls to Action, Winnipeg, Manitoba.
[16] Ardith Walpetko We'dalx Walkem, A New Way Forward, Discussion Paper commissioned by the BC Specific Claims Working Group, August 2018. Accessed online March 1 2023: https://www.ourlawsarisefromtheland.org/discussion-paper. She cites *Williams Lake Indian Band v Canada (AANDC),* 2018 SCC 4.
[17] Val Napoleon, "Thinking About Indigenous Legal Orders" Centre for First Nations Governance, (2007), online: http://fngovernance.org/ncfng_research/val_napoleon.pdf, cited on page 14 of Walkem, A New Way Forward.

> 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.[18]

Disruptions to Indigenous governance and law cannot necessarily be compensated through monetary settlements because they represent intangible harms to Indigenous obligations to all living beings within a territory. Walkem writes, "As Indigenous cultures are tied to lands and resources, failure to reserve or protect land [has] impacted language, spirituality, and the ability to teach new generations about cultural beliefs and laws."[19] When reserves were cut off, and lands were lost and damaged, or mismanaged, the Canada and provincial governments caused significant disruption to Indigenous economies, law and governance, socio-cultural transmission, spiritual practices, and knowledge that cannot be simply paid off.

Even the 1973 Statement on Claims acknowledges this reality, where it states that land claims, "are not only for money and land, but involve the loss of a way of life" and therefore "must contribute positively to the lasting solution of cultural, social and economic problems that for too long have kept the Indian and Inuit people in a disadvantageous position within the larger Canadian society."[20] This viewpoint was reiterated and upheld in 1982, when the Specific Claims policy was outlined in

[18] Walkem, A New Way Forward, 26-27.
[19] Ibid, 17.
[20] "Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," Communiqué (Ottawa: Department of Indian Affairs and Northern Development), August 8, 1973, p. 4.

greater detail by the Minister of Indian Affairs at the time, John Munro. In *Outstanding Business: A Native Claims Policy,* he acknowledges:

> In the area of compensation, the general view expressed was that bands should be restored to positions held before loss. Many of the bands view claims not only as a means to restore or improve their land base but to obtain necessary capital for socio-economic development. *Where non-Indians are occupying claimed lands, such lands should be returned to the bands concerned and, if necessary, the former occupants compensated by the government*.[21]

The Royal Commission on Aboriginal Peoples (RCAP) also emphasized the importance of land return over a decade later, arguing that within the Specific Claims process, "Aboriginal people are seeking to replace the land they lost with other land."[22] Further,

> Expanding the Aboriginal land and resource base is not just about honouring past obligations or paying a moral debt to Aboriginal people. It is about laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada's enormous land mass, of mutual reconciliation and of peaceful co-existence. *Without it there can be no workable system of Aboriginal self-government.*[23]

Land is integral to Indigenous self-determination, but also to the maintenance and continuity of Indigenous language, culture, and nationhood.[24] The lack of an

[21] *Outstanding Business*, p. 178, *emphasis added.*
[22] RCAP, VOLUME 2 Restructuring the Relationship, p. 285.
[23] Ibid, p. 423, *emphasis added.*
[24] For a clear demonstration of this argument, see, for example: John Borrows, 'A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government' (1992) 30 Osgoode Hall Law Journal 291, 294.

effective land return process through the Specific Claims policy violates Indigenous law, Section 35(1) rights, international rights to self-determination protected through UNDRIP, and is a breach of the Honour of the Crown and principles of reconciliation.

Barriers to Land Return in the Specific Claim Policy

The primary form of compensation for the settlement of Specific Claims has been monetary. Since the policy explicitly provides for the return of lands, why has the resolution of claims been mostly settled through financial compensation? There has been a strong government emphasis and policy bias towards the resolution of Specific Claims as one-time financial payments. Compensation has been emphasized over land return in policy, legislation, and by Crown negotiators for the settlement of Specific Claims.

In terms of policy, Specific Claims prioritize private property interests over First Nation land interests. A provision in the policy states, that, "As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed."[25] In an FAQ on the Crown Indigenous Relations website, it states, "At present, private property will not be on the table, nor will private property owners be asked to sell their land unwillingly."[26] The government's emphasis is rather on financial compensation to facilitate the purchase of private lands: "A claimant may

[25] Clause 8 states: https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629#fn1-rf. This principle was also incorporated into Bill C-30, which established the Specific Claims tribunal in 2008. Though the legislation was never implemented, due to its controversial failure to incorporate any amendments proposed by Indigenous peoples, it nonetheless stipulated that the tribunal: 20(1)(a) shall award monetary compensation only; (g) shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority (C-30, 39th Parliament, 2nd session, October 16, 2007, to September 7, 2008, An Act to establish the Specific Claims Tribunal and to make consequential amendments to other Acts. Received Royal Assent June 18, 2008).

