



Valuing Specific Land Claims:

Historical CSI (Crime Scene Investigation)

By John Peebles, AACI, P.App, (RPF Ret.), Land Ethic Consulting Ltd.

If you are an appraiser with an attention to detail, an interest in the history of Canada and Indigenous peoples, and are not afraid of a little research, then you may find that Specific Land Claims offers a niche valuation opportunity. I like to think of Specific Claims assignments as historical crime scene investigation (CSI). Like the investigators on the TV shows, success comes from top-flight analysis, communication skills, and problem solving capabilities. Clients demand university thesis-quality reports and a catalogue of reliance documents. The key lies in piecing together documentary and archival records.

Let's start with some background on Specific Claims and related jargon.

Specific Claims refer to monetary damage claims made by a First Nation (i.e., Claimants) against the Crown, or Dominion of Canada. Claims generally fall into several general categories: wrongful administration of land and other First Nation resources (e.g., timber, gas, oil, or minerals), a promise to provide Reserve land that was not fulfilled, or severance of Reserve lands without adequate compensation.

Historically, the Courts offered the only path for resolving First Nations' claims of injustices related to Reserves. In 2008, the Specific Claims Tribunal was formed to

accelerate the resolution of Specific Claims. The Tribunal is a joint initiative with the Assembly of First Nations and Canada. Claims are heard by an independent body of federal judges appointed from Provincial Superior Courts across the country.

Most Specific Claims involve compensation for land and require expert reports such as appraisals. During the Claims process, expert reports are generally filed with the Tribunal by both parties (i.e., First Nations and Canada). Similar to the Courts, the Tribunal has specific rules of procedure for submissions, admission of evidence and hearings.

There are several potential types of compensation identified in the *Specific Claim Act*. The nature of the Claim may require one or all three types of assignments: Current Unimproved Market Value, Retrospective Market Value, and Loss of Use. Retrospective Market Value and Loss of Use valuations are very challenging appraisal assignments, mainly due to historic valuation dates, non-typical terms of reference and assumptions, broad scope of work, and difficulty in

sourcing and interpreting historic market information.

The most complex and challenging Specific Claims assignment is Loss of Use. The unique methodologies and research for Loss of Use is the focus of this article. Loss of Use (LOU) means the financial loss that a First Nation may have experienced over a defined Claim Period for designated Reserve land or for land that was promised as a Reserve. Most LOU expert reports interpret the financial loss of use of land to be equivalent to the notional rental income for the Claimed Land for each year of the Claim Period. The sum of the annual notional rent brought forward to present value represents the total Loss of Use. There is an ongoing debate over whether the annual notional rent is net rent or gross rent and whether a fee simple interest is the correct basis for determining rent. Note that the value

of the improvements made by the First Nation or others over the Claim Period is not generally included in the financial LOU analysis.

For the dozen or so Specific Claim assignments with which

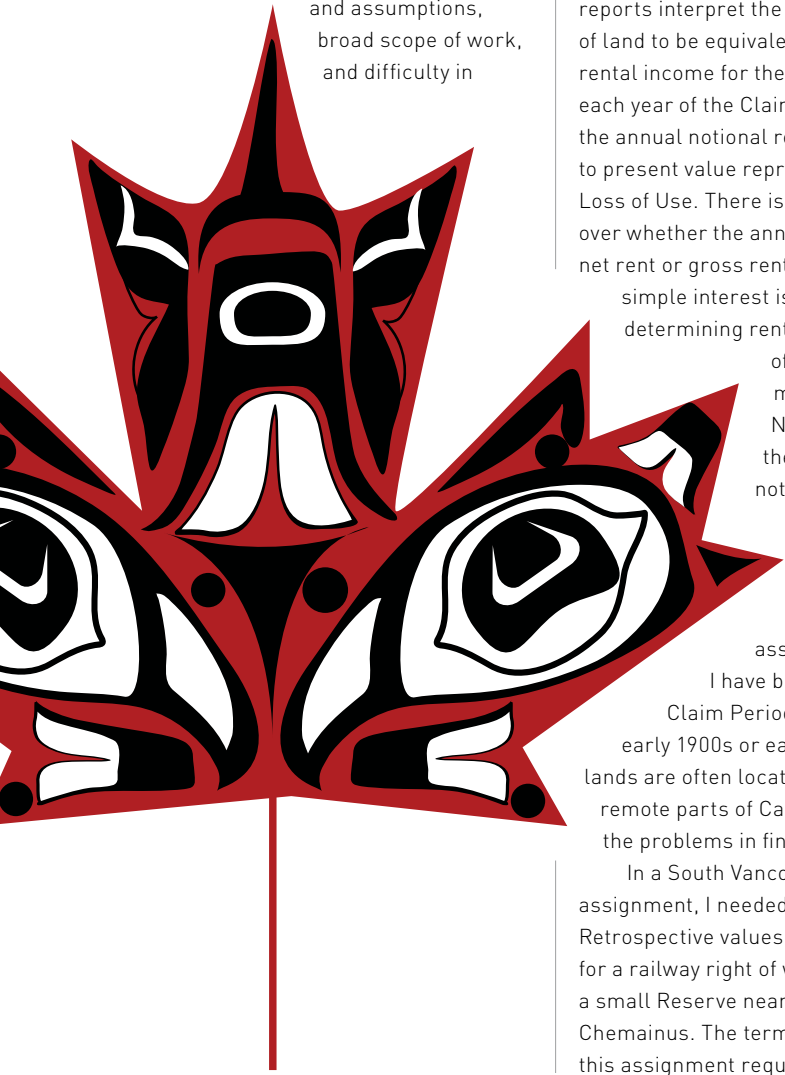
I have been involved, the Claim Periods tend to begin in the early 1900s or earlier. The Claimed lands are often located in rural and remote parts of Canada, which amplifies the problems in finding market data.

