National Claims Research Workshop
LAND RIGHTS – BEYOND THE STATUS QUO
OCTOBER 22nd, 23rd, 24th, 2019
SIX NATIONS OF THE GRAND RIVER TERRITORY

Presentation on Alternative Funding for Submissions, Negotiations, Specific Claims Tribunal, and/or Litigation for Specific Land Claims

1. Introduction:

We all know that going up against the federal government to assert a claim of Indigenous rights is an upfill battle, in many ways. I won't go through all of the hurdles, but will focus on just one, a big one, and that's the cost of preparing and carrying through with a legal claim.

So where can a First Nation turn to receive the funds necessary to finance a long and expense legal battle? Let me very quickly run through the options, before focusing on my specific topics today.

Here's the options:

1) Self-funding

2) Government financing

3) Bank loan

4) Law firm financing, in a contingency agreement.

I will very quickly summarize the disadvantages of each of those options. I don't think you need me to tell you this, so I will go through them quickly.

Self-funding is difficult unless a First Nation has discretionary funds. Otherwise the funds they receive from government are earmarked for programs and services for their citizens.

Government Financing Loans obtained from the Specific Claims Branch are deducted from the final negotiated settlement. There are also no assurances that sufficient loans will be available to any First Nation submitting an application to Specific Claims Branch or the Specific Claims Tribunal to pay their expenses as they are being incurred.

Many Indigenous groups will not even initiate the negotiation process, or have formally withdrawn their application, because of concerns that Canada will not provide adequate loan funding to allow them to achieve a successful outcome.

Canada's Budget 2019 announcement in regard to Loan Forgiveness pertains to those loans which were accessed for the resolution/settlement of Comprehensive Claims and not to Specific Claims.

Bank loan I will discuss in detail with the arrangement that can be made with banks who are insured by an Insurance Company.

Contingency fee Agreements The Law Society of Upper Canada released information on Nov 10, 2017, on contingency fee agreements. The CFA's provide members of the public with access to justice by allowing clients not to pay legal fees until a settlement or trial results in damages recovery. The lawyer or paralegal usually receives a fee calculated as a percentage of what is recovered.

"The existence of contingency fees is critical in opening the doors to justice for all Ontarians, no matter your financial situation," says Malcolm Mercer, Chair of the Law Society's Advertising and Fee Arrangements Issues working group. "The recommendations we are proposing focus on transforming the way contingency fees work, providing equal access to justice for all individuals regardless of their ability to pay, while increasing clarity and visibility, and consumer protection."

The recommendations, which will be tabled at Convocation, were developed by the Law Society's Advertising and Fee Arrangements Issues Working Group and are designed to regulate contingency fees to facilitate legal representation at a fair and reasonable cost, and include:

The introduction of a mandatory standard contingency fee agreement;

A 'Know Your Rights' guide for the public, which contains information on consumer rights in relation to contingency fee agreements;

Disclosure requirements on completion of an agreement which provide the consumer with the following:

a clear breakdown of the final settlement or award, the net amount going to the client, disbursements costs, legal fees and taxes;

a statement explaining the reasonableness of the fee in light of factors such as legal complexity, the results achieved, and the risk assumed, including the risk that the matter would not have been successful; and

a statement that the client has the right to assess the account.

Requirement for legal professionals to publicly disclose the maximum contingency fee percentage they charge by practice area, allowing increased transparency, and the ability for individuals to shop around for representation; and

New reporting information will be required on licensees' (lawyers and paralegals) annual reports to the Law Society. Aggregate data will be shared with the public and policy makers to better inform future consumer choice and policy decisions. Signing and dating contingency fee agreement

In my experience there were a lot of problems with CFAs entered into by Claimants and their lawyers with respect to the Indian Residential School claims under the Settlement class action.

with respect to the Indian Residential School claims under the Settlement class action.

The purpose of my talk today is to outline a fifth option, and one that I think may be of benefit to many of you. This option sometimes goes under the name of “Litigation Finance Insurance”, but that sounds a little mysterious, and doesn’t actually tell many of us who are not in the financial sector what that really means, so I will boil it down into something even a lawyer like myself can understand.