[26] INAC, Specific Claims Action Plan–Frequently Asked Questions (emphasis added). Accessed online on February 7, 2023. https://www.rcaanc-cirnac.gc.ca/eng/1100100030312/1581290230461

use settlement money to purchase lands. Any land purchased by a claimant would be on a willing-seller/willing-buyer basis."[27] There is a contradiction here in the willingness of the government to buy out Indigenous land interests, but not Third Party land interests. This constitutionality of this position will be discussed further below.

In terms of legislation, emphasis on monetary compensation can be found in the 2003 Specific Claims Resolution Act and in the 2009 Specific Claims Tribunal Act (SCTA). While the 2003 legislation never came into force (First Nations rejected it for lacking an independent adjudicative process), it is emblematic of the Crown's position, since it did not authorize any remedy for Specific Claim settlement other than compensation.[28] More recently, the 2009 SCTA legislated that Tribunal decisions are limited to monetary awards with a cap on $150 million for compensation.[29] These legislative barriers undermine and contradict the remedy of land return that is authorized by the Specific Claim policy.

In terms of negotiation, Canada currently controls the assessment and adjudication process for Specific Claims. Despite a long history of consistent recommendations, detailed below, from multiple government evaluations and audits for an independent adjudication process, Canada has maintained the final decision-making authority for Specific Claims settlement since its introduction. Therefore, the Crown has also benefited from a significant discount on breaches of lawful obligation to First Nations because of its emphasis on financial compensation, paired with a cap on financial remedies and a lack of transparency on the formula for determining damages.[30]

[27] https://www.rcaanc-cirnac.gc.ca/eng/1100100030501/1581288705629#fn1-rf.
[28] See also: Denielle Boissoneau-Thunderchild, "The Expectation of Justice," *Indigenous Law Journal* 5 (2006).
[29] Specific Claims Resolution Act, S.C. 2003, c. 23, Assented to 2003-11-07.
[30] Specific Claims Resolution Act, clause 20(1).

On monetary caps specifically, policy reviews have recommended the removal of the arbitrary cap of $150 million on all Specific Claims, but this cap only gradually shifted in recent years.[31] In 2009, the Harper government released *Justice at Last*, an action plan on Specific Claims, and committed to establish a process to negotiate claims that exceeded the cap. Yet, the Attorney General of Canada in 2016 found that the Department instructed the Assembly of First Nations to remove any reference to this process from its work plan.[32] While the process was approved in 2015 by Cabinet, First Nations were not informed. Today, a cabinet approval is required to exceed the $150 million cap.

The negotiation process is also notoriously lengthy for Specific Claims, an issue raised repeatedly in policy evaluations and that has been criticized in numerous reports. This drawn-out process creates another barrier for Bands who seek to buy back lands from willing sellers with the financial compensation they are eventually awarded. Over time, land prices increase and therefore raise the costs of purchases. This, in turn, can impair the ability of First Nation to buy back lost lands. The timeline of negotiations also dictates that First Nations must await the final resolution of a claim to receive compensation, even if lands become available for purchase during the negotiation process, which can also result in lost opportunities to buy back lands.

Finally, there tends to be a deference and preference by the Crown that First Nations purchase lands under the Addition to Reserve and Treaty Land Entitlement policies, companion legislation to the colonial *Indian Act*, 1867, rather than through a nation-to-nation land claim negotiation under the Specific Claims policy.

[31] Disputes in calculating financial loss, due to differences in methodology of present day dollar values, can also mean the difference of millions or billions of dollars.
[32] Indigenous Land Rights: Towards Respect and Implementation, 2018, Report of the Standing Committee on Indigenous and Northern Affairs | February 2018: "The $150 million cap imposed on the Specific Claims Tribunal should be reviewed to ensure it provides a just alternative to litigation" p. 114.

Additions-to-Reserve (ATR) and Treaty Land Entitlements (TLE) provide separate processes for returning land to First Nations as sub-sets to Specific Claims. They will be examined briefly here, since they complicate the land return policy that is meant to exist within the Specific Claims mandate. There are also significant barriers to land return in the implementation of both policies that a more comprehensive and reformed Specific Claim Land Return policy could address.

Treaty Land Entitlements (TLEs) are a subset of Specific Claims that relate to violations in the standard calculations of hectares to population in the treaty process.[33] Treaty Land Entitlements can involve the purchase of Crown Land or private land. The majority of TLEs are negotiated in Manitoba and Saskatchewan – provinces that have framework agreements with Canada for the provision and conversion of land.[34] TLEs were introduced in 1992, when the first Framework Agreement was signed with the province of Saskatchewan and 25 First Nations. In 1997, the Manitoba Treaty Land Entitlement Framework Agreement was signed by the Treaty Land Entitlement Committee of Manitoba Inc. (representing 19 First Nations), by Canada, and by the province of Manitoba.

