

IPPERWASH DISCUSSION PAPER  
TREATY AND ABORIGINAL RIGHTS

June 2006

**IPPERWASH INQUIRY**



**COMMISSION D'ENQUÊTE SUR  
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**MEMORANDUM**

**TO:** Ipperwash Inquiry  
Parties with Part Two Standing

**FROM:** Nye Thomas  
Director, Policy and Research  
Ipperwash Inquiry

**DATE:** June 2006

**RE:** Discussion Paper on Treaty and Aboriginal Rights

**1. INTRODUCTION**

This is the third and last short discussion paper on major policy areas being considered in Part Two of the Ipperwash Inquiry. This paper discusses several issues concerning Treaty and Aboriginal rights. The Inquiry's two other papers discuss the relationship between police and government and the policing of Aboriginal occupations and protests, including the relationship between Aboriginal peoples and the police.

The purpose of this paper is to provide parties with notice of the issues that Part Two is considering on this subject. The paper also sets out a series of questions that are likely to arise in our deliberations. **Parties are encouraged to consider some or all of these questions and the issues raised in the discussion papers in their written and oral submissions.** A list of questions is attached as Appendix A.

Neither the Commissioner, commission staff, nor the Inquiry's Research Advisory Committee have reached any conclusions on these issues. The Inquiry's policy staff and Research Advisory Committee have, however, provisionally identified a series of issues and questions that are likely to inform our analysis. The Commissioner will not be considering final recommendations on this or any other Part Two topic until the evidence is completed and all submissions have been received.

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This discussion paper does not include references to the factual evidence or testimony heard at the Part One hearings. This paper will, however, discuss several policy topics or issues that have been discussed at the hearings. This is because many of the legal, policy and practical issues discussed at the hearings have been discussed in previous Inquiries, reports, and articles on this subject.

This discussion paper does not purport to address every relevant issue on this subject. Moreover, the issues and questions discussed here are neither exhaustive nor fixed. They are, rather, a summary of major issues and questions that we have identified so far. We encourage parties to discuss or recommend other issues or questions we have not identified.

The focus of this paper is on provincial policy and processes.

## **2. WHY ARE TREATY AND ABORIGINAL RIGHTS IMPORTANT TO THE INQUIRY?**

The potential range and depth of treaty and Aboriginal claims in Ontario is extensive. Virtually all of Ontario is subject to a treaty. Moreover, the province has the authority to enact a wide variety of laws directly affecting Aboriginal interests, including laws regulating natural resources, the environment, the management and sale of Crown lands, local works and undertakings, the protection of heritage and cultural property, the issuance of fishing licenses, and “all matters of a merely local or private nature” in the province.

Frustration with existing land, treaty and Aboriginal claims processes have often led Aboriginal people to blockade or occupy public and private places across Ontario and Canada. Several of the Inquiry’s research papers contain extensive inventories and case studies of Aboriginal occupations and protests precipitated by a dispute over treaty or Aboriginal rights.<sup>1</sup> The Inquiry has also been advised that Aboriginal frustration with the existing processes may be increasing.

It appears that the absence of timely, fair and effective procedures that can be reasonably counted upon to address disputes will likely lead to more occupations and protests in the future. Incidents in the Caledonia and Big Trout Lake regions are but two recent examples of a consistent trend. Unfortunately, the *risk* of violence is present every time police and Aboriginal peoples confront each other in this manner.

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<sup>1</sup> The number and frequency of Aboriginal disputes is difficult to determine but they are quite common. Several of the Inquiry’s research papers include inventories or examples of Aboriginal occupations and protests including: John Burrows, *Crown and Aboriginal Occupations of Land: A History & Comparison*; Don Clairmont/Jim Potts, *For The Nonce: Policing and Aboriginal Occupations and Protests*; and Jean Teillet, *The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario*. Each paper is posted on the Inquiry’s website.

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The human and financial costs of occupations and protests are potentially very high. The Inquiry believes, however, that the resolution of treaty and Aboriginal rights issues are also important because they may contribute to a continuing atmosphere of insecurity and uncertainty with respect to the lands and resources at issue. This atmosphere threatens the well-being and opportunities of all who have interests in these areas. Perhaps most importantly, peaceful outcomes of treaty and Aboriginal rights are an important means of building and maintaining a relationship with the Aboriginal peoples in Ontario.

Treaty and Aboriginal rights are, of course, enshrined in the Canadian constitution. The Supreme Court of Canada has established significant duties and obligations on governments pursuant to those rights.

In these circumstances, the Inquiry believes it is important to consider whether or how these processes can be reformed in order to reduce the number or risk of Ipperwash-like occupations and protests in the future.

### **3. BACKGROUND**

The law, policy, and history of land and treaty claims are lengthy and complex. Both Professor Coyle and Ms. Teillet discuss these subjects at length, as have a number of other reports, inquiries, and commissions. It must be noted, however, that most reports and recommendations appear directed to federal land claims policy, not Ontario's.

### **4. GUIDING PRINCIPLES ON TREATY AND ABORIGINAL RIGHTS**

The Inquiry will likely begin its analysis of these issues by identifying several core principles to use as reference points for our analysis and recommendations. To this end, the Inquiry has provisionally identified several potential principles, including:

- Acknowledging and respecting treaty and Aboriginal rights. Additional principles could include the following:
- Promoting fair, timely, efficient and effective decision-making processes;
- Promoting participation by affected governments, First Nations, communities and other stakeholders;
- Promoting accountability and transparency;
- Promoting public education; and,
- Promoting harmonious relations between Aboriginal peoples and non-Aboriginal Ontarians.

*Question 1: Are these principles appropriate to guide the Inquiry's analysis and recommendations on treaty and Aboriginal rights? Or should there be others? If so, what should they be?*

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## **5. LAND CLAIMS POLICY AND ISSUES**

### **a. Number and Status of Land Claims<sup>2</sup>**

Professor Coyle reports that of the 242 land claims in Ontario received by the federal government since 1973, 13% (31 claims) are listed as settled. Twenty-four have either been rejected on legal grounds or the file has been closed. One hundred and sixteen claims are under review by the federal government and 21 are in negotiation. Forty-one of the claims filed in Ontario against the federal government are currently before the courts.