In short, a well-established insurance company with considerable financial assets and financial risk assessment experience makes an assessment of your legal case against Canada, and if the company concludes that you have a good case, which will likely result in compensation, the company decides to take a risk and commits to financially backing your claim. It then works with a regular bank to arrange a loan to your First Nation to provide up-front funding to cover several years of costs for lawyers, researcher, experts and so forth, which are required to proceed with your legal case, and – and this is the key part – guarantees to the bank that it, the insurance company, will pay back the loan if the claim doesn’t succeed and the First Nation can’t pay back the loan. That’s where the word “insurance” comes in – the insurance company is insuring the bank’s loan, to give the bank the confidence to provide the loan to the First Nation.

Why does an insurance company get involved, and why does this work? Well, I'm no financial expert, but I think I've figured out that the key is that insurance companies are specialists in assessing risks – that's what insurance is – and so insurance companies are potentially in a better position to make risk assessments about something as specialized as a legal claim – something banks are too cautious, and not really knowledgeable enough about, to get involved with.

The final piece of the puzzle is that in fact insurance companies are not experts in assessing lawsuits as specialized and complicated as First Nation legal claims either, so another player is needed, and that's where an agency like LRMS comes.

LRMS is a group of individuals who combine a set of factors into a rare package – they know a lot about First Nation legal claims, they know a lot about First Nation communities and how they work, they know how to work with the financial experts at a big insurance company, they know about helping with the bank loan that the insurance company will insure, they know how to manage all the paperwork and administration, and they know how to work with experienced lawyers who can help them assess a legal case. They are the centerpiece that pulls all the different pieces together.

One item that I think is so often overlooked and becomes a huge issue on the reserve is the fact that very few First nations plan for the settlement and AIS have had so many chiefs tell them that the community is now in worse shape than it was prior to the claim with drug dealers, gangs, infighting with the people trying to settle the trusts.

I believe that we should ensure that not only that communities get good advice on settlements but not to leave the community readiness until they get the settlement cheque from Canada.

Also many communities are really challenged and have little capacity to actually manage these claims and simply hand away their settlement to lawyers who are frankly less organized then the First Nation and I think the community needs to see the claim as a tremendous business opportunity and they should not simply hand it off to a law firm. LRMS provides guidelines on how to plan and strategize for settlement so that the funds will go to economic development.

2. Process

The message I wish to deliver is that there are alternative funding opportunities available to First Nations to prepare their Submissions on the Minimum Standard for
Filing a Specific Claim Submission with the Minister of Crown-Indigenous Relations and Northern Affairs (CIRNAC). If the Minister finds that Canada has an outstanding legal obligation, which means that the Minister admits that the First Nation has proved that the claim is valid, the claim can proceed to negotiations. According to the Department of Indian Affairs, now CIRNAC , approximately 70% of all Specific Claims are accepted for negotiation on the grounds that the claim is valid against the Crown (ie. an “outstanding lawful obligation”). This alternative funding is also available for the negotiations that take place before a claim is settled. If the Minister rejects the Claim, alternative funding is also available to proceed to the Specific Claims Tribunal, and if the claim is not successful at the Tribunal then the First Nation may consider applying for a Judicial review to the Federal Court. The chance of overturning a Tribunal decision by way of a judicial review is weak. In the Williams Lake Indian Band v.

Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4, the Supreme Court has provided that the Tribunal's decision is final and conclusive unless the decision is unreasonable. This means that the Tribunal decision cannot be appealed per se. The Specific Claims Tribunal Act states:

> 34 (1) A decision of the Tribunal is subject to judicial review under section 28 of the Federal Courts Act. 34

Final and conclusive

> (2) Subject to subsection (1), the Tribunal's decisions are final and conclusive between the parties in all proceedings in any court or tribunal arising out of the same or substantially the same facts and are not subject to review.

The Supreme Court establish a very high test for parties to be able to have a court invalidate a Tribunal decision. In other words, Specific Land Claims best chances for being validated are at the Ministerial level or at the Tribunal level.

