

**IPPERWASH INQUIRY
CONSULTATION ON DRAFT PAPER “ADDRESSING
ABORIGINAL LAND AND TREATY RIGHTS IN ONTARIO: AN
ANALYSIS OF PAST POLICIES AND OPTIONS FOR THE
FUTURE” by Michael Coyle**

**Friday, April 29, 2005
10:00 a.m. – 4:00 p.m.
Holiday Inn on King
Toronto**

NOTES

- 1. Opening prayer:** Nishnawbe Aski Nation Grand Chief Stan Beardy
- 2. Participants:** See Appendix A, attached
- 3. Agenda:** See Appendix B, attached
- 4. Introduction**

Peter Russell welcomed the participants. He noted that a roundtable meeting with experts on the paper was held on February 4, 2005. He then introduced Commissioner Sidney Linden.

Commissioner Linden thanked the participants, Michael Coyle for his work on the paper, and Peter Russell for chairing the session. The Inquiry wanted to hear the parties' views on the paper, and the land and treaty rights issues. He noted that the Federal government had not taken up the Inquiry's invitation to participate.

Nye Thomas explained the focus of Part 2 of the Inquiry and its aim of developing policy recommendations on preventing violence in similar circumstances to the Ipperwash incident.

5. Overview of Paper

Michael Coyle outlined the highlights and recommendations of the paper. It dealt with two main topics:

- How are Ontario and Canada dealing with land and treaty disputes?
- What changes should Ontario and Canada make in the policy and processes of resolving land and treaty disputes?

Treaties, according to the Supreme Court of Canada, engage the “honour of the Crown.” Both Ontario and Canada have failed to observe treaties; Canadian governments violated

First Nations' political and legal rights and took away First Nations' land. Particularly in the last 20 years, First Nations filed many claims alleging that governments broke the law in different ways.

Canadian courts have set out the Crown's obligations to define, recognize and implement treaty rights. Ontario has established no law or policy to do this. While some good settlements have been reached, according to Coyle, 103 out of 116 disputes remain unresolved.

Coyle's premise in the paper was that disputes over land and treaty rights should be settled in a timely way, through a process that appears fair to a reasonable observer. Coyle reviewed the paper's findings on timeliness. Ontario takes on average 6.5 years to review a claim, once all research has been completed. On average, settled claims took 15 years. Claims that alleged Ontario acted illegally have been in the system an average of 19.2 years. Extrapolating from the fact that Ontario received 21 new claims in the past five years, while only settling four, Ontario will never settle its outstanding claims.

There are three main flaws in Ontario's approach:

- Ontario lacks a dispute resolution mechanism for negotiated claims when the process is stalled, not even to seek non-binding opinions on legal issues.
- The current process is not fair. Since there is no independent review of claims, the Ontario government is in an inherent conflict of interest when it decides on whether a claim is valid. There is no recourse to an independent third party.
- The process is not timely. The government can freeze the process for political or legal reasons. Because of high costs, it is hard for First Nations to take disputes to court.

The paper contains recommendations for action by Ontario, based on the premise that negotiation, rather than going to court, is the best track for resolving disputes. Coyle mentioned recommendations such as:

- Make a dispute resolution process available for all claims. Could range from non-binding tools such as access to a legal opinion and escalate according to time frames to binding arbitration.
- Establish a "keeper of the process." This would be a new role, responsible for supervising the completion of tasks within agreed time limits, unless all parties agree to waive a particular time limit.
- Increase resources for reviewing and negotiating claims. Increasing the resources (funding and staff) of the Ontario Native Affairs Secretariat (ONAS) would enable the Province to reduce the time to review and resolve claims.

6. Discussion

a) Ontario Government Update

Doug Carr referred to a paper that the Province distributed at the meeting, "The Resolution of Land Claims in Ontario: A Background Paper," dated April 27, 2005. It deals only with land claims and not other rights and disputes. Carr said that Ontario is

committed to timely and fair settlement of land claims. He gave reasons why claims take so long to settle. Ontario is seeking finality and closure in each case. Also, Cabinet approval, working out the impact on third parties and referenda among the First Nations take time.