In 2009, the Auditor General of Canada found "significant progress" on TLEs in terms of land transfers (made since the previous audit in 2005), with 315,000 acres converted to reserves in Manitoba and Saskatchewan. However, the AG noted no improvement in processing times and tracking procedures. In addition, the Department of Aboriginal Affairs and Northern Development, as it was called at the time, "rarely supported the First Nations in Manitoba in their efforts to resolve third-party interests, as it did for Saskatchewan First Nations. And it has not established plans for converting to reserve status more than 250 selections of land

[33] OAG, Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada, 2016, Ottawa: Canada.
[34] Indigenous and Northern Affairs Canada, Treaty Land Entitlements. Accessed online January 25, 2023. https://www.sac-isc.gc.ca/eng/1100100034822/1612127247664

in Manitoba that are not part of a four-year ministerial commitment."[35] These long wait times have significant political, cultural, economic, and spiritual impacts on First Nations. For example, the Salt River First Nation signed a TLE agreement in 2008. While waiting out the lengthy process of settlement, they reported the hardship of "grave cultural and language loss" that accompanied their lack of access to land. The settlement agreement also failed to set aside all the lands selected as reserve.[36]

Additions-to-Reserve (ATR) follows from Specific Claim monetary settlements. Using Specific Claims monies, ATR guides First Nations to purchase land on a willing-buyer/willing-seller basis or to select from unoccupied federal or provincial/territorial land to create new reserve lands.[37] The ATR policy dates back further than TLEs, to 1972, as a remedy for the lack of provisions for reserve expansion in the *Indian Act*, 1876.[38] But a Senate Standing Committee in 2018 on Indigenous land rights implementation that covered both TLEs and ATRs extensively found significant problems with the ATR approach, concluding that it had failed to improve or address conflicts within the policy.[39]

For example, Chief Maracle of the Mohawks of the Bay of Quinte criticized the ATR policy, stating that it was "unreasonable to expect our community to buy its own treaty lands back." He also noted Canada's conflict-of-interest in determining whether land can transfer back to First Nations; rather than deal with land as a

[35] Indigenous Services Canada, Treaty Land Entitlement. Accessed online March 10, 2023. https://www.sac-isc.gc.ca/eng/1100100034822/1612127247664
[36] Office of the Attorney General of Canada. Chapter 4: Treaty Land Entitlement Obligations Indian and Northern Affairs Canada. 2009 Status Report, p. 2.
[37] Brief presented by the Salt River First Nation, 26 October 2017, cited in Standing Committee on Indigenous and Northern Affairs, *Indigenous Land Rights: Towards Respect and Implementation,* Parliament, 1st Session, 42nd Parliament, Feb. 2018, p. 33.
[38] Indigenous Services Canada, Additions to Reserve. Accessed online January 25, 2023. https://www.sac-isc.gc.ca/eng/1332267668918/1611930372477
[39] Indigenous Services Canada, Additions to Reserve. Accessed online Feb. 3, 23. https://www.sac-isc.gc.ca/eng/1332267668918/1611930372477

constitutionally protected Aboriginal and treaty right of First Nations, the policy "deals with Indian land as a mere policy issue."[40] According to the Senate final report, other community leaders, like Grand Chief Sheila North Wilson of Manitoba Keewatinowi Okimakanak Inc. and Chief Bear of Brokenhead Ojibway Nation described lengthy ATR processes that impede progress on economic development, and a raft of other issues such as insufficient land allocation, obstacles to land selection and acquisition, prioritization of third party interests, and conflictual municipal relations.[41]

Both TLE and ATR share the requirement that land can only be transferred back to First Nations on a willing-seller / willing-buyer basis. This means that settlement terms must accommodate a range of Third Party interests. These include consideration of whether Third Parties might be "landlocked" by reserve creation within new boundaries and their access to utilities, as a result. First Nations must also consider whether private owners have subsurface rights to the proposed reserve land, to which they would have to negotiate access or a buy-out. If the Third Party owns and intends to exploit mines and minerals on proposed reserve land, the First Nation must also obtain *written consent* to a "surface only Reserve" or buy-out. Furthermore, the First Nation must manage all these negotiations themselves, with only assistance from INAC. Therefore, third party interests can seriously lengthen negotiations for ATRs in both rural and urban areas. Utility easements, rights-of-way, existing leases, and private ownership of subsurface rights all lend considerable complications to negotiation.[42]

[40] Standing Committee on Indigenous and Northern Affairs, *Indigenous Land Rights: Towards Respect and Implementation,* Parliament, 1st Session, 42nd Parliament, Feb. 2018.
[41] Indigenous Land Rights: Towards Respect and Implementation Report of the Standing Committee on Indigenous and Northern Affairs Hon. MaryAnn Mihychuk, Chair, February 2018 42nd Parliament, 1st Session, INAN, Evidence 29 September, 2017, 0925 (Chief R. Donald Maracle).
[42] INAN, Evidence, 27 September 2017, 0805 (Grand Chief Sheila North Wilson); INAN, Evidence, 27 September 2017, 0915; 0920 (Chief Jim Bear).