In the Williams Lake case, the Court stated that

> Parliament established the Specific Claims Tribunal ("Tribunal") with a mandate to award monetary compensation to First Nations for claims arising from the Crown's failure to honour its legal obligations to Indigenous peoples. In this case, the Tribunal concluded that the band had a valid specific claim for losses arising from the Crown's acts and omissions in relation to the Village Lands. It found that the Imperial Crown had owed, and breached, a legal obligation to the band in relation to the protection of its lands from pre-emption based on s. 14(1)(b) of the Act and that the Crown in right of Canada ("Canada") had owed, and breached, a fiduciary obligation to the band based on s. 14(1)(c). It further found that Canada could be held responsible under the Act for the band's pre-Confederation claim. Before the Tribunal ruled on compensation, Canada sought judicial review of the Tribunal's validity decision. The Federal Court of Appeal allowed Canada's application and dismissed the band's claim.

The Supreme Court found that:

The standard of review applicable to the Tribunal’s decision is reasonableness. The validity of the band’s claim did not depend on the resolution of a constitutional issue.

Rather, it required the Tribunal to interpret its home statute to decide whether the grounds advanced relate to a legal obligation of the Crown within the meaning of s. 14 of the Act. It also required the Tribunal to derive legal obligations of the Crown from legislation, treaties and the common law, including fiduciary law. In making these legal determinations, the Tribunal applies judicial doctrines to historical circumstances that, by virtue of the applicable limitation periods, others will rarely consider. This distinctive task conferred by Parliament requires a measure of flexibility and adaptation to map onto historical claims. The application of fiduciary law in the historical contexts in specific claims and familiarity with the large and specialized evidentiary records fall within the Tribunal’s expertise and are entitled to deference.

The Tribunal’s analysis of the Crown’s sui generis fiduciary obligation is a sufficient basis on which to restore its decision, without considering the application of an ad hoc fiduciary obligation to the conduct of Crown officials under either

The Tribunal’s analysis of the Crown’s sui generis fiduciary obligation is a sufficient basis on which to restore its decision, without considering the application of an ad hoc fiduciary obligation to the conduct of Crown officials under either

s. 14(1)(b) or (c) of the Act. A sui generis fiduciary obligation arises from the Crown's discretionary control over a specific or cognizable Aboriginal interest and is specific to the relationship between the Crown and Aboriginal peoples. The interest at stake must be sufficiently independent of the Crown's executive and legislative functions to give rise to fiduciary duties. A fiduciary obligation requires that the Crown's discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary, as embodied, for example, in the fiduciary duties of loyalty, good faith and full disclosure. The standard of care to which a fiduciary is held in its pursuit of the beneficiary's interests is that of an ordinary prudence in managing one's own affairs. The conduct of the fiduciary that comes under scrutiny is its exercise of discretionary control over the Aboriginal interest vulnerable to the exercise of discretion. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct, not by delivering a particular result. Although the Crown must have regard to competing interests, the existence of such interests does not absolve it altogether of its fiduciary duty to reconcile them fairly.

The Tribunal's conclusion that the band had established a valid claim on the grounds of the Imperial Crown's breach of a sui generis fiduciary obligation — before Confederation based on s. 14(1)(b) of the Act — was reasonable. The Tribunal identified the specific or cognizable Aboriginal interest at stake as the band's interest in the Village Lands, and found that, by Proclamation No. 15, the Imperial Crown had assumed discretionary control over that interest.

The Tribunal further found that the Crown had not acted with reference to the band's best interest in exercising its control over these lands. The duty of ordinary prudence required the Crown, at a minimum, to inquire into the extent of the band's settlement so that it could be protected, and the failure to do so put the Crown in breach of the fiduciary obligation.

The Village Lands would have qualified as "Indian settlements" under Proclamation No. 15 and the colonial policy governing its implementation ought to have led to measures reserving them from pre-emption. In the Tribunal's view, the band's interest in the Village Lands in respect of which the Crown owed a fiduciary duty did not depend on whether or not Crown officials took the appropriate action to secure land protection. This conclusion meets the requirement for an Aboriginal interest capable of grounding a sui generis fiduciary obligation insofar as officials were in a position to identify the interest at stake and it was sufficiently independent of the Crown's executive and legislative functions. The band's interest in the Village Lands was not created by colonial legislation. Rather, it was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation.