Carr said that improvements should be made in the process, such as better coordination with the Federal government and perhaps a roster of dispute resolvers available when needed, not a permanent body. He doubted that the Province's review process could be shortened to less than three years. There could be more outreach and information provided to potential claimants to ensure claims are submitted in good form. Ontario wants to "empower the parties" in the process.

Carr referred to recent announcement of a new process for Ontario government and First Nations political leaders to meet periodically. This forum could address rights and treaty issues. A tripartite process could be set up to include Canada. Ontario plans to announce a new approach to Aboriginal affairs soon.

Russell asked if things would move faster if the Ontario provided more resources to ONAS. Carr said that they would.

b) Federal and provincial roles

Who takes the first step in a land claim, the Federal government or the Province? Coyle answered that the Federal government made treaties before Confederation. Then the Crown divided itself into the two levels of government and jurisdiction was split. A First Nation needs a legal opinion on which Crown to address. Then the government may or may not respond. It goes on a case-by-case basis. It would be best to have a joint forum with both governments on land and treaty rights.

Russell said he heard that some First Nations leaders have seen a provincial discussion paper on a tripartite process and asked Carr about it. Carr said that it is under discussion with the Chiefs of Ontario. Others commented that it could be a place to work on land and treaty rights. There was such a forum in Ontario up to 2000, the Indian Commission of Ontario. A new body might restore or improve on it.

First Nations look back on the past 30 years of "superficial relationships" and statements of government intent that don't go anywhere. A tripartite forum is not enough. First Nations need a commission with the power to settle matters. We should stop tinkering with what doesn't work. If it doesn't improve, we'll have "another situation." The Federal government didn't even have the courtesy to appear today.

We need Federal and Ontario processes to be compatible. Most land claims involve both governments. What's the incentive to make Ontario mesh its scheme with Canada? BC did it under pressure from First Nations. Should the Inquiry recommend a structure for federal-provincial participation? Coyle said that the recommendations do address both governments, such as on page 54.

c) What was the intent behind treaties?

When the treaty commissioners came to negotiate Treaty 9, the First Nations leaders and representatives were illiterate and could not speak English. The commissioners came with a written text, so how could the treaties be justified? One can question the validity of the surrender of land. First Nations intended to agree to *share* the land. If the treaties were properly negotiated, we might not have today's disputes.

Coyle said that treaty making was not addressed in detail in the paper. He didn't intend to say that the process was fair. There is now a historical effort to recover what was said and intended in treaty making. This raises issues "outside the box" of treaty-based disputes.

d) St. Catharines Milling case

Will Ontario continue to rely on the St. Catharines Milling case, which allowed Ontario to disregard treaty rights? Will past erroneous judgments and action based on it continue to stand? Carr said that Ontario's decisions would be based on the state of the law in Canada. While describing himself as not an expert, he said that Ontario is "comfortable with our current position."

Russell observed that Supreme Court of Canada decisions since St. Catharines Milling have repudiated that case's treatment of Aboriginal title.

e) The public interest

Participants said that the public interest, and especially the public understanding of the issues, is paramount in determining the approach to land and treaty rights. Until that changes, "tweaking the system" won't work. The Canadian public views treaties as far in the past and doesn't understand why we need to honour them. People think First Nations were conquered.

At the Ipperwash Inquiry hearings, non-Aboriginal people are awe-struck at what they hear. That's where it starts, the needed change in public perception. Russell said the Inquiry needs to address public education to change public understanding of the issues. It is essential to changing governments' approach. Otherwise, politicians see the public interest in land claims served by drawing claims out and spending the least amount possible. Changing public perception is high on the agenda for fixing the land claims process.

Why is there so little coverage of the Inquiry on a daily basis? The story is not getting out, compared to other inquiries. More resources and efforts are needed on this. It's a pity there's not wider access to the information. It could be the decision on location of the hearings. We need to change mindsets.