Professor Coyle reports that of the 116 formal land claims filed with the Ontario government since 1976, about 13 claims have been settled, 11 are being negotiated, 48 are currently being reviewed by Ontario to determine if the province will agree to negotiate the claims, 14 are described by Ontario as “inactive”, and 30 are before the courts.

Since 1976, only 11% of claims against Ontario have been settled. Professor Coyle notes, however, that “[t]hese settlements have been significant and often creative in their approach to righting historical wrongs.”<sup>3</sup>

Although the focus of the Inquiry’s deliberations will be on provincial policies and programs, the Inquiry recognizes the important role of the federal government in these issues. The federal Crown is, of course, the only signatory on most treaties in Ontario.

### **b. The Indian Commission of Ontario (ICO)**

Ontario established its first general process for addressing First Nations’ claims in 1976. The Indian Commission of Ontario (“ICO”) was established by a resolution of the Chiefs of Ontario and parallel Orders-In-Council by the federal and provincial governments in 1978. Professor Coyle’s paper summarizes the mandate and history of ICO.<sup>4</sup>

Between 1990-1999, 16 claims were settled through the ICO process. The ICO often became involved during periods of tension or occupations, such as when it facilitated an agreement between two First Nations, nine municipalities, a conservation authority and the federal and provincial governments related to the City of Brantford and Six Nations land claims.

At times, the ICO engaged historical fact-finders, neutral appraisers, or loss of use experts. These services required the consent of the parties and were designed to avoid

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<sup>2</sup> See generally Coyle at 30-33. Professor Coyle’s data is to the end of 2004. The Inquiry will update these figures for our final report.

<sup>3</sup> *Ibid* at 46.

<sup>4</sup> See generally Coyle at 41-47.

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costly and lengthy “wars of experts.” The ICO prepared drafts of potential settlements and coordinated and facilitated public consultations at the party’s request.

The majority of land claims negotiations facilitated by the ICO involved both the federal and provincial governments and one or more First Nations. The ICO also facilitated First Nation's policing agreements agreements.

The ICO process was not capable of resolving all issues brought before it. For example, issues could not enter the ICO process for facilitation unless all parties agreed. Several files lingered for years without significant progress. Moreover, ICO’s lack of enforcement powers meant that it could not require parties to reconsider their positions on specific issues. As a result, First Nation representatives stated that the ICO needed more effective powers to advance negotiations. On the other hand, government negotiators expressed concern about perceived bias in the approach of ICO facilitators.

In 1999, an independent review recommended improvements to the ICO process. At the same time, an all party-steering committee recommended renewing its mandate for another five years. Nevertheless, the federal Minister of Indian Affairs and Northern Development declined to renew the ICO’s orders-in-council. As a result, the ICO ceased operations in March 2000. Since then there has been no permanent tripartite body in Ontario to discuss or facilitate the resolution of land claims.

### **c. Land Claims In Ontario Since 2000**

Ontario continues to negotiate land claims. The province’s approach to land claims and negotiations are set out on the Ontario Secretariat for Aboriginal Affairs website.<sup>5</sup>

In April 2005, the Ontario Native Affairs Secretariat (ONAS) (now the Ontario Secretariat for Aboriginal Affairs) submitted a paper to the Inquiry called “The Resolution of Land Claims in Ontario: A Background Paper.” This paper is posted on the Inquiry’s web site.

The paper provides an overview of treaty making in Ontario, a summary of the division of powers between the federal and provincial governments and the impact this division has on land claims. The paper also sets out the significance of land claims to the many interested parties, including First Nations, governments, and private property owners.

The paper states that the provincial government is committed to settling land claims with First Nations and Canada, and that “clearly, it is in the public interest to find a fair and balanced resolution to Aboriginal land claims.”<sup>6</sup>

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<sup>5</sup> <http://www.aboriginalaffairs.osaa.gov.on.ca/english/negotiate/approach.htm>

<sup>6</sup> Ontario Native Affairs Secretariat submission to the Inquiry, *The Resolution of Land Claims in Ontario: A Background Paper*, at 7.

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According to ONAS, it is inevitable that land claims negotiations take a long time:

Ontario's experience is that, with rare exceptions, claim negotiations take years to reach fruition not because of impasses at the negotiating table, or because one of the parties is dragging its feet, but because successful claim negotiations, with their complex mix of legal obligation, long standing grievance, emotion, and once-and-for-all nature are very time-consuming undertakings.<sup>7</sup>

The paper details several time-consuming challenges facing the negotiation of land claims in Ontario. According to ONAS, these challenges "should make it plain that averaging the length of time between the receipt of a land claim and the completion of the implementation of a settlement is misleading if it is used as a measure of the responsiveness or good faith of any particular party."<sup>8</sup>

ONAS states that third party intervention in land claims negotiations can be useful in some cases but is not necessary in all. ONAS states that the ICO was necessary because there was a lack of qualified dispute resolution professionals at the time. ONAS argues that it may now be more cost-effective to employ dispute resolution experts on an as-needed basis rather than reestablishing an ICO-like institution.<sup>9</sup>

#### **d. Comments on Ontario's Land Claims Process**

The Inquiry has heard a great deal about the Ontario land and treaty claims process through our background papers, Research Advisory Committee members, consultations, and our own research. Professor Coyle summarizes several of the common criticisms of Ontario's land and treaty claims process:

- The process takes a long time: Unresolved claims now in negotiations have spent an average of 18.5 years in the system. And the backlog of outstanding land claims against the province is rising: in the last five years Ontario has settled four land claims, while 21 new land claims were filed against the province;
- The process lacks mechanisms, other than discussion, for resolving disagreements among the parties: if Ontario decides not to negotiate a claim that the First Nation believes is valid, court is the only alternative. Ontario has no equivalent of the federal specific claims commission that can review the government's decision and issue recommendations. Nor is there an administrative tribunal to review the decision<sup>10</sup>;
- The province typically will not accept a First Nation's request to arbitrate issues or support non-binding, independent legal opinions or neutral facilitation. As a result, there may be few tools or processes available to overcome impasses in negotiations.

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<sup>7</sup> *Ibid* at 35.

<sup>8</sup> *Ibid* at 34.

<sup>9</sup> *Ibid* at 35.

<sup>10</sup> The federal specific claims commission is controversial in its own right.

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- There is a significant lack of provincial government resources to support land claims negotiations and resolutions; and,
- Ontario's land claims policy lacks transparency and accountability.