In a South Vancouver Island assignment, I needed to determine Retrospective values and Loss of Use for a railway right of way that severed a small Reserve near the community of Chemainus. The terms of reference for this assignment required LOU estimates

“Clients demand university thesis-quality reports and a catalogue of reliance documents. The key lies in piecing together documentary and archival records.”

for three LOU Claim Periods involving three discrete areas. The earliest LOU Claim Period was 1885 to 1963. I needed to learn about market conditions, land values, and rates of return for the Claim Periods. My first step was to bring some order to this highly complex assignment. I developed a research plan that set out the tasks, order of research (i.e., priorities), research sources, and target dates. The plan also set out the related professional hours and fees, expenses, need for specialist sub-contractors (e.g., historians, surveyors, mapping companies, and land title researchers), and the logical sequence of work. With this roadmap sketched out, I was then able to dive into market research, focusing on the Claimed Lands.

LOU analysis requires four areas of market research: identifying, land rents, land values rates of return, and market conditions over the Claim Period. Land rents can be sourced from Reserve and non-Reserve lands. However, Reserve rents are easier to source for historic time periods, since there is no central registry of land rents of non-Reserve lands.





Reserve rents are also good indicators of LOU, since government policy over the years has been to establish rents based on land capability as unimproved, similar to the LOU premise. The most compelling market data for LOU will be from Reserves that are similar in location and land characteristics to the Claim Lands. *More on Reserve rent research later in this article.*

Land rent research serves two purposes: rents are indicators of rental value for the Direct Comparison Approach and contribute to calculated rates of return. Say that Reserve lands with good agricultural potential in the Creston area of the Kootenay Region rented for \$10 per acre per annum in the 1950s. If these

lands are representative of the Claimed Lands, you can establish the notional value of the rented Reserve lands through additional land title sales research. If the notional market value of the rented Reserve land is \$200 per acre at or around the rent date, the notional rate of return would be 5%. If you assemble enough rate of return indicators, patterns emerge and a market rate of return can be concluded for the Claimed Lands. This rate will change over time in response to the usual local and regional market forces. The key extraordinary assumption for this analysis is that value of Reserve land is representative of similar non-Reserve lands. There is some disagreement about this principle, but most LOU researchers

in BC do not adjust Reserve land values to account for the nature of the interest (i.e., Dominion Government fee simple held in trust for First Nations).

The main source for historic land values is Provincial Land Title office records. In BC, the Land Title & Survey Authority (LTSA) provides contemporary title records online. Most title records prior to the 1960s are only available on microfilm. Furthermore, there are thousands of hard copy and linen tracings of historic maps, sketches, and survey plans that are not digitized or microfilmed. This means you need to engage a qualified land title research expert to complete research under your direction or have authorization and skills to conduct the research on your own.



“You need to develop strategies to deal with research costs, gaps in understanding motivation of the parties and nature of improvements.”

I have learned that the best way to set priorities for land title research is to analyze both historic maps and contemporary online mapping of the area surrounding the Claim Lands and compile a list of potential rural property sales leads. The next step, the title search process, will require a general understanding of how land titles are recorded in your province. For example, in BC, the best approach is generally to begin with the original Crown Grant of the property and search successive title transfers. This approach generates multiple resales – very useful in understanding trends in market conditions. While the formats of land title transfer records have evolved over the years, most have common elements: the legal description of the property, the declared transfer price or value (the sale price), parties to the purchase and sale, and title transfer date (the sale date). Be prepared for the frustration and challenges of in-depth land titles research. It may seem you have spent a lot of money for very little result. You can expect research time and expenses for 20 to 30 transfers for each targeted property, poor quality of microfilmed documents, a high percentage of non-arm’s length title transfers involving related parties and estates, gaps in the motivation of the parties, and uncertainty regarding land improvements.