Coyle's paper puts the legal issues across clearly. It needs to get out to the public and to educators in schools and communities.

Coyle said that someone should study the costs of not settling claims, something beyond the scope of the paper. It is doing damage to the moral fabric of Canada. Aboriginal people feel that they're treated the worst and that their rights are taken less seriously. It damages their dignity and builds frustration. There are legal costs and economic damage from unresolved disputes. Ontario does not calculate its total liability for land claims or the cost of not settling. Courts can block land transfers and resource development when First Nations' treaty rights are not resolved.

The ONAS website should tell the history of treaties and how Ontario was settled, what was done to First Nations in violation of treaties.

Russell said that the Inquiry is talking about developing educational products. One participant said that a video based on Darlene Johnson's evidence could be compelling and passionate.

f) Dispute resolution

Land and treaty negotiations cannot work without a mandatory dispute resolution mechanism, under a time frame, that applies to both Canada and Ontario. This can work for and against First Nations. The Inquiry should recommend that we go beyond the status quo and show how it could work.

Resort to dispute resolution, both facilitation and binding arbitration, should be at the initiative of any one party, under a phased approach. The first step could be to access a non-binding opinion on an issue. This would be better than the former Indian Commission of Ontario. Coyle said it could be established by law or by agreement among the parties.

Carr said that Ontario disagrees with binding arbitration for land claims. It involves complex legal and political issues as well as third party interests.

g) Implementation prospects

Page 56 of the paper should cover Federal and Ontario responses and action on past reports. What are the prospects for Ontario to implement whatever the Inquiry recommends?

The Inquiry is an opportunity to change the historical pattern. The Federal government has set up a specific claims process and passed legislation. It's too bad that they didn't consult Ontario about it. However, since the Federal legislation hasn't been proclaimed, there's an opportunity to work it out with Ontario.

Russell recalled the recommendations of the Royal Commission on Aboriginal Peoples, such as an Aboriginal Tribunal, that were mostly not implemented. The proposed tribunal would have put land claims on a fast track and would have had access to specific knowledge. It would have been fairer, involving Aboriginal people in adjudication.

Past commissions of inquiry have succeeded when certain conditions occur. Recommendations are more likely to be implemented when:

- Reports are timely and go to the same government that appointed the commission;
- Government officials who will implement the recommendations are consulted as they are developed;
- Officials want to make change in order to do a better professional job;
- The issues are of broad public interest and affect large segments of the public;
- There are supportive ministers in government;
- Recommendations fit the government's agenda;
- The government needs a course of action to respond to public demand.

h) Impact of the lack of resolution of land and treaty rights on First Nations communities

How would you feel, one participant asked, if you got a different pension than your co-worker? How would you feel if your employer just stopped paying your pension and it seemed nothing could be done about it? In each community, elders have seen breaches of treaties and they are dying without seeing the problems rectified. This leads to a deep sense of frustration and despair.

Another point of frustration expressed several times was the very serious difficulty in knowing where to lodge a claim – with the Federal government or the Province.

What is the price to First Nations of no settlement? Consider what they lose, compared to when settlements are reached. Money is available for employment. People get education. Standards of living rise and health costs are lower. Without settlements, people are dependent on government programs. Parents lose self-esteem. Dependency sets an example for children who see how their parents live.

Elders die. Aboriginal youth go to schools with non-Native youth and hear, “Native people should just forget about it and move on.” Aboriginal children need information to defend themselves. They need to know that this is their land. It's unfair to them and all children. It's scary and dangerous.

It used to be easy to mislead Aboriginal people. Now people watch the stock exchanges and ask, “Why are we so poor when \$20 billion is coming out of traditional lands?” In the past 20 years, 286 young people died by suicide. The violence has turned inward. It's just matter of time till the violence turns outward. There will be major conflicts in the north and northwest.

You can't hide the reality from young people now. They are putting pressure on the chiefs.

i) Control of the process

Russell said that governments have a real reluctance to give up control but it happens occasionally that they agree to shared design and management of processes.