The Tribunal's conclusion that Canada owed, and breached, a fiduciary obligation in relation to the Village Lands, based on s. 14(1)(c) of the Act, was also reasonable. The Tribunal identified the specific or cognizable Aboriginal interest in the Village Lands as an interest that was vulnerable to the adverse exercise of Canada's discretion. It held that after British Columbia's entry into Confederation, Canada's discretion in relation to Aboriginal land interests flowed from its position as the exclusive intermediary with the Province in relation to those interests in the reserve creation process. It openly acknowledged that such discretion was limited by the need for provincial cooperation and that Canada could not unilaterally create a reserve. Its conclusion that a fiduciary obligation arose in the absence of complete or exclusive control aligns with general principles of fiduciary law — that the alleged fiduciary have scope for the exercise of discretion or control to affect the beneficiary's interests. The extent to which the claimed loss is attributable to Canada's breach, as opposed to the Province, raises questions of causation to be determined at the compensation stage. Furthermore, the Tribunal did not ignore the distribution of powers and responsibilities under the Terms of Union when it found that the band's interest lay in the Village Lands and defined Canada's fiduciary obligation in relation to that interest. Neither Canada's constitutional obligation to create reserves according to a particular policy,

nor the Province's obligation to convey land for that purpose, is in issue. The question is not whether the band was entitled to the allotment of the Village Lands as a reserve — either under the Terms of Union or as a consequence of Canada's fiduciary obligation — but whether the actions, decisions and judgments of the federal Crown officials that would affect the band's interest met the applicable standard of conduct in relation to that interest.

The Tribunal found that Canada had to fulfil the fiduciary duties with respect to an interest in the land with which the band had a tangible, practical and cultural connection, and that it had failed to discharge them. The Tribunal did not find that Canada owed the band a fiduciary duty at large, nor did it find that Canada's obligation as fiduciary was to deliver the allotment of the Village Lands as a reserve.

The Tribunal considered all of the circumstances, and the extent to which Canada met the requisite standard of conduct was a heavily fact-based inquiry. **It was reasonable for the Tribunal to conclude that federal Crown officials with knowledge of the circumstances surrounding the Williams Lake pre-emptions and the band's situation did nothing to challenge the pre-emptions.** Their inaction and the decision-making that led to the eventual allotment of a reserve to the band elsewhere fell short of fulfilling the Crown's fiduciary obligations**. The Tribunal reasonably concluded that ordinary prudence required them to make use of the available means of preserving the band's interest by seeking, on an immediate basis, enforcement of provincial protection for Indian settlements, and, on a more permanent basis, having the land**

allotted as a reserve. While Canada was obliged to consider settler interests, in this case, the only competing interests were those acquired as unlawful pre-emptions, which the Tribunal did consider. **The fact that Canada eventually procured a reserve for the band elsewhere cannot undo the breach of fiduciary duty, although the Tribunal reasonably concluded that it may reduce the amount of compensation.**

The Tribunal's definition of the Crown as a single, continuous and indivisible entity to validate the band's claim against Canada for pre-Confederation breaches, under s. 14(2) of the Act, was reasonable. This conclusion is grounded in the Tribunal's decision as a whole, and expanding upon it based on the record, the arguments and the legal principles underlying the decision, constitutes permissible supplementing of the Tribunal's reasons.

Section 14(2) defines "Crown" by reference to the legal obligation whose breach or non-fulfilment forms the basis for a specific claim. A legal obligation of the Imperial Crown will satisfy the first branch — the "legal obligation" branch — where it "became . . . the responsibility of" Canada. Although the Tribunal did not apply it, the second branch — the "liability" branch — will be met where "any liability relating to its breach or non-fulfilment became . . . the responsibility of" Canada. The Tribunal found that the Imperial Crown came within the extended meaning of "Crown" because the fiduciary obligation that it had allegedly breached was a legal obligation that became the responsibility of Canada, and for which Canada would, if in the place of the colony,

have been in breach. This reading effectively projected Canada backwards into the place of the Imperial Crown for certain obligations. The Tribunal indicated that this interpretation of the legal obligation branch of s. 14(2) would not extend the application of s. 14(1)(b) to all potential liabilities of the Imperial Crown, and that Canada's post-Confederation fiduciary obligations supplied the limits contemplated by that branch.