Notwithstanding these criticisms, it is clear that the absence of the ICO or similar body has not prevented bilateral or trilateral discussions between First Nations and the provincial and/or federal governments. Over the last 10 years, there has been a proliferation of bilateral and multilateral initiatives. Indeed, there have been many successful negotiations between the province and Ontario First Nations respecting land and treaty claims and/or resource development.

Nonetheless, it is also clear that Aboriginal frustration with existing land claims policies and procedures is an important catalyst for Aboriginal occupations and protests.

#### **e. Recent Developments**

First Nation leaders and the current provincial government have both publicly committed to developing a "new partnership." In 2005, the province announced its "New Approach to Aboriginal Affairs" policy. This document contains several provincial commitments on Aboriginal issues, primarily in the areas of health and education.

There is also support for the revitalization of effective tripartite relations between First Nations, Canada, and Ontario. To this end, First Nations leaders, Canada and Ontario have recently agreed to re-establish an intergovernmental forum on a time-limited, experimental basis to revitalize relations among the governments. The "Rebuilding Canada-First Nations-Ontario Intergovernmental Relations" process was announced on April 12, 2005. Since then, the parties have been working to develop agendas, work plans, and processes for addressing issues of mutual concern.

From the Inquiry's perspective, the "Rebuilding Canada-First Nations-Ontario Intergovernmental Relations" process appears to be a positive development. Effective tripartite negotiations and processes are a necessary, but perhaps insufficient, step to constructively and peacefully address First Nations issues and reduce the risk of violence at occupations and protests. Effective land claims policies and processes are also needed.

To date, the Inquiry has heard both guarded optimism and some disappointment about the "Rebuilding Canada-First Nations-Ontario Intergovernmental Relations" process. Some observers and participants highlight the important precedent of having Canada, Ontario and First Nations return to any kind of intergovernmental table since the demise of the ICO approximately six years ago. Others appear discouraged by what they see as a lack of progress, institutional capacity, and/or commitment to ensure the process achieves its potential.

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It is unknown at this point what effect, if any, the occupation in Caledonia will have on provincial land claim policies or processes, consultation policies or processes, etc. News reports suggest that the provincial government may be reconsidering or updating some of these policies as a result of its experience at Caledonia.

**f. “Promise Keepers”**

Our two previous discussion papers emphasized our concern about the transparency and accountability of decision-making for police and government decision-makers in the police/government relationship and for policing occupations and protests. This concern is equally applicable for treaty and Aboriginal rights.

One approach to promote accountability and transparency was recommended in the 1985 Task Force to Review Comprehensive Claims Policy (the “Coolican Report”). The report, entitled *Living Treaties: Lasting Agreements*, recommended the appointment of an independent Commissioner for Aboriginal Land Claims Agreements. The Commissioner’s role was to “keep the promise” of the treaties by independently monitoring the progress of negotiations between the federal government and First Nations' and to report to the federal Parliament as needed.

The Commissioner for Aboriginal Land Claims Agreements differs somewhat from the treaty commissions that we will describe below. The Commissioner for Aboriginal Land Claims Agreements concept is an accountability mechanism while the treaty commissions have a more explicit role in facilitating discussions and public education.

The Coolican Report’s recommendation for an independent “promise keeper” is similar in some respects to other independent agencies that report to the federal or provincial legislature. For example, the Environmental Commissioner of Ontario is appointed by the Ontario Legislature to monitor and report on government compliance with the Environmental Bill of Rights (EBR) and to educate the public about their rights. The EBR allows Ontarians to comment when a ministry proposes a new Act, regulation or policy, or approves an instrument that may significantly affect the environment.

A First Nations or Aboriginal equivalent to the Environmental Commissioner could have a similar mandate. The actual commissioner would presumably be appointed jointly or after consultation with Ontario’s First Nations and Aboriginal communities.

A “Promise Keeper” or Environmental Commissioner-like office would likely promote accountability and transparency of decision-making on treaty and Aboriginal rights. It also appears consistent with several other principles that the Inquiry has provisionally identified to guide its analysis and recommendations. Such an office could:

- Independently and impartially assist governments, First Nations, and others to identify and negotiate treaty or Aboriginal disputes before an occupation or protest;

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- Independently and impartially assist governments, First Nations, Aboriginal and others to prioritize resources and issues;
- Hold governments, First Nations, and others publicly accountable for their role in the tripartite process or other processes or issues; and,
- Improve public education, participation and communication.

#### **g. Guiding Principles on Land Claims Issues**

In addition to the provisional principles identified earlier, the Inquiry has also tentatively adopted the six criteria identified by Professor Coyle that should be used to design an effective process for resolving land claims in Ontario:

- It should be timely;
- It should be fair and perceived by all parties as fair;
- It should address the underlying grievance behind the claim and contribute to reconciliation between First Nations and the Crown;
- It should take into account the division of responsibilities between the federal and provincial governments, without allowing that division to cause delays in the settlement of claims;
- It should protect the interests of the general public; and
- It should address systemic disincentives that discourage governments from negotiating settlements in a timely manner.<sup>11</sup>

Professor Coyle also recommends that negotiation, in a process agreed to by all parties that includes methods of breaking impasses, remains the most effective method of resolving land grievances in a manner that honours the relationship of the parties and addresses their need for flexibility. Formal litigation should be a last resort.

*Question 2: What is needed to ensure the current “Rebuilding Canada-First Nations-Ontario Intergovernmental Relations” process is successful?*

*Question 3: Are the criteria identified by Professor Coyle appropriate long-term objectives for a provincial land claims process? Or should there be others? If so, what should they be?*

*Question 4: What kind of institutional structure(s) or processes are necessary to meet any recommended long-term objectives for a provincial land claims process? For example, what structure(s) or processes are needed to ensure an Ontario land claims process is fair, independent, and efficient?*

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<sup>11</sup> Coyle at 47.

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*Question 5: What lessons, if any, can policy-makers draw from recent incidents at Caledonia, Big Trout Lake, and elsewhere about best practices for addressing long-standing treaty or Aboriginal claims?*

*Question 6: Should Ontario establish an independent office of the Legislature similar to the Provincial Auditor or the Environmental Commissioner of Ontario to oversee and monitor the relationship between the Crown and First Nations? Would this office promote transparency and accountability?*

## **6. PROVINCIAL REGULATION OF LAND AND RESOURCES**

The Crown owns approximately 87% of the land in Ontario. The Ministry of Natural Resources (MNR) is responsible for managing Crown lands and natural resources, including fish, wildlife, and forests. The responsibilities of the Ministry of Northern Development and Mines (MNDM) include the *Mining Act*, mineral exploration and mining activities on Ontario.