Case Study: Mistawasis First Nation in Saskatchewan filed a Specific Claim that covered 18,155 acres of land wrongly taken in a series of surrenders from 1911-1917, in addition to allegations of mismanagement of their funds in a capital account. They were told that there was no possibility of land return under the Specific Claims policy and despite the land assessment value, they were awarded significantly less. In 2001/2002, they received $16 million to purchase back these lands under the ATR policy. They were able to buy back 700 acres within the province of Saskatchewan, and over time, a further 11,000 acres outside of the surrender area. They were lengthy and frustrating delays to transfer lands to reserve status. Those lands not adjacent to reserve could not be converted, despite families reoccupying them, resulting in lack of bus service for children to school and no funding for basic infrastructure like water and housing. They were also restricted to buying back lands in Saskatchewan, rather than the broader Treaty 6 area that their traditional territory covers.

With the onus currently on First Nations to negotiate land transfers and purchases, Third Party interests can be an insurmountable obstacle. Provinces further complicate this process for First Nations by continuing to issue leases and mining licenses prior to the completion of ATR conversions.[43] Senate also highlighted the problem that once third parties know there is a willing First Nation buyer, they inflate the prices, which deflates the total lands First Nations have the capacity to purchase. The report notes, "There is also insufficient support from regional offices in brokering these agreements with municipalities and third parties. There are also poorly accessed dispute resolution and mediation processes."[44]

The Senate recommended instead that provincial governments consult with First Nations to resolve conflict over land before it intensifies. However, a more robust,

[43] Report of the Standing Senate Committee on Aboriginal Peoples, Additions to Reserve: Expediting the Process, Ottawa: Canada, November 2012, p. 16.
https://sencanada.ca/Content/SEN/Committee/411/appa/rep/rep09nov12-e.pdf
[44] Ibid, p. 17.

transparent, and supportive land return policy would go much further towards addressing this range of issues.

PART 2: RECOMMENDATIONS FOR STRENGTHENING THE LAND RETURN MANDATE IN SPECIFIC CLAIMS

Wide scale reform is needed for the Specific Claims policy and fundamental to strengthening the land return policy is the independent adjudication and resolution of claims by a new tribunal body. Numerous government and community reports have condemned the lack of an independent adjudication process for Specific Claims as a miscarriage of justice. These recommendations date back to 1948, when a committee of the House and Senate recommended the creation of an independent administrative tribunal to adjudicate "Indian claims and grievance."[45] In 1983, the Penner Report supported an independent tribunal body for claims.[46] But despite reviewing the policy and establishing a Specific Claims Commission in 1991, binding decisions remained with the Minister.

In 1993, the AFN-Canada Joint Working Group that was established post-Oka Crisis to review the Specific Claims policy released a report with recommendations for an independent claims body to resolve outstanding claims.[47] RCAP followed in 1996 and fully endorsed an independent claims process, as well.[48] In 2006, the Senate Standing Senate Committee on Aboriginal Peoples released a special study on Specific Claims called*, Negotiations or Confrontation: It's Canada's Choice,* that identified once again Canada's conflict of interest assessing and adjudicating claims against itself brought by First Nations. The Senate report called for an independent

[45] AGC, Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada, Ottawa, Canada, 6.2.
[46] Formally titled, Keith Penner, Indian Self-Government in Canada: Report of the Special Committee, House of Commons, Issue No. 40 Wednesday, October 12, l983, October 20, 1983, pp. 114-115.
[47] INAC, Specific Claims: Justice at Last, Ottawa: Canada, p. 7.
[48] RCAP, Volume 2: Restructuring the Relationship, Ottawa, Canada, p. 514.

tribunal panel to be established within a two-year period.[49] A decade later, the Attorney General of Canada investigated the specific claims policy and recommended wide scale reform, noting failure across multiple areas., finding overall that the Department failed to improve the resolution process of Specific Claims.[50] The audit noted that, "When First Nations cannot settle claims through this process, they may withdraw their claims or pursue them through the Specific Claims Tribunal or the courts. These alternatives have led to further delays and could lead to higher costs for both the government and First Nations, and to strained relations between the two parties."[51] These criticisms of the Specific Claims adjudication process have proved to matter acutely when First Nation land under negotiation in Specific Claims proceedings face existential threat through industrial development.

The failures of the Department over the years to settle Specific Claims in timely, fair, reasonable, and just ways has greatly harmed First Nations. While awaiting the resolution of Specific Claims, violent paramilitary operations against First Nations have erupted in flashpoints across the country, including Kanesatake (1990), Six Nations (2006), and Tyendinaga (2007). In Kettle and Stony Point First Nations (Ipperwash) in 1995, an unarmed Ojibway man named Dudley George was killed by the Ontario Provincial Police in a night-time raid to clear the site. Later, authorities were forced to admit that the land reoccupied by the First Nations – which contained a sacred burial site – had been wrongly expropriated by the Canadian military, and it was quietly returned.[52] The Ipperwash Inquiry into the operation