The Tribunal treated s. 14(2) as a free-standing basis for Canada's liability for the Imperial Crown's breaches of certain obligations and rejected the view that it operates as an enforcement mechanism. It found the legal obligation branch not to require an independent and outstanding obligation — transferred to Canada under the Terms of Union — to establish the Village Lands as a reserve. This interpretation of the legal obligation branch as encompassing certain fiduciary obligations of the former colonies is consistent with the structure of s. 14, and the nature of fiduciary obligations which does not require the transfer of the obligation itself**. It was therefore open to the Tribunal to interpret s. 14(2) as giving effect, not to the assumption by Canada of a specific obligation, but of a discretionary power to affect the band's interests in the context of an established fiduciary relationship.** The Tribunal's view of s. 14(2) is consistent with its understanding of the role Parliament intended the extended meaning of "Crown" to serve within the specific claims sheme -

> to remedy historical injustices committed by the Crown, be it the Imperial Crown or Canada. This view is also consistent with an Indigenous perspective on the continuity of the fiduciary relationship between Indigenous peoples and the Crown before and after Confederation.
>
> [207] There is much wisdom in those cautionary notes. Judicial review is not artificial resuscitation. As slow as reviewing courts ought to be to reach such a conclusion, sometimes a statutory delegate's reasons for decision are truly indefensible by any standard. This is one of those times. **The Tribunal's reasons for finding that Canada is liable under s. 14(1)(b) for the Colony's breach are just not amenable to judicial supplementing, and this Court should not strain to do so by insisting that, if we just look hard enough, we will be able to see what really isn't there.**

I have cited the Williams Lake case extensively for the purpose of bringing to your attention that the first analysis at the Departmental level is crucial and/or at the Specific Claim Tribunal as there is no appeal to the regular courts only the judicial review to the Federal Court, which is very difficult and restrictive. I believe some First Nations, particularly, if a province is involved, have gone directly to the regular courts. There is a restriction on the Tribunal's jurisdiction over a province. The Act states:

Restriction

23 (1) The Tribunal has jurisdiction with respect to a province only if the province is granted party status.

Party status of a province — mandatory

(2) If the Crown alleges that a province that has been notified under subsection 22(1) is wholly or partly at fault for the claimant's losses, the Tribunal shall grant the province party status provided that the province certifies in writing that it has taken the steps necessary for it to be bound by decisions of the Tribunal.

Party status cannot be bound by the Tribunal unless it agrees to do so. Therefore, the regular court system still is an option available to the First Nations.

With respect to the alternative funding, I have assisted several communities through my interaction with the Legal Expense Financing and Insurance Program (LMRS), which is operated and managed by the Aboriginal Insurance Services, Inc. (AIS) and their business partners, which in their case is Allied World, in obtaining funding for their expenses associated with pursuing a specific claim. The process is transparent and collaborative and does not expose the community to any financial penalty or impairment. Through their growing network of Indigenous insurance brokers, AIS provides products and services dedicated to the growth and prosperity of First Nations, Indigenous, and Métis communities, businesses, and people across Canada.

LMRS offers a product that meets the regulatory guidelines put forth by our Federal Regulator of Financial Institutions (OSFI) and does not expose the community to any unlicensed entity. Allied World is covered by the OSFI.

The Office of the Superintendent of Financial Institutions (OSFI) is an independent federal government agency that regulates and supervises more than 400 federally regulated financial institutions and 1,200 pension plans to determine whether they are in sound financial condition and meeting their requirements.