The Inquiry has heard that the regulation of land and natural resources is a continuing source of tension and frustration between Aboriginal peoples and the provincial government. Indeed, we have heard that the regulation of these resources is the *major* catalyst for occupations and protests in Ontario.

The ongoing dispute at Big Trout Lake in northern Ontario is an instructive example of how a resource development issue can trigger an Aboriginal rights protest, stall economic development, and create uncertainty for First Nations and non-Aboriginal communities alike. Big Trout Lake also demonstrates that northern Ontario is likely to be the site of increasing tension between First Nations, the provincial government, and resource companies over the management and development of resources within traditional Aboriginal territories.<sup>12</sup>

### **a. Aboriginal Peoples and MNR**

Jean Telliet's background paper for the Inquiry summarizes the argument made by many First Nations about the regulatory regime governing resources in Ontario:

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<sup>12</sup> The conflict arose when a mining company staked a claim in the Big Trout Lake area, the traditional territory of the Kitchenuhmaykoosib Inninuwug (KI) First Nation and wanted to begin preliminary work at the site. Members of the First Nation subsequently blockaded a winter road. The First Nation asserted that their inherent rights were violated by the Ontario government when it granted the mining company a permit pursuant to the *Mining Act*. The mining company withdrew from the area and filed a \$10-billion lawsuit and injunction application against the First Nation. KI brought an injunction application against the mining company and counterclaimed for \$10-million in damages. As well, KI filed a third party claim against the Province of Ontario for, among other things, a declaration that the *Mining Act* is unconstitutional.

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Aboriginal peoples have always had traditional territories. They have always accessed (or tried to access) those territories in order to use the natural resources. The greater Canadian public sees these same lands as ‘public lands’. The fundamental difference between these two positions should not be underestimated.<sup>13</sup>

. . . the natural resources regulatory regime in Ontario is still implemented largely as it was prior to 1982 – government management and control and open access. While there has been some movement (largely as a direct result of Aboriginal rights disputes or court judgments), and there are some policies that give government officials discretion with respect to Aboriginal rights, by and large the natural resources regulatory regime still does not allow, recognize, respect or understand Aboriginal rights and does not include the meaningful participation of Aboriginal peoples. In general, the regime operates as if this crucial element – Aboriginal rights - is the same as every other part of the regulatory regime.<sup>14</sup>

The Union of Ontario Indians has told us that:

[It] is becoming increasingly difficult for First Nation leaders to engage community members in supporting any discussion with governments and certain ministries, the MNR in particular. There is a tremendous sense among community members that, because they have been ignored and, in many circumstances, harassed for so long, there is no point in wasting their time trying to work with the MNR. In a few cases, some community members even become distrustful of their own Councils when they engage in discussions with the MNR about resource management issues.<sup>15</sup>

Taken together, our research papers, submissions to the Inquiry, and comments from our consultations can be summarized as follows:

- MNR policies and enforcement activities are sometimes inconsistent with Aboriginal and treaty rights;
- Aboriginal peoples often lack meaningful involvement in MNR policy development; and,
- MNR processes lack transparency and accountability.

The Ministry of Natural Resources provided two extensive submissions to the Inquiry on these issues and others.<sup>16</sup> The first submission outlines the mandate of MNR and its

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<sup>13</sup> Teillet at 68.

<sup>14</sup> *Ibid* at 69.

<sup>15</sup> Union of Ontario Indians, *Resolving Rights Based Issues and Land Claims*, at 20.

<sup>16</sup> See MNR’s two submissions to the Inquiry, *The Regulatory Role of the Ontario Ministry of Natural Resources and the Ministry’s Relations with Aboriginal People* (hereinafter *Regulatory Role of MNR*) and

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programs and policies governing resource management. The second discusses MNR's enforcement activities. Both submissions discuss the ministry's relationship with Aboriginal peoples in Ontario.

In the first submission, MNR "acknowledges that the historical policies and practices of provincial and federal governments have resulted in ongoing disenfranchisement and displacement of Aboriginal people from their land and traditional practices in Canada."<sup>17</sup> This submission concludes that:

The examples provided throughout this paper demonstrate [MNR's] awareness and sensitivity to both the constitutional protections afforded Aboriginal people, and the unique perspectives they can bring to bear on resource conservation and management issues. Where appropriate within its legislative mandate, the Ministry has also made significant efforts to assist Aboriginal communities in realizing improved economic benefits in the province.

[R]elationships continue to improve and with that, better communication; better understanding of one another's perspectives, and less conflict will follow. [MNR] staff have played a significant role in the development and enhancement of relationships with Aboriginal people. This is not to say that disputes will not occur; they are inevitable as Aboriginal people and non-Aboriginal people alike seek greater clarity and certainty in a dynamic and evolving area of law, and as competition increases for limited resources.<sup>18</sup>

The first submission identifies several challenges that complicate its relationship with Aboriginal peoples, including:

- Jurisdictional questions between the federal and provincial governments;
- Continuing uncertainty about the nature and scope of s. 35 *Charter* rights;
- The expectation that government policies and legislation will change quickly;
- There have been six different provincial governments since 1982, each with its own legislative and policy agenda; and
- Differing view regarding the nature and scope of treaty rights and the meaning and intent of the treaties themselves.<sup>19</sup>

#### **b. Best Practices**

Notwithstanding these tensions, it is clear that there are many positive examples of the provincial government, First Nations and Aboriginal communities, and others

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*Memo from George Ross to Kim Twohig, Feb.3, 2006* (hereinafter *George Ross Memo*) posted on the Inquiry's website at [www.ipperwashinquiry.ca/policy\\_part/submissions/index.html](http://www.ipperwashinquiry.ca/policy_part/submissions/index.html).

<sup>17</sup> *Regulatory Role of MNR* at 5.

<sup>18</sup> *Ibid* at 29-30.

<sup>19</sup> *Ibid* at 5-7.