[49] Senate Standing Committee on Aboriginal Peoples, "Negotiation or Confrontation," 2006.
[50] OAG, Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada, 2016, Ottawa: Canada.
[51] Ibid, 6.17.
[52] Kate Dubinski, Quarter century after killing of Dudley George, Ontario provincial park land returned to First Nation, Sept 8, 2020. Accessed online on Feb. 6, 23. https://www.cbc.ca/news/canada/london/ipperwash-provincial-park-returned-to-kettle-stony-point-first-nation-1.5715748

recommended that a key part of the reform to the Specific Claims process was "establishing an independent tribunal to resolve disputes."[53]

Given the importance of land as an integral aspect of Indigenous identity and self-government, the lack of a robust land return policy is especially troubling, given the current paucity of lands in Indigenous possession. South of the sixtieth parallel in Canada, reserve land makes up less than one half of one percent of the Canadian land mass, according to RCAP, and much of this land is of "marginal value," in terms of economic productivity. By comparison, in the United States (excluding Alaska), the comparable number is three percent. RCAP also cites the research of Robert White-Harvey, whose work shows that, "all of the reserves in every province of Canada combined would not cover one-half of the reservation held by Arizona's Navajo Nation."[54] The current size of the First Nation land base also calls for the need to prioritize First Nation land interests in Specific Claims policy reforms.

While some First Nations may prefer one-time payouts, many First Nations have demanded restitution for the illegal disposition of their lands. The Union of British Columbia Indian Chiefs (UBCIC) passed a resolution in 2022 to seek funding and support to advocated "for a new independent process to include land back—restitution of lands, including funding to support the development of a discussion paper exploring issues related to land restitution including the application of Article 13 of British Columbia's Terms of Union."[55] The Assembly of First Nations (AFN) Specific Claims Reform Proposal Independent Centre for the Resolution of Specific Claims (ICRSC) also recommends the expansion of resolution approaches, to "incorporate Indigenous systems of restitution for what was fully lost in the breach of lawful obligations. This may result in the return of land, revenue-sharing,

[53] Ipperwash Inquiry (Ont) Sidney B Linden and Ontario. 2007. *Report of the Ipperwash Inquiry*. Toronto: Published by Ministry of the Attorney General Queen's Printer for Ontario, p. 83.
[54] Cited in RCAP, 1996, p. 416. Original citation: Robert White-Harvey, "Reservation Geography and the Restoration of Native Self-Government" (1994) 17:2 Dal LJ 587.
[55] UBCIC Resolution # 2022-18, Calling for the Restitution of Land as a Remedy in Specific Claims Resolution, June 2-3, 2022.

compensation for loss of cultural knowledge connected with the breach or multi-year financial settlements."[56]

The AFN held a national consultation process on the Specific Claims policy in 2019, hosting dialogues on First Nations' visions for an independent process. At these meetings, many First Nation leaders spoke in support of a new form of redress. For example, one person commented: "I want restitution rather than reconciliation for the last 152 years of genocide, destruction, theft. When we talk about the land issue and land claims, I want to hear restitution."[57] They also spoke to the broader forms of loss that are inherent to the loss of land: "When you finally agree to a settlement through adjudication it needs to include a remedy on making something better, how will you conserve fish habitat, deer habitat for example?"[58] The 2019 dialogue sessions established several key principles, including the need to support the recognition of Indigenous laws and dispute mechanisms, the need to remove arbitrary limits on compensation, and the restitution of lands.

SPECTRUM OF LAND BACK

A. Land Transfer from Third Parties

1. Addressing the Constitutionalization of Aboriginal land

As Anishinaabek legal scholar John Borrows notes, no form of property ownership in Canada is absolute. There are limitations on private property that include "mortgages, leases, liens, easements, zoning regulations, expropriation orders, taxation, treaty rights, contractual obligations, and other statutory, common law,

[56] AFN Specific Claims Reform: The Path to Resolution, April 2022, p. 15.
[57] AFN, Specific Claims Reform: A New Independent Specific Claims Resolution Process, Part One: Summary Report of Regional Dialogue Sessions, 2019, p. 89.
[58] Ibid.

and equitable limitations."[59] Crown ownership is also restricted, for example, "by private interests carved out from the Crown's beneficial interest."[60] Property interests of the Crown, in other words, may transfer through a conveyance of interests. Aboriginal title is also subject to limitations according to the Supreme Court of Canada, for example, the Supreme Court in *Sparrow* lay out a series of limitations. Beyond Aboriginal title, within Indigenous law, Borrows notes, many different types of sharing are recognized across Indigenous territories, as well.