Federally regulated entities include all banks in Canada, and all federally incorporated or registered trust and loan companies, insurance companies, cooperative credit associations, fraternal benefit societies and private pension plans. OSFI's scope of regulation does not include consumer or consumer-related issues or the securities sector, which are the responsibility of other agencies, both federal and provincial.

OSFI publishes information regarding the following foreign insurance companies such as, the classes of insurance, their chief agents, and the province, in which their chief agencies are situated, in accordance with section 585 of the Insurance Company Act and the Regulations Prescribing Alternative Means of Publication (Foreign Companies).

In its website OSFI publishes the Name of Foreign Insurance Company (FIC), the Name under which FIC is authorized to carry on its insurance business in Canada, the name of the Chief Agent, the address of the Chief Agency in Canada, and the Authorized class(es) of insurance specified in the Order, including class limitations. OSFI lists Allied World Specialty Insurance Company as the FIC, which is authorized to carry on its business, the name of the Chief Agent is:

Gordon, D. Kerr
Chief Agent
1600-200 KING ST W
TORONTO, Ontario
M5H 3T4

Finally, OSFI lists Allied World's authorized products as Property; Accident and sickness; Automobile; Credit; Fidelity; Hail; Liability; Marine; Surety; Boiler and machinery; Legal expenses. Legal expenses are where the alternative Funding for specific claims falls under.

OSFI regulates by developing rules, interpreting legislation and regulations and providing regulatory approvals for certain types of transactions. It also contributes to new accounting, auditing and actuarial standards. All of this must balance the goals of safety and soundness with the need for institutions to operate within a competitive marketplace.

OSFI supervises by analyzing financial and economic trends to identify emerging issues that could adversely affect institutions. It assesses an institution's financial condition, material risks and the quality of its governance, risk management and compliance. When weaknesses are identified, OSFI intervenes early and works with executive management, boards and pension plan administrators to correct matters.

Allied World Assurance Company Holdings, Ltd, through its subsidiaries, is a global provider of insurance and reinsurance solutions. Allied World offers superior client service through a global network of offices and branches.

All of Allied World's rated insurance and reinsurance subsidiaries are rated A (Excellent) by A.M. Best Company, A- (Strong) by Standard & Poor's, and A3 (Good) by Moody's, and our Lloyd's Syndicate 2232 is rated A+ by Standard & Poor's and AA- (Very Strong) by Fitch. The process is transparent and collaborative and does not expose the community to any financial penalty or impairment.

Several banks/financial institutions have partnered with LMRS as they are satisfied that this product complies with all of their regulatory requirements and can be administered and deployed to assist First Nation communities advance their specific claims.

I understand Randy Sherwin of AIS made a presentation last year and gave specific example of the Six Nations of the Grand River experience with alternatives to the government funding for land claims.

Many of their clients have successfully negotiated their claims on their terms once they became involved and actively participated in the management and oversight of their negotiation. Working with their clients LRMS has created a business model that includes the First Nation creating a multipurpose Specific Claims Legal Administrative Trust. The following is from the Litigation Risk Management Services Legal Expense Financing and Insurance Program document issued by AIS.

Litigation Risk Management Services

Creating such a Trust protects the interests of the lender, insurer and the First Nation, and maintains consistent monitoring and progress of the specific claim. The Trust is independent of the First Nation government, and is not affected by daily administration and politics, nor is it affected by election promises.

The Trust ensures that financial recourse to the First Nation is limited, and that the insurance policy the trust purchases will provide assurance that the lender will be paid in full (including interest) in the event the loan goes into default, the claim is rejected, or the settlement is not adequate to pay the loan in full.

LRMS prefers to work directly with those First Nations communities with the capacity and desire to create a Trust, and become fully engaged in their specific claim application process by utilizing and employing local resources to assist with the claim assessment, research, evidence gathering, etc. The Trust provides the required claims management oversight including interviewing and hiring the representative law firm that will ultimately work with the administrative trust to provide full litigation oversight and of the claim.