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successfully negotiating and managing natural resources on traditional territories, including:

- Saugeen Ojibway Nations and Ontario Government Commercial Fishery Agreement for the Waters around the Bruce Peninsula;
- Anishinabek/Ontario Fisheries Resource Centre;
- Anishinabek/Ontario Resource Management Council;
- Northern Boreal Initiative;
- The Wikwemikong Community Forestry Management Agreement; and,
- The Interim Hunting Agreement between the Algonquins of Golden Lake and Ontario.

The Inquiry's research papers and submissions outline a number of best practices for achieving negotiated, constructive, long-term agreements on resource development, use, and management. The Inquiry expects to discuss best practices in our final report.

### **c. Duty To Consult And Accommodate**

Three recent Supreme Court of Canada cases, *Haida Nation*, *Taku River*, and *Mikisew* have made it clear that the federal and provincial governments have a duty to consult with Aboriginal peoples and accommodate their interests when governments are considering actions that might affect those interests.<sup>20</sup> *Mikisew* is particularly relevant to Ontario, since it involved a treaty.<sup>21</sup>

The scope of the duty to consult and accommodate is potentially very wide: it could be triggered in all circumstances where the province has actual or constructive knowledge of an Aboriginal rights or title claim and is considering actions that might negatively affect those rights or title. This decision could affect provincial initiatives in a broad range of areas in which the province can directly affect Aboriginal interests, including natural resources, the environment, the management and sale of Crown lands, local works and undertakings, the protection of heritage and cultural property, the issuance of fishing licenses, and relevant "all matters of a merely local or private nature" in the province.

Ms. Teillet states that the new constitutional duties set out in *Haida Nation* and *Taku River* require both procedural and substantive changes to the existing natural resources regulatory regimes and requires the full participation and co-operation of Aboriginal peoples. She recommends developing:

a long-term solution if we are to avoid legal and economic uncertainty. There is a

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<sup>20</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

<sup>21</sup> Treaties 3, 5 and 9, the numbered treaties covering parts of Ontario, include a provision identical to the treaty at issue in *Mikisew*.

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need for a new ‘orderly’ process to implement this duty. Indeed the Supreme Court of Canada suggested that new mechanisms and institutions might be appropriate for the implementation of this duty. It seems unlikely that this duty can even begin to be implemented without such changes. And there is urgency here. The duty is going to be triggered in a wide variety of statutory and policy contexts. While the need is for a long-term solution – it cannot be long in the coming.<sup>22</sup>

Ontario’s 2005 “New Approach to Aboriginal Affairs” committed the province to drafting consultation guidelines.<sup>23</sup> In June 2006, the Province released “Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights.”<sup>24</sup>

The Inquiry expects to consider the duties and issues raised by these cases and Ontario’s draft guidelines in our final report. For present purposes, however, we will simply state that these cases no doubt require the federal and provincial governments to take a new approach in their dealings with Aboriginal peoples.

#### **d. Transparency and Accountability**

New consultation and accommodation policies may enhance the transparency and accountability of provincial government decision-making and activities. Our two previous papers identified several potential accountability mechanisms respecting MNR activities during an Aboriginal occupation or protest. The Inquiry may also want to identify additional mechanisms or processes to enhance transparency and accountability of MNR’s policy or enforcement initiatives. One conceivable option is to recommend that MNR and other relevant ministries (such as MNDM) develop an Aboriginal equivalent of the Statement of Environmental Values.<sup>25</sup>

*Question 7: What kind of institutional structure(s) or processes are required to promote peaceful, negotiated, sustainable resource management and development in Ontario? What principles or best practices are appropriate or helpful to meet this objective?*

*Question 8: How can relations between MNR and First Nations or Aboriginal peoples in Ontario be improved at a local or enforcement level?*

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<sup>22</sup> Teillet at 72.

<sup>23</sup> To date, Alberta, Manitoba, and Quebec have released draft consultation policies, guidelines or discussion papers for input. British Columbia, Saskatchewan, Nova Scotia, and New Brunswick have committed to developing consultation policies.

<sup>24</sup> The draft guidelines are posted at <http://www.nativeaffairs.jus.gov.on.ca/english/news/draftconsult.html>.

<sup>25</sup> Ontario requires each designated ministry to develop a Statement of Environmental Values (SEV). The SEV contains information about how the ministry will apply the Environmental Bill of Rights to ministry decisions. SEVs are posted on the Environmental Registry for public review and comment.

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*Question 9: How can or should transparency and accountability for MNR policies and activities be improved? Should MNR and other designated ministries develop a statement of principles or values, similar to a Statement of Environmental Values, that explains how they are addressing Ontario's relationships and obligations with Aboriginal peoples?*

## **7. ABORIGINAL ARCHAEOLOGICAL, BURIAL AND OTHER SACRED SITES**

Part Two of the Inquiry has heard that Aboriginal heritage sites, including archeological, burial and other sacred sites are important “flashpoints” for Aboriginal protests and occupations.<sup>26</sup> Aboriginal occupations and protests at Oka, Ipperwash, and involving the Chippewas of Nawash are but a few examples.

Professor Darlene Johnston's background paper for the Inquiry discusses the importance of Aboriginal archaeological, burial and other sacred sites at length. Professor Johnston emphasizes that an understanding of history, origin stories, and the unique connection that Aboriginal peoples have to the land and the burial sites of their ancestors is key to understanding why Aboriginal people are willing to take to the barricades in order to protect these sites. Professor Johnston explains that European settlers demonstrated little respect for Aboriginal worldviews and traditions of sacredness. Aboriginal peoples ability to protect their heritage sites was severely affected by the loss of their land to European settlers and the subsequent loss of control over their lives.

### **a. Nature and Location of Sites**

Aboriginal peoples lived throughout most of Ontario for many thousands of years prior to European contact. As a result, Aboriginal heritage sites occur throughout the province. Nevertheless, the location of Aboriginal archaeological, burial and other sacred sites is sometimes difficult to determine. It may also sometimes be difficult to identify the appropriate First Nation to consult with.