Reliance on improved land sales is a problem since the focus of LOU analysis is the financial loss of use of unimproved land. Using unadjusted improved land sales will skew the analysis and reduce the reliability of the LOU estimates.

You need to develop strategies to deal with research costs, gaps in understanding motivation of the parties and nature of improvements.

The time and cost of land title and Indian Land Registry System research may represent up to 20% of the total cost of an LOU assignment. Prior to beginning a LOU assignment and drafting a detailed proposal, you should have a frank discussion with your client about the difficulty, time, and expense of the LOU analysis. Remember that the potential for Claims compensation may be up to \$150 million, and clients will expect you to complete a detailed and rigorous analysis. I find it is useful to say that the opposing legal counsel and their experts will spend two to three hours reviewing every one hour of work you have spent on the LOU analysis (and vice versa). You may be able to save your client some research expense by starting with a small list of potential properties and expanding the list only as more useful information is needed. You can also give instructions to your land title researchers to avoid retrieving documents for non-arm’s length transfers, saving some printing fees.

However, researchers will still need to search successive titles to find the next transfer of these properties, at least in the BC land titles registry. Keep in mind that most land title offices do not want your researcher monopolizing scarce microfilm readers, since other researchers need access to historic records for other research related to legal matters, genealogy, etc. For example, the Victoria BC land title office has only one or two microfilm reader-printers that work well. The competition for these machines means dirty looks if one researcher stays on the best machine too long. You can also streamline Indian Land Registry research by focusing rent research on First Nation Reserves with similar characteristics to the Claimed Lands.

Older land title documents may be in poor condition and scanned versions can be difficult to interpret. This problem can be overcome in some cases by retrieving the original document from the land title office vaults. Each provincial land title office will likely have different policies and restrictions for access to these sensitive fragile records.

The condition of the land at the sale date is often difficult to determine given the passage of time, lack of air photography prior to the 1930s, and government policies for land settlement. The Colony of Vancouver Island and later Province of BC, similar to other western



provinces, encouraged early settlement of Crown land through pre-emptions. In this process, a pre-emptor could purchase Crown land for a low statutory rate, if they completed a certain amount of land development and lived on the property. This means that almost all resales of pre-empted rural land had some form of land development, a residence, and farm buildings. While Crown Grant sketch documents (i.e., the original conveyance of the land) were occasionally annotated with roads, trails, cabins, and land clearing, the developed condition of most lands' agricultural capability prior to widespread air photography is tough to verify.

However, there is some tricks-of-the-trade to reduce this uncertainty. Consider again the Chemainus example mentioned earlier. The local government is the North Cowichan District (NCD), which is one of the oldest municipalities in British Columbia, established in 1873. The NCD has maintained an archive of all assessment records from the date of incorporation. The NCD provided me access to the historic assessment records and provided an archivist to retrieve the dusty ledgers for each year. My goal was to find assessment information for some early land title transfer records. Minimal information was available for each property, but the records were useful in distinguishing between *wild land* or *unimproved land* and farm land, and the value assigned to improvements such as cabins and barns. The earliest available air photography for this area was from the 1940s and the assessment research helped to establish with more confidence the nature of agricultural improvements for post-1940 sales. [Tip: a good source for the earliest available air photos is the *National Air Photo Library of Natural Resources Canada*.] Most provinces have additional air photography available for more contemporary periods.

Another of my CSI assignments was a Specific Claim in the Cariboo-Chilcotin (southcentral BC), a region well known for cattle ranching. I was able to analyze improved two historic ranch sales by comparing air photos around the sale date to published autobiographies of two local ranch families. The autobiographies described in detail the purchase and sale of the properties including buildings, improvements, irrigation, grazing permits, and water licences. Family archives can also yield some rare finds. The daughter of the owners of a large well-known ranch near Williams Lake was willing to share an old appraisal report that had been completed just before the sale of the ranch. The message from these CIS-type examples is it will be never enough to cobble together some historic land titles, you need to dig a little, or a lot!

Understanding the motivation of the parties requires going back in time to the prevailing social, legal, and economic forces affecting the area over the Claim Periods. What are the forces that might have influenced the behaviour of buyers and sellers? For example, documentary research for the early 1900s revealed that South Vancouver Island experienced periods of land speculation, growth, and recession. A number of buyers in the early 1900s were overseas investors from the United Kingdom. Real estate speculation was common in the UK during this period, and regions in BC such as South Okanagan, Kootenays, and Vancouver Island were targets for speculators. Investors bought and sold properties in the same way that many of us buy and sell stocks in today's market – meaning that a UK buyer would not necessarily be well-informed about local market conditions in the Cowichan Valley and may have paid more for property than an informed local resident.