A number of LRMS preferred law firms and land claims specialists agree that a significant portion of the administrative costs could easily be reduced by hiring and training community support and research staff, which they could mentor, to build capacity for future claims. Unfortunately, not all communities have the capacity, due to limitation of local resources, to manage the specific claims process. In these instances, LRMS provides the First Nation with a list of pre-qualified and trusted researchers, experts, and law firms that can be engaged by the Trust, to pursue their claim.

Litigation Risk Management Services

Many potentially successful claims have languished within the Specific Claims process for years without resolution; many due to lack of funding or poor claims management.

In some cases, Canada has had no action taken by the First Nation to engage in negotiations in pursuit of a settlement, as the First Nation lacks the financial resources to further their claim, and are reluctant to sign a contingency fee agreement with a law firm that is expecting 30% of the settlement.

In some instances, these delays may have actually benefited the First Nation as other settlements, new legal precedents, or new policies have occurred or have been put in place that could affect the possibility of achieving a better settlement.

The Specific Claim Legal Administrative Trust, which is the legal entity created by a Band Council Resolution, performs multiple functions including, but not limited to, the following:

» Managing the claim which will include interviewing and hiring the legal team and required experts

» Pay the legal fees and disbursements as they are incurred and participating in claim management status meetings with the insurance company.

» Reporting the claim progress with the community and Chief and Council

» Purchasing the insurance policy that will be used to provide the collateral required by the lender

Litigation Risk Management Services

First Nations deserve the opportunity to find the best opportunities for pursuing settlements, to make informed decisions based on a solid basis of information and, where desired, to re-engage the Specific Claims process in a manner that evens the playing field with Canada.

The LRMS process consists of four stages.

1. Client Qualification Interview

2. The Application

3. Underwriting and offer

4. Proposal Acceptance

Stage One: The Client Qualification Interview

Litigation Risk Management Services

The First Nation must first appoint LRMS directly or through their law firm which will permit LRMS to assess their specific claim submission. LRMS conducts a Specific Claims Feasibility Analysis (SCFA) to benchmark the First Nation's grievance against our underwriting data base. An SCFA rating of 85% or greater is necessary to advance to the application stage, provided a positive outcome on the community assessment phase which includes:

» Does the chief and council have the support of the community to pursue the specific claim?

» What historical information is available with respect to the claim?

» What research and legal analysis, if any, has been done?

» Has there been a collection and recording of relevant oral history?

» Is the argument or historical record related to the claim supported by past settlements, acceptances for negotiation and/or court rulings favourable to the First Nation?

» Is there a realistic and objective method to determine the minimum amount of monetary compensation at which the claim would be expected to settle?

» Does First Nation leadership and community have reasonable expectations of potential monetary compensation?

» Is the First Nation seeking a settlement involving elements besides monetary compensation?

» Has the First Nation created a specific claim administration Trust?

Provided the SCFA scores higher than 85% and the community assessment stage is in order, LRMS will contact the lender to confirm the First Nation's historical relationship (if any) with the lender and identify any credit risk issues such as past loan defaults that may jeopardize the loan agreement will need to be resolved prior to LRMS moving to the application stage.

Stage Two: Application

LRMS works with the First Nation and/or their legal counsel complete the Legal Expense Insurance application, and to obtain the required underwriting documents to conduct a specific claim analysis.

The specific claim analysis consisting of the following:

» Bios of the legal team appointed by the Trust to manage the claim

» Details of the claim and Key legal considerations

» Defendants Liability and Relief sought including Estimation of Compensation Sought and Valuation Formula

» Original claim document submitted to the Specific Claims branch and Rejection or acceptance letters

» Statement of Claim and any subsequent filings of motions or appeals

» Expert reports including Traditional Land Use and Occupancy Studies, Traditional Ecological Knowledge Studies, Loss of Use reports and any Framework Agreements

» Contingency Fee Agreements, Legal expense and disbursement budget, Claim work/activity/timeline and Milestone and timetable achievement schedule

Stage Three: Underwriting and Offer

Litigation Risk Management Services

UNDERWRITING

LRMS delivers the Legal Expense Insurance application and underwriting documents to the insurance broker (Aboriginal Insurance Services) which includes the budget and workplan, and a copy of the LRMS Specific Claims Feasibility Analysis (SCFA) and rating.