The Chiefs of Ontario warn against simple or general definitions because “the definition of what is “sacred” is determined by the First Nation community itself and [is] reflective of the community's values of what is sacred.”<sup>27</sup> As a result, the Chiefs argue against a “pan-Aboriginal” approach to this issue. The Chiefs also note that not all burial sites could be or were protected by reserve boundaries and that it is precisely because the location of burial grounds lies within traditional and/or treaty territories – but outside reserve boundaries – that the potential for conflict arises.<sup>28</sup>

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<sup>26</sup> See generally the DVD of the Inquiry's December 9th, 2005 forum on Aboriginal burial and other sacred sites, available upon request.

<sup>27</sup> Chiefs of Ontario draft submission to the Inquiry at 31.

<sup>28</sup> *Ibid* at 32

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A provincial representative at the Inquiry's December 9<sup>th</sup>, 2005 consultation on Aboriginal burial sites explained that the *Heritage Act* and the regulation of archaeologists have greatly improved over the past decades. Today, archaeological studies are routine on many development projects in Ontario: in 2004, over 1,400 archaeological projects were undertaken in the province by licensed archaeologists and over 800 archaeological sites were reported. Over 300 of these sites were subject to some form of excavation by archaeologists to document the human history of these places.<sup>29</sup>

### **b. Current Provincial Legislation**

Given this context, it is appropriate to ask whether and how Aboriginal heritage sites are addressed or protected under current provincial legislation.

There are currently five provincial Acts that directly or indirectly affect Aboriginal archaeological, burial and other sacred sites in Ontario.<sup>30</sup> Municipalities, regional governments, provincial agencies, and developers are also often involved in the identification and protection of Aboriginal heritage sites.

Ontario's legislative regime for protecting Aboriginal heritage sites has been strongly criticized. Professor Ron Williamson, an expert in Aboriginal archaeological sites and chief archaeologist and managing partner of Archaeological Services Inc., told our December 9<sup>th</sup> consultation that:

The provincial archaeological conservation legislative mandate has been one of an unqualified success at destroying these valuable heritage legacies through excavation, and an unqualified disaster at protecting them.<sup>31</sup>

The Chiefs of Ontario have also told the Inquiry: "Current federal and provincial legislation does not adequately protect the burial grounds of the First Peoples."<sup>32</sup>

Critics of the current provincial regime raise several related issues. Taken together, the prevailing objections to the current provincial regime can be summarized as follows:

- Provincial laws do not adequately protect or respect Aboriginal heritage sites;
- Overlapping provincial regulatory regimes, such as the *Heritage Act* and *Cemeteries Act*, need to be coordinated more clearly, effectively and consistently;

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<sup>29</sup> Comments by Neil Ferris, Regional Archaeologist, Ontario Ministry of Culture at our Dec. 9<sup>th</sup> consultation.

<sup>30</sup> These include the *Environmental Assessment Act*, the *Planning Act*, the *Aggregate Resources Act*, the *Ontario Heritage Act* and the *Cemeteries Act*. The first three Acts govern planning and development. The fourth and fifth Acts address the investigation and disposition of Aboriginal archaeological and burial sites.

<sup>31</sup> Comments by Professor Ron Williamson, Archaeological Services Inc. at our December 9<sup>th</sup> consultation.

<sup>32</sup> Chiefs of Ontario draft submission at 32.

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- More effective and timely consultation is needed with First Nations on policy development and with respect to specific sites; and,
- Municipalities, developers and others need provincial leadership and support to fulfill their responsibilities effectively and consistently.

We were told that failure to address these issues would result in continued desecration of Aboriginal heritage sites.

The Inquiry is also aware that there are sometimes fundamental disagreements about the appropriate response to the discovery of an Aboriginal heritage site. First Nations, developers, municipalities, government agencies, archeologists, conservation authorities, private landowners, cemetery managers and others may either disagree about what should be done or who should bear the economic risk or costs.

Given the complexity of issues and the number of potential parties involved, this situation may suggest that the provincial government should work with First Nations, archeologists, municipalities, developers and others to develop best practices, protocols, and share resources.

Another potential response would be for the province to enact dedicated Aboriginal heritage sites legislation.

### **c. Best Practices**

Notwithstanding these comments, many positive developments and best practices are also apparent, including:

- The Founding First Nations Circle.<sup>33</sup>
- The best practices developed by the Town of Midland when a Huron/Wendat burial site was discovered during the development of a site within the town limits.
- “Archeological master plans” being developed by the City of Toronto and other municipalities.<sup>34</sup>
- Protocols and practices developed by Parks Canada, the Office of the Chief Coroner, police services, Aboriginal organizations and others when Aboriginal heritage sites are discovered.

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<sup>33</sup> The Founding First Nations Circle originated in the Ontario Realty Corporation’s development for the Seaton lands in Pickering. The Circle helped secure an acceptable resolution to the development of the Seaton site. The Circle also helped secure a site disposition agreement with York Region during the widening of Teston Road in the City of Vaughan. The Circle will also be involved in talks with the Province and others about an archeological dig at a 500-year old Huron-Wendat site called Skandatut discovered in Vaughan.

<sup>34</sup> These master plans map known and likely archaeological sites. These can assist municipalities and developers avoid disturbing archeological resources (many of which are Aboriginal in origin) before breaking ground on construction projects.

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- It appears that provisions in the *Cemeteries Act* and regulations referring to an “unapproved Aboriginal peoples cemetery” may be changed.

*Question 10: Should the province bring together provincial officials, First Nations, provincial agencies, municipalities, developers, archaeologists, and others to promote leadership, consultation, develop best practices, protocols, and share resources in this area?*

*Question 11: Is dedicated provincial Aboriginal heritage legislation needed to promote clarity, consultation and consistency in the treatment of Aboriginal heritage sites or is the current legislative regime sufficient?*

*Question 12: How can the province and/or others support organizations like the Founding First Nations Circle to promote effective and appropriate consultations with First Nations?*

## **8. LESSONS FROM OTHER PROVINCES**

The Inquiry conducted an informal survey of other provinces and territories to see if we could identify any best practices or programs that advanced the principles we have provisionally identified.

Needless to say, every province and territory has its own unique history and issues. Nevertheless, we believe we have identified two institutions or initiatives that might have some relevance in Ontario. The first is the office of the treaty commissioner. The second is the legislative and policy program initiated by the B.C. provincial government.