Over my years of Specific Claim research, I have learned that the best data may not be published in official government records. My favourite source for understanding market conditions is local historical societies and archives, usually staffed by volunteers. These volunteers have a passion for preserving history and love the opportunity to share their knowledge, helping with aids and research tips once they understand your research questions. Sadly, local archives and historical societies are always short of funding and some fragile documents cannot be safely stored and conserved. Please remember to donate to the archives and historical societies that have assisted you. First Nations community members are a valuable source of information about changes in land-use over time. Statements by community members are often part of the common records assembled by the Claimant and Canada as part of the Claim process.

My favourite online research sources are historic newspapers and city-town directories (listings of residents and businesses). Canadian university libraries usually have online holdings of historic newspapers. The University of Saskatchewan holds the early years of the *Regina Free Press*. The University of BC holds an amazing collection of short-lived newspapers for mining towns that no longer exist in the Kootenay Region. The Vancouver Public Library holds an online collection of directories for town, villages, and communities in BC dating back to the 1860s, or the colonial period of BC. Library and Archives Canada and Census Canada have historic records for land and timber leases, permits, and sales, annual reports of government agencies, and Census reports. I also commonly rely on University Master's and PhD thesis documents, some dating back to the 1920s; these are also searchable in most university library systems. Thesis documents will often point to other document leads given the requirement to cite all reliance information. As well, I recommend

“Think of your report as one large economic model that depicts how land values and rents evolved over a period of time.”

connecting with your local university’s Faculty of History to see if a co-op student can provide some research assistance. Students have access to very powerful search engines and know how to use them (probably better than you!). You might be surprised at the relevant records that students can download at no cost from global research sources such as ABI/INFORM.

Finally, some thoughts on two important LOU methodologies: the Rate of Return method and Direct Comparison Approach. The Rate of Return Method (RoR) is effectively the reverse of Ground Rent Capitalization: the appraiser starts with a known land value and applies a rate of return to arrive at a notional land rent. Alternatively, where reasonable market information is available, the appraiser can identify rents for unimproved land through direct comparison, and directly estimate the notional rent for the Claimed land. In my experience, it is best to attempt both methodologies, and then compare and reconcile the outcomes for specific periods of time or eras over the defined Claim Period. An alternative simplified method with a single rate of return for the entire Claim Period has also been proposed as a LOU methodology. For more information on the fixed rate approach refer to the Winter 2006 *Appraisal Institute Magazine* article entitled Valuing First Nation Land Claims and Other Historical Damages, authored by Arthur Hosius, PHD and Lawrence Smith, PHD, University of Toronto economists.

In determining land rents for LOU

assignments, you need to balance the integrity of analysis with analysis of vast amounts of market data for some time periods and gaps in data for other periods. A mass valuation approach can help avoid getting too bogged down and producing a report of 1,000+ pages that lay-people and the Tribunal (intended users) will not comprehend. Reserve lease agreements, permits, and other land tenures rents are recorded in the Indian Land Registry System (ILRS) (actually multiple systems), some dating back to the 1890s. While the general public has access to limited information in the ILRS, you need additional authorization to retrieve the tenure documents and document rents and fees. Gaining access to the ILRS and knowing how to query the system are basic competencies for Specific Land Claim assignments. While the ILRS is far from exhaustive or complete, it is the single best resource available for lease, licence, and permit rents. For example, I have found lease records dating back to the 1890s for agricultural lands in the Cowichan Valley and mining surface rights for lands in the Fraser Canyon of southwest BC.

Some closing thoughts on documenting your Specific Claims findings, or, how to prepare a complete and compelling valuation report.

In my experience, the most effective reports are organized with multiple headings, sub-headings, and bullet points. Avoid jargon, superlatives, and unsupported opinions. Most legal professionals are adept at sensing advocacy so ensure your analysis and

‘voice’ are independent and bias-free. Always remember that you are writing for lay-people who may have limited understanding of appraisal principles and generally accepted practices. Reports should include a glossary of terms, footnotes for all sources cited, and an explanation of the assignment and your overall findings. LOU reports can include self-contained valuation sections for specific valuation eras or periods of time with consistent social, economic, and legal influences. This approach makes it easier for intended users to understand your findings and supporting analysis, and to see the logical progression from one era to the next. Think of your report as one large economic model that depicts how land values and rents evolved over a period of time.

Over my 12 years of Specific Claims assignments, I have found these to be the most challenging and rewarding of my career. Specific Claims are a small niche in the appraisal business with very few qualified members and I feel privileged to be a part of this group of recognized *land-CSI investigators*. If you think you have the skills, abilities, and CSI instincts to broaden your scope of practice, you may find that partnering with an experienced Claims appraiser is the best way to gain competency in this area. ▣