LRMS continues to work with the insurer and the applicant to provide additional supporting information or documentation as required. The insurer obtains an independent legal review, and conducts their required client and final legal reviews, and provided the specific claim meets the final underwriting criterion, the Insurer will issue a certified quotation for presentation to the Trust. I am one of the lawyers that will provide an independent legal review.

OFFER

Following the underwriting and if the insurer agrees to proceed with insurance an insurance proposal is prepared and issued to the Trust that includes:

» Description of the specific claim

» a limit of indemnity,

» the policy period,

» the insurance premium,

» the interest calculation,

» trustee, set up and legal fees,

» legal and disbursement fees as agreed in the approved budget.

Stage Four: Proposal Acceptance

Litigation Risk Management Services

The First Nation will receive an insurance Proposal from Allied World Specialty Insurance Company. If the First Nation approves the Proposal, they must execute a Band Council Resolution (BCR) creating and empowering the Specific Claim Legal Administrative Trust to proceed with the specific claim application and provide all necessary directions and executed documentation and instruction to bind the insurance policy.

Upon receipt of the BCR, and the binder [the insurance binder represents the agreement between you and the insurance company and is a confirmation in writing that a policy will be issued. The insurance binder is a proof of insurance you can use until you receive your actual policy. An insurance binder may be issued for a limited time and have an expiry date]. LRMS reengages with the lender and provides to the lender:

» Allied World Specialty Insurance Company will issue a binder letter to the Specific Claim Legal Administrative Trust and add the lender as a loss payee and the Trust must re confirm that the insurance proposal is to be bound

» The Specific Claim Legal Administrative Trust then becomes a party to the binder letter (with Allied World Specialty Insurance Company) and Loan Agreement (with the Lender)

» To the lender a copy of the specific claim underwriting overview

» Loan matrix calculator that includes the cost of specific claim legal fee and disbursement budget and workplan, insurance premium, loan set up, trust and legal fees and

» Allied World Specialty Insurance Company issues a formal insurance policy that is delivered to the administrative trustee, law firm, and lender.

» LRMS provides the insurer with all lender documents as they are executed and processed with the lenders independent law firm if applicable.

On a periodic basis (minimum 6-month intervals), file audits are conducted to determine specific claim file activity and status, including approved budget and timeline are on track, verification of continuing merit of the claim, and settlement prospects. All invoices and payment requests from legal counsel or manager are sent to the Specific Claim Legal Administrative Trustee for execution. The Specific Claim Legal Administrative Trustee verifies the drawdown request amount and timeline conforms with the approved workplan and budget and agreed by insurer.

Litigation Risk Management Services

The Specific Claim Legal Administrative Trust executes several assignments and directives.

Walk Away Agreement: Agreement between the insurer, the Trust and the Nation designating, for purposes of the insurance policy, an amount of award or settlement that would be satisfactory to the Nation as a resolution to the Specific Claim, and sufficient to discharge the amount outstanding under the loan agreement.

Assignment of Insurance Proceeds: Agreement between the Trust and the Insurer assigning any monies that may become payable under the insurance policy to the lender.

Irrevocable Direction to Administrative Trust: Direction by the Nation to the Trust to direct Canada to deposit with the Trust any monies owing and payable to the Nation as related to a resolution of the Specific Claim.

Irrevocable Direction to Canada: Direction by the Trust and the Nation to Canada to deposit with the Trust any monies owing and payable to the Nation as related to a resolution of the Specific Claim.

3. Conclusion

With the recommendation of AIS I have been one of the lawyers who has been retain by Allied World to provide an opinion for Allied World regarding the merits of a First Nation specific land claim within the Specific Claims Policy. An opinion is prepared to assist Allied World with determining whether or not it should provide a guaranteed line of credit to MCCN to pursue this claim.

I have worked with Gord Kerr, of Allied World, Randy Sherwin, and Bill Monture of AIS for the past three years, and I can attest to their good character, transparency and good faith. They care for our people. In addition, I have known Phil Monture and his work in land claims and his wonderful reputation.