### **a. Treaty Commissions**

British Columbia, Saskatchewan, and Manitoba have treaty commissions established by agreements among Canada, the provinces, and First Nations organizations.<sup>35</sup> These commissions are independent, neutral bodies responsible for facilitating treaty negotiations between governments and First Nations. The commissions themselves do not negotiate treaties. Rather, they support parties in treaty negotiations. The BC Treaty Commission describes its role as follows:

The Treaty Commission's primary role is to oversee the negotiation process and ensure that parties are being effective and making progress in negotiations. In carrying out this role, the Treaty Commission:

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<sup>35</sup> For more information, see <http://www.bctreaty.net/> (British Columbia), <http://www.otc.ca/> (Saskatchewan), and <http://www.trcm.ca/> (Manitoba).

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- Accepts First Nations into the treaty process and assesses when the parties are ready to negotiate;
- Monitors and reports on the progress of negotiations and encourages timely negotiations by helping the parties to establish meeting schedules and by monitoring deadlines;
- Offers advice and chairs key meetings at treaty tables, when requested;
- Assists the parties in developing solutions and in resolving disputes;
- Facilitates and coordinates high level talks among the Principals and helps to identify priority issues and opportunities; and
- Develops policies and procedures for the six-stage treaty process.<sup>36</sup>

Ontario is different from B.C. in that B.C. is still negotiating new treaties. Nevertheless, the treaty commission concept is interesting because it is an independent, jointly-appointed institution whose general mandate is to facilitate negotiations between governments and First Nations.

Treaty commissions also have public education mandates that are discussed below.

#### **b. British Columbia**

British Columbia is considered by many observers to be the most active province with respect to acknowledging and negotiating treaty and Aboriginal rights. Since *Haida Nation* and *Taku River* in 2004, the provincial government and First Nations in B.C. have undertaken many important initiatives.

For example, in 2005, leaders from the First Nations Summit, the Union of BC Indian Chiefs, and the BC Assembly of First Nations signed a “Leadership Accord” creating the First Nations Leadership Council, the purpose of which is to represent the interests of First Nations in British Columbia and to work to bring about changes to government policy that will benefit all First Nations in B.C.

The provincial government and First Nations in B.C. also developed the *New Relationship*, a document supported by resolutions of the Union of BC Indian Chiefs, the Special Joint Assembly of First Nations Chiefs, and the First Nation Summit. Some of the commitments in the *New Relationship* and elsewhere include agreements to:

- Establish new institutions to negotiate government-to-government agreements for shared decision-making regarding land use planning, management, tenuring and resource revenue and benefit sharing;
- Establish funding and structures to support First Nations’ capacity and effective participation in the processes;
- Develop a new consultation and accommodation framework;

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<sup>36</sup> See <http://www.bctreaty.net/>.

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- Develop new mechanisms for land and resource protection, including interim agreements;
- Develop impartial dispute resolution processes and work towards a decrease in conflict leading to litigation. As part of this process, the Province has committed to review its Aboriginal rights cases and litigation approach to ensure they are in keeping with the *New Relationship* principles;
- Regular joint meetings between the First Nations Leadership Council and provincial Deputy Ministers to work to advance the *New Relationship*; and,
- Create an evaluation process for monitoring and measuring the achievements of the *New Relationship* vision and action plans.

In June 2005, the government of British Columbia created the Ministry of Aboriginal Relations and Reconciliation.

In September 2005, the B.C. government announced a \$100-million First Nations New Relationship Trust Fund. The purpose of the New Relationship Trust is to provide First Nations with the tools, training and skills to participate in the New Relationship, including effective participation in land/resource management, land-use planning processes and to develop social, economic and cultural programs.

The First Nations Leadership Council and the province are committed to public education campaign about the *New Relationship* and public progress reports.

The Inquiry's survey and consultations suggests that the B.C. government's initiatives represent a kind of high water mark for provincial policy and initiatives regarding treaty and Aboriginal rights in Canada. The B.C. government's policy initiatives, engagement with First Nations, and website probably represent a high-water mark of transparency and accountability as well.<sup>37</sup>

*Question 13: Should Ontario have a Treaty Commission similar to those in British Columbia, Saskatchewan and Manitoba?*

*Question 14: What lessons, if any, can policy-makers draw from B.C.'s approach to First Nations or Aboriginal issues? What are the challenges and opportunities of this approach?*

## **9. PROVINCIAL LEADERSHIP, RESOURCES, CAPACITY AND ORGANIZATION**

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<sup>37</sup> The website of the B.C. Ministry of Aboriginal Affairs and Reconciliation contains detailed information about the provincial government's policies, information about specific negotiations and treaties, and a series of progress and implementation reports. See generally, [www.gov.bc.ca/bvprd/bc/channel.do?action=ministry&channelID=-536896053&navId=NAV\\_ID\\_province](http://www.gov.bc.ca/bvprd/bc/channel.do?action=ministry&channelID=-536896053&navId=NAV_ID_province)

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The Inquiry has heard from First Nations leaders and others about the pressing need for resources to build the capacity within First Nations communities to address treaty and Aboriginal rights, particularly with regards to the government consultation and accommodation requirements outlined above. The Inquiry has heard First Nations leaders and others discuss the need for improved leadership capacity within the provincial government as well.

Decisions about provincial leadership, capacity and resources obviously have an important effect on treaty and Aboriginal rights in Ontario. They are also obviously complex issues in their own right. Any consideration of these issues, moreover, necessarily requires decision-makers to balance financial and other resources that might be devoted to treaty and Aboriginal rights issues against other Aboriginal or public priorities. Nevertheless, the Inquiry believes it is important to ask whether or how the provincial government can enhance its leadership, capacity and resources dedicated to these areas.

Some commentators also recommend that the provincial government establish a dedicated ministry for Aboriginal affairs. At present, British Columbia is the only province that has a ministry or department dedicated to Aboriginal affairs and whose minister is solely responsible for this area. The Ontario Secretariat for Aboriginal Affairs (OSAA) is a dedicated secretariat within the Ontario Ministry of Natural Resources. OSAA's predecessor, the Ontario Native Affairs Secretariat (ONAS), was a secretariat within the Ministry of the Attorney General. The Inquiry has heard arguments for and against alternative organizational structures.