Yet, under Specific Claims it is mostly Indigenous peoples who have had to reconcile or release their own interests in land to private interests when the two legal regimes collide. If reserve lands are infringed, extinguished, or damaged by the province through the allocation of Aboriginal interests to third parties, who should be held responsible? In British Columbia, for example, Indigenous land was given away to private property holders by the province. However, the provincial Crown does not have the right to give away Indigenous lands, as we know from the imperial Royal Proclamation of 1763, section 109 of the British North America Act, 1867, and the constitutional divisions of power that hold "Indian and the lands reserved for Indians" under the federal head of power. In addition, constitutionalized Aboriginal title rights, "should obviously trump non-constitutionalized property interests, according to Borrows.[61] He writes that, "to hold otherwise would privilege non-Aboriginal interests over rights constitutionally protected within the country's highest law. This would be discriminatory. It would not treat Aboriginal and non-Aboriginal interests in a land in a way that respects the constitutional nature of Aboriginal rights."[62]

[59] John Borrows. "Aboriginal Title and Private Property." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 71. (2015), p. 101. http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/5
[60] Ibid, p. 101.
[61] Ibid, p. 117.
[62] Ibid, p. 117.

The Supreme Court has been ambiguous in its treatment of private property interests versus Aboriginal lands. The federal government holds underlying title to reserve lands and legally, this interest cannot be subordinated to provincial or privately owned lands. But as Inupiat/Inuvialuit legal scholar Gordon Christie points out, private property owners have been hidden from the colonial dynamic beneath a "veil of time" theory that suggests past injustices cannot be reconciled through restoration of lost lands.[63] The prioritization of Third Party, private ownership, over Aboriginal lands subject to Specific Claims must be addressed in the policy.

2. Premium Offers: Expansion of Willing Seller / Willing Buyer Framework

2.1 Establishing a Specific Claims Trust Fund

One way to ensure that First Nation lands are not de facto lost through the real estate market, upon the validation of a First Nation's Specific Claim submission, a special trust fund would be established for the resolution of their claim. The use of these funds would be structured into the settlement process as follows: lands under claim could be purchased on an ongoing basis, as land becomes available, or as sellers indicate a willingness to settle. An ongoing framework for land purchase would ensure that lands do not risk changing hands during the settlement process and to address rising land prices that occur naturally over time or by sellers who seek to take advantage of the policy. The model for this ongoing land purchase model is the incremental treaty process, where interim agreements protect the long-term interests of First Nations during the negotiation period. If Bands prioritize land return in their negotiations, all efforts must be exhausted to return these lands to the First Nation.

[63] Gordon Christie, "Aboriginal Title and Private Property" in Maria Morellato, ed., Aboriginal Law Since Delgamuukw (Aurora, ON: Canada Law Book, 2009), 177.

2.2. Monies for the Trust Fund

These monies would draw from federal and provincial budgets through funding set aside as contingent liabilities or Claims Against the Crown. Monies would be estimated and allocated using methodologies that account for lost opportunity costs in addition to lost financial wealth due to the loss of use of lands [see Proxy Model below]. These matters should not be deferred to ATRs because the matter of compensation here must be commensurate with the cost to purchase of lands.

- Mohawks of the Bay of Quinte case study: The community established a fund to pay out private owners on the Culbertson Tract a premium price for their properties. Landowners can therefore voluntarily and transparently access information to facilitate the transfer of land. This fund is set up as a trust, administered by BMO that is arm's length, interest accruing, to account for the increase in land prices ticking up over time, and to facilitate the acquisition and purchase as land *as it becomes available*.

2.3 Updating the Compensation Framework for Specific Claim Lands

The current formula for compensation of lost lands and resources is opaque and inadequate. We recommend the adoption of a Proxy Model to determine compensation amounts for lost or mismanaged lands. Challenges in the past with compensation figures have rested on the trouble with discounting the present value of money. The court has been critical of the federal government's methods of calculation in the past.[64]

- Robinson Huron and Superior Treaty Annuities Case study: Nobel-prize winning economist Joseph Stiglitz was hired by the treaty signatories to

[64] *Southwind v. Canada*, 2021 SCC 28.

challenge the Crown's failure to respect the "escalator" clause in their 1850 treaties, which was meant to ensure that value accrued from their lands would be reflected in revenues returned to the First Nation signatories on fair terms. Stiglitz testified that the Crown experts miscalculated the sums owing today due to a cap on annuities in 1874. The correct economic framework for measuring value is economic rents, he concluded, and the appropriate economic framework for assessing a sharing of resources is a joint-venture style relationship, because it isolates the intrinsic value of the lands and resources the Anishinabek contributed from the management and price-setting policies undertaken by the Crown. The "present value" of lost sums should factor opportunity costs sacrificed by missed capital for investment, such as equities, education and healthcare, as well, which account for the intergenerational perpetuation of income and wealth inequalities today.

B. Provincial Non-Assertion and Co-Management

1. The Principle of Provincial Non-Assertion

The principle of "non-assertion" techniques have precedent in the modern treaty process. If First Nations can be required to waive or relinquish their rights, the provincial government could also enter into an agreement to modify regulations to accommodate Indigenous law and enforcement. Provincial non-assertion would mean specific jurisdictional arrangements with First Nations over their territories over management zones or resources.