The Royal Proclamation of 1763 saw the situation as a meeting of two nations. When the Federal government and Ontario control the process, it violates that principle.

Page 58 has good ideas but it would be a fundamental shift for Ontario to accept such recommendations as a permanent facilitation body and access to an independent tribunal with binding powers to resolve legal disagreements. Coyle said that Canada has done it. Federal and Ontario processes don't have to be identical, just compatible.

Should First Nations take these disputes and the treaty rights process to an international forum? Russell said such an international Aboriginal forum, formed in 2003, exists under UN auspices and will meet again in two weeks.

j) Other ideas

Other ideas to consider:

- An Aboriginal Relations Commission to be the “keeper of the process” of land and treaty rights negotiations.
- An Aboriginal “Auditor General” to give the public an independent view of whether the procedures are effective, and focus on other relevant issues such as the use of the courts, resource development impacts, etc. This could be a continuing body, like Ontario’s Environmental Commissioner.
- An RCAP-style Aboriginal court, a joint tribunal for land and treaty rights.
- Aboriginal Day in Ontario, to increase public awareness and education.
- Consider Metis rights, which sometimes overlap with First Nations’ rights and claims.

7. Closing prayer: Ron George

Appendix A – List of Participants

Peter Russell – Chair of the consultation and member, Ipperwash Inquiry Research Advisory Committee

Michael Coyle – author of the paper

Parties with Standing

Aazhoodena and George Family Group: Graham George

Aboriginal Legal Services of Toronto: Kim Murray, Brian Eyolfson, Julian Falconer

Chiefs of Ontario: Kathleen Lickers, Sara Neuert, Grand Chief Stan Beardy of the Nishnawbe Aski Nation

Chippewas of Nawash: Lorraine Land, Paul Jones

Kettle and Stony Point: Jonathan George

Nishnawbe Aski Police Services Board: Cathy Beamish

Ontario Provincial Police: Andrea Tuck Jackson, Ron George

Province of Ontario: Doug Carr - Acting Assistant Deputy Attorney General and Secretary for Native Affairs and former Director of Negotiations at ONAS
Eileen Hipfner, Kim Twohig, Sue Freeborn

Residents of Aazhoodena: Mark George

Ipperwash Inquiry

Sidney Linden – Commissioner

Ronda Bessner – Senior Legal Analyst

Tom Mitchinson – Senior Adviser

Noelle Spotton - Policy Counsel

Erin Stoik – Junior Legal Analyst

Jeffrey Stutz – Senior Policy Advisor

Nye Thomas – Director, Policy and Research

Jodie-Lynn Waddilove - Assistant Commission Counsel

Appendix B – Agenda

AGENDA

9:15 a.m. – Light breakfast

10:00 to 10:15 – Opening prayer and Introductions

10:15 to 10:30– Welcome, overview and purpose of the consultation by Chair, Peter Russell (member of the Ipperwash Inquiry Research Advisory Committee)

10:30 to 10:45 – Welcome and brief presentation by Ipperwash Inquiry Commissioner, Sidney Linden; brief overview of the Part Two process by Nye Thomas, Director of Policy and Research for the Inquiry

10:45 to 11:15 – Overview of the paper by author, Michael Coyle

11:15 to 11:30 – Break

11:30 to 12:30– Discussion:

- a) Are the current land and treaty claims processes working effectively?
- b) Recommendations for addressing the timeliness of the existing processes
- c) Recommendations for resolving disagreements over the law relating to a claim
- d) Recommendations to ensure the process strengthens the parties' relationship
- e) Recommendations to address the division of responsibilities between Ontario and Canada
- f) Recommendations to address the public interest
- g) Recommendations to address Treaty rights

12:30 p.m. to 1:30– Lunch break

1:30 to 2:30- Continuation of discussion

2:30 to 2:45– Break

2:45 to 3:30– Continuation of discussion

3:30 – Summary and closing prayer