*Question 15: In addition any potential initiative identified in this paper, what is needed to promote First Nations and Aboriginal people's capacity to participate fully in consultation processes with governments?*

*Question 16: In addition to any potential initiative identified in this paper, how can or should the province enhance its leadership, resources or capacity dedicated to treaty and Aboriginal rights in Ontario? What are the challenges and opportunities of any recommended initiatives?*

*Question 17: How can the province enhance its organizational capacity to address treaty and Aboriginal rights issues? Is the present organizational structure appropriate or sufficient? Should the province establish a dedicated Ministry of Aboriginal Affairs?*

## **10. EDUCATION**

Education is a complex subject that the Inquiry will not be able to address in detail. Nonetheless, the subject is relevant to us because we have consistently heard that

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education about Aboriginal peoples, their history, current concerns and aspirations will likely improve relationships between Aboriginal peoples and non-Aboriginal peoples, reduce racism, and reduce the risk of violence in Ipperwash-like situations. For example, Ontario Regional Chief Angus Toulouse told the Inquiry that:

The general public lacks the understanding about our inherent rights, and our aspiration for our future generations. There needs to be more focus on providing the general public with the necessary sources to educate themselves regarding our principles, values and future direction....The government must commit to work with First Nations to promote effective public education regarding First Nation rights, histories and future aspirations.<sup>38</sup>

It can also be argued that the likelihood of violence increases when the non-Aboriginal population, especially those most immediately affected by the Aboriginal peoples' action, have little knowledge or understanding of the rights at issue. As a result, the Inquiry is likely to consider general recommendations in this area.

#### **a. The Public School System**

The Ontario Ministry of Education (MOE) sets the curriculum for public elementary and high schools. Over the years, the Ministry has included more Aboriginal perspectives and content in the public school curriculum. In September 2005, for example, the Ministry changed the curriculums in several areas to include more Aboriginal perspectives, histories, and examples. The Ministry has also hired Aboriginal educators to help develop new curriculums and consulted with the Chiefs of Ontario to assist with Aboriginal issues and perspectives.

Despite these and other developments, the Inquiry has heard of some difficulties in expanding or supporting native studies programs. For example, there are currently a number of Native Studies courses in the high school curriculum, but they are not mandatory. As a result, it appears that the majority of secondary schools in Ontario do not offer these courses consistently or at all. The Inquiry has been told that there is a lack of continuing education and other resources for teachers in Aboriginal issues.

#### **b. Public Education in General**

The Union of Ontario Indians recommends that a joint public education program on treaties, First Nation history and contemporary issues be developed that is relevant to local communities and treaty areas. The Union further recommends that each PTO (Political Territorial Organization) be provided resources to carry out this work within their respective treaty areas. They also recommend that support be provided for existing

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<sup>38</sup> Ontario Regional Chief Angus Toulouse speaking at the March 8 and 9, 2006 Chiefs of Ontario Special assembly with the Inquiry, available on the Inquiry's website.

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processes (like the Nijii Circle in North Bay) that promote media awareness and opportunities for First Nations to tell their own stories.

### **c. Treaty Commissions**

As mentioned above, three provinces have Treaty Commissions whose mandates include providing public education about treaties and the relationship between First Nations and non-First Nations peoples. These commissions appear to undertake an impressive array of public education initiatives.<sup>39</sup> To our knowledge, there is no equivalent organization in Ontario.

*Question 18: How can the province, Aboriginal organizations and others promote curriculums or resources that reflect First Nations and Aboriginal issues, histories and current events in public schools?*

*Question 19: What steps can governments and Aboriginal organizations take to improve public education in general about First Nations and Aboriginal issues, histories and current events?*

*Question 20: Should Ontario have a Treaty Commission with an explicit public education mandate?*

## **11. CONCLUSION**

As noted above, the purpose of this paper is to provide parties with notice of the issues that Part Two is considering. Parties are encouraged to consider some or all of these questions and the issues raised in the discussion papers in their written and oral submissions.

Please contact me with any questions or comments.

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<sup>39</sup> The B.C. Treaty Commission maintains a web site, produces annual reports, newsletters, special publications, videos and television documentaries. Commissioners deliver presentations to community forums, business organizations, schools and post-secondary institutions. The B.C. Commission also produces a Teacher's Guide that includes background information and lesson plans on treaty making and self-government. The Teacher's Guide is provided to every elementary school in B.C. The Saskatchewan Office of the Treaty Commissioner (OTC) has produced a teaching manual and has developed a Treaty Information Kit for schools that includes curriculum supplements, videos and books about the history of treaties. The OTC also trains teachers, maintains a Speakers Bureau and a Learning Centre.

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**APPENDIX A**  
**QUESTIONS ON TREATY AND ABORIGINAL RIGHTS**

- Question 1: Are these principles appropriate to guide the Inquiry's analysis and recommendations on treaty and Aboriginal rights? Or should there be others? If so, what should they be?*
- Question 2: What is needed to ensure the current "Rebuilding Canada-First Nations-Ontario Intergovernmental Relations" process is successful?*
- Question 3: Are the criteria identified by Professor Coyle appropriate long-term objectives for a provincial land claims process? Or should there be others? If so, what should they be?*
- Question 4: What kind of institutional structure(s) or processes are necessary to meet any recommended long-term objectives for a provincial land claims process? For example, what structure(s) or processes are needed to ensure an Ontario land claims process is fair, independent, and efficient?*
- Question 5: What lessons, if any, can policy-makers draw from recent incidents at Caledonia, Big Trout Lake, and elsewhere about best practices for addressing long-standing treaty or Aboriginal claims?*
- Question 6: Should Ontario establish an independent office of the Legislature similar to the Provincial Auditor or the Environmental Commissioner of Ontario to oversee and monitor the relationship between the Crown and First Nations? Would this office promote transparency and accountability?*
- Question 7: What kind of institutional structure(s) or processes are required to promote peaceful, negotiated, sustainable resource management and development in Ontario? What principles or best practices are appropriate or helpful to meet this objective?*
- Question 8: How can relations between MNR and First Nations or Aboriginal peoples in Ontario be improved at a local or enforcement level?*
- Question 9: How can or should transparency and accountability for MNR policies and activities be improved? Should MNR and other designated ministries develop a statement of principles or values, similar to a Statement of Environmental Values, that explains how they are addressing Ontario's relationships and obligations with Aboriginal peoples?*

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- Question 10: Should the province bring together provincial officials, First Nations, provincial agencies, municipalities, developers, archaeologists, and others to promote leadership, consultation, develop best practices, protocols, and share resources in this area?*
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