- Non-Assertion in the Modern Treaty Process: The federal government required the Tlicho nation in 2003 to agree not to assert or exercise

section 35(1) rights, other than those laid out in the treaty.[65] The Non-Assertion technique exhausted any assertion of section 35(1) rights that differed from the treaty rights laid out in their final agreement. The treaty also required a "release" to all third parties and the Crown from any further legal obligation to the Tlicho nation "in relation to any Aboriginal or treaty right held by the Tlicho as if those rights did not continue to exist" (2.6.4). This back-up "release" was no longer required of the Tsawwassen First Nation in 2009 when they signed their final agreement in response to concerns from Indigenous peoples that the clause amounted to *de facto* extinguishment.

2. Models of Co-Management

Claim areas of lost and damaged reserve lands currently classified as Crown land (public municipal land, provincial or federal Crown lands) could be returned to First Nation jurisdiction through co-management arrangements of shared jurisdiction. Co-management zones could also be established on purchased private lands. Co-management regimes will require significant but essential research and planning, which could be supported by an Independent Centre for the Resolution of Specific Claims (ICRSC). Specifically, the Resource Hub, which would "provide training and skills development related to research and claim development" could help with baseline studies and research to facilitate the development of protocol agreements.[66] Co-Management studies and models developed by First Nations under the Specific Claims policy could also contribute to the body of research and

[65] Doug Eyford, A New Direction: Advancing Aboriginal and Treaty Rights, Ottawa: Canada, 2015. See also: Land Claims and Self-Government Agreement Among the Tåîchô and The Government of the Northwest Territories and the Government of Canada, 2003, https://www.tlicho.ca/sites/default/files/documents/government/T%C5%82%C4%B1%CC%A8cho%CC%A8%20Agreement%20-%20English.pdf. This technique was also exercised in the 2006 Nunavik Inuit Land Claims Agreement (NILCA).
[66] Assembly of First Nations, Specific Claims Reform Proposal: Independent Centre for the Resolution of Specific Claims (ICRSC), April 2022, 15.

expert reports that would "enable the ICRSC to facilitate sharing of knowledge transfer, and access to evidence that has not previously existed for First Nations."[67]

The Funding Division of the ICRSC could support the research "associated with the recognition of Indigenous laws of participating First Nations," including engaging knowledge keepers and Elders.[68] These studies could include: land use and occupancy (traditional use studies), alienation and cumulative impact studies, toponymy mapping, etc. On Crown and private lands, these maps could also provide inventories for negotiations with industry and the Crown, e.g. mapping easements, leases, rights-of-way, etc. First Nations could prepare comprehensive land use planning and economic development visioning based on this research and baseline studies to sustainable, ecologically sensitive, and productive co-management plans.

As one participant in consultations on Specific Claims imagined:

> Funding could assist with researching broader stories; create an institutional structure and rules to accommodate this broader story. We need resources to examine laws and customs and ways of thinking (e.g. fox archetype character that formulates ways of thinking) Common value systems are represented in our stories. In dream hunts, if I as an animal give up my life, then you must share and use all of me. This sharing meat teaching comes from the Elders).[69]

The specific governance protocols would be negotiated with each First Nations, based on their cultural practices and legal orders, without prejudice to ongoing title and treaty claims.

[67] Ibid, p. 11.
[68] Ibid, p. 13.
[69] AFN-Specific-Claims-Dialogue-Summary-Report, p. 113.

3. Expanded notion of Compensation to Resource Revenue Sharing (RRS)

For lands that are damaged beyond repair or that have been expropriated for national infrastructure or commercial industry, First Nations could also accept financial compensation and resource revenue sharing agreements to support their economic livelihood, e.g. from train lines running through reserves, hydropower, hydro lines, oil and gas installations, cottage rents, highways, etc. These resource revenues would be negotiated as part of a compensation package for First Nations whose claims have been verified through the policy.

- **Barriere Lake Case Study**: The Trilateral Agreement was signed in 1991 between the province of Quebec, the government of Canada, and the Algonquins of Barriere Lake. The TA covered 10,000 out of 17,000 square kilometers of the First Nation's traditional territory that had never been subject to land treaties with Canada. The federal government agreed to fund the necessary land use and occupancy studies for the creation of discrete management zones on the territory. Each management zone would be subject to sustainable resource management regimes based on scientific (Western and Algonquin) knowledge of ecologically sensitive resource management practices, including baseline studies of riparian zones, sustainable forestry yields, and other sensitive cultural areas. Resource revenue sharing agreements were also negotiated for wealth leaving the territory in the form of hydropower and recreational activities. The pilot project brought stability and certainty to the region for private harvesters and First Nation land use practices. The Trilateral Agreement was never fully implemented, however, because of the provincial government's reluctance to pursue an arrangement of shared jurisdiction

with First Nations.[70] A United Nations report hailed the agreement as a "trailblazer" and pointed to six important features of the plan: it put the doctrine of sustainable development into practice; it established a real partnership between government and an Indigenous community; it blended Indigenous knowledge with modern development processes; it provided for a working partnership that fostered mutual respect between Canadians and Indigenous peoples; it established an important scientific and technical experiment that would help amend forestry practices; and it created an important educational and operational model, not only for Canada, but for the rest of the world.[71] The Royal Commission on Aboriginal Peoples called the Trilateral Agreement a "model for co-existence."[72]

C. Land Back

1. Title and Treaty Paramountcy to Federal and Provincial Jurisdiction

A new approach is required to deal with Specific Claims on treaty and title lands. The Crown's assertion of underlying title to reserve lands is an outdated legal construct that requires reconciliation with inherent Aboriginal and treaty rights in Canada.

In BC, Quebec, and other jurisdictions where treaties have not been negotiated, these lands are subject to Aboriginal title claims. This legal principle has

[70] For more on the Trilateral Agreement, see: Shiri Pasternak, *Grounded Authority: the Algonquins of Barriere Lake Against the State*, University of Minnesota Press, 2017.
[71] United Nations Convention on Biological Diversity, September 30, 1997.
[72] Claudia Notzke, "The Barriere Lake Trilateral Agreement," a report prepared for the Royal Commission on Aboriginal Peoples—Land, Resource and Environment Regimes Project (Barriere Lake Indian Government—October 1995), 21.

implications for ongoing Specific Claims. As *Tsilhqot'in Nation* established,[73] "once title is established, any prior action in relation to the land taken or authorized by the Crown without the consent of the Aboriginal claimants could amount to an unjustifiable infringement of Aboriginal title."[74] Actions taken through the Specific Claims process on lands subject to Aboriginal title, therefore, could be voided or compromised if subject to a declaration of title.

This leads to three considerations of Aboriginal title concerning Specific Claims:

(1) The cost and duration of establishing Aboriginal title under the current land claim policy and through litigation does not mitigate the *de facto* case for Aboriginal title that many Indigenous nations hold throughout the country. Therefore, *prior actions* to the establishment of Aboriginal title must be reconciled with Aboriginal title claims through Specific Claim negotiation policies, with careful consideration of impacts and implications to potential Aboriginal title infringement.

(2) Provincial liability is activated by the fact that lands subject to Specific Claims may also have the status of Aboriginal title lands. As Kent McNeil argues, "Where claims are strong, the province should either obtain the consent of the Aboriginal claimants before proceeding or abstain from actions that could give rise to claims for compensation.[75] This factor is key to provincial participation in the Specific Claims policy, especially for land return.

[73] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.
[74] McNeil, Kent. "Aboriginal Title and the Provinces after Tsilhqot'in Nation." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 71. (2015), p. 76. https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/4

[75] Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015), p. 87. https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/4

(3) Compensation is owed to First Nations *from the time of* infringement. This principle is established in the jurisprudence in relation to infringements to private property in Canada and must be applied to Aboriginal title and treaty lands, as well. As Kent McNeil asks: "Why should Aboriginal title holders be subject to governmental expropriation of the resources from their lands for the benefit of privately owned corporations when private land ownership are not?"[76]

As noted above, legal scholar John Borrows notes that mostly, Indigenous peoples have had to reconcile or release their own interests in land. For example, in BC, most of this unsurrendered land was given away to private property holders. This is not a legal power that the provincial Crown possesses. Borrows also suggests that the holders of these "flawed grants" may still possess some rights. The Crown could negotiate new treaties; or Indigenous governance systems could manage the private interests on their lands, protected by the honour of the Crown. These ideas could be integrated through the recognition of Indigenous law and governance in the Specific Claims policy.

From a historic treaty perspective, Canadians violated their own treaty rights when they failed to uphold agreements made in treaty council. Yet treaty nations have been made to pay twice: first, as a result of the failures of the Crown to uphold treaties that led to the loss of lands, and second, with the lack of a meaningful policy for land return. The Specific Claims policy must have a viable land return policy that honours the spirit and intent of the treaties. As treaty scholar Sharon Venne explains:

> When the Elders entered into treaties with the British Crown, it was to ensure that the future generations would be able to continue to live on their lands in

[76] Ibid, p. 83-84.

> the way that the Creator had directed. As the present policies demonstrate, Canada as a successor state has no intentions of following the terms of the treaties and actively pursues a course to undermine and diminish the treaties. Of course, Canada as a successor state cannot change the treaties without the consent of the Indigenous peoples and so has set up scenarios for the necessary consent to be given to change the treaties.[77]

The Specific Claims policy defers the return of treaty lands to the Treaty Land Entitlement policy, rather than deal directly with land return.

Yet the Supreme Court has repeatedly noted that treaties must be interpreted as Indigenous peoples would have understood them at the time of negotiation and in accordance with their own laws. This possibility is not currently available through the TLE process but could become an integral part of the Specific Claims process through mechanisms of the independent tribunal. Once again, the provinces do not possess the legal authority to extinguish or otherwise settle Aboriginal title and treaty claims, yet de facto these negotiations empower the provinces through poor land return policies on lost lands.

[77] Sharon Venne, "Treaty Doubletalk in Canada," *Indigenous Law Bulletin* 45 (2000) 5(1).