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, February 4, 2005
10:00 a.m. – 4:00 p.m.
250 Yonge St., Suite 2910
Toronto

NOTES

1. **Participants:** see Appendix A, attached

2. **Overview of Paper**

Michael Coyle outlined the main features of the paper. It addressed two over-arching questions:

- What changes could Ontario make in how it deals with land claims?
- What could induce Ontario to change its approach in policy and process? None of the past recommendations for significant change have been adopted.

Coyle's premise in the paper was that valid land claims should be settled in a timely way, through a process that appears fair to a reasonable observer. In the meeting, the focus was on Ontario though the paper also dealt with the federal government.

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 take 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 two central policy issues for Ontario:

- Ontario lacks a dispute resolution mechanism for negotiated claims that could settle such matters as the validity of the claim, the amount of compensation or the determination of responsibility between the federal government and Ontario.
- First Nations claimants do not perceive the current Ontario process as 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.

The paper contains five main "options" for action by Ontario:

1. Dispute resolution process 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.

2. Consultation with First Nations. Could propose that Ontario develop the policy and process with First Nations.
3. Time Ontario takes to review claims. Could greatly accelerate the review stage, especially as many claims are similar.
4. Resources available. Would increasing the resources (funding and staff) of the Ontario Native Affairs Secretariat (ONAS) enable the Province to reduce the current time, said to be three to five years from filing to decision on whether the claim is valid and negotiable? Could the cost of research on claims be reduced by agreement among the parties to do it jointly?
5. Systemic disincentives to settling claims. Consider whether Ontario's accounting treatment of land claims (negotiated vs. court-ordered settlements) and possible career consequences for provincial public servants involved in settlements affect the outcomes and processes. Also the scrutiny of settlements by central agencies of government and the public.

The paper also discusses how Ontario deals with treaty rights in regulatory programs and adjudicative tribunals.

3. Discussion

The discussion included:

- Facts cited in the paper.
- What takes time in the current process.
- Ontario government's policy and perspective on land claims.

a) Facts

Ontario's land claim settlements, unlike Canada's, come out of central revenue funds rather than ministry budgets regardless of whether they are negotiated or imposed by a court decision. At the start of negotiations, the possible cost is identified and it is updated as negotiations proceed.

Do Ontario settlements require cabinet or ministerial approval? All require cabinet approval. They require fiscal approval because ONAS has no program funding for settlements. Disposal of land requires cabinet approval. Big, complex or politically sensitive settlements go to cabinet first for the mandate to start negotiations.

b) Timeliness

Looking at the ONAS fact sheet, "Aboriginal Land Claims and Ontario's Negotiation Process," the pre-negotiation stage takes three to five years currently, which is better than five years ago. ONAS has developed a standard package for claimants on how to submit and claim.

It takes three to five years to review a claim. Because of resources, it may take two years before the work starts on file within ONAS. It's roughly a year for historical research. ONAS asks if the research is of sufficient quality and whether it addresses all the issues important to Ontario.

It also takes time to coordinate positions within the government. And a year for policy review, to determine, "Is the matter negotiable?"

ONAS needs a firm mandate from the government at the start of negotiations to ensure that the provincial position will be maintained.

c) Ontario land claim policy

Ontario's policy is set out on the ONAS website in four fact sheets. Copies were distributed at the meeting. Ontario favours empowering the parties to engage each other better, in contrast to the paper's approach of improving results by involving a third party to settle disputes and move processes forward.

4. Issues and Options

a) Timeliness

Ontario could do better in reviewing and negotiating land claims, notwithstanding the improvements the government sees in recent years.

The inquiry could recommend that ONAS hold a meeting with First Nations as soon as claims materials are received, to improve communication. A three-party meeting (First Nation, Ontario and Canada) could be held when either government receives a claim, to plan research, decide who should be involved, etc. This could just move the bottleneck to the negotiation stage if more resources are not made available.

b) Dispute resolution

Is the proposed model in the Coyle paper the same as the old Indian Commission of Ontario (ICO), with the addition of legal expertise?

Michael Coyle responded that it was. Also, he suggested that any new institutions and processes should be designed with First Nations.

A better blueprint would have more "teeth" than the ICO, which couldn't deal with First Nations' issues if Ontario didn't agree (the Temagami claim for example). It had no capacity to get a third-party legal opinion. It would be better if a new ICO could:

- Force the parties to meet if they're not meeting.
- Resolve deadlocked issues with binding decisions.
- Send references to the courts for decision.

One size may not fit all. The system should allow for the parties to work things out. The parties could have access to a "roster" of facilitators or a forum in the biggest, hardest cases. Guidelines are needed to indicate when to resort to such tools.

You need to depict the costs of not settling to governments. Factors like the accumulated cost of the claim with interest, more critical commissions and more conflict.

Why not consider "the honour of the Crown" too? The federal government makes you sign away your right to litigate if you start negotiations.

What about a "fall-back" strategy for the paper to deal with the possibility that Ontario will not reform its way of reviewing and negotiating claims? That would involve improving First Nations' access to the courts and litigation. Could allowing lawyers and First Nations to agree on contingency fees help even the capacity between the sides?

It would be worth looking at cases that have gone to court to assess the prospects for First Nations to take the litigation track.

Negotiation looks good but doesn't guarantee any results; court looks bad but it can deliver results, usually faster. Consider proposing an Aboriginal Court, as recommended by the Royal Commission on Aboriginal Peoples (1996), as a backstop to the process. The best model would combine the strengths of both negotiation and court decisions. The "hammer" could be available at two or three points. Easy cases would stay in the negotiation track. For example, any party could go to the Aboriginal Court:

- After one or three years, if the Province/Canada has not decided whether to negotiate or not.
- On total compensation.
- To bail out of negotiations at any stage if they bog down.

It would be worth looking more widely at experience in other jurisdictions to find good working models. Maybe New Zealand, where Aboriginal people have become politically effective since the 1970s.

c) Resources

It's hard to see any improvement happening without Ontario putting more resources into settling land claims.

What arguments could convince the Ontario government to increase resources for resolving Aboriginal land claims?

- Show the results that could be achieved.
- Relate the proposal to the government's stated priorities.

ONAS spending has been flat-lined in the last few years and was cut before that.

Show the tangible costs of not settling land claims. Possible costs of not settling include:

- Uncertainty over resource development on disputed lands, especially in the north.
- Undermining the value of citizenship in the eyes of First Nations people.
- Impact on third parties, mainly by depressing land values and impairing municipal ability to raise realty tax revenue.
- People will note that the federal government is settling claims and compare Ontario unfavourably.

Ontario has not quantified the overall land claims picture to see what the total liability would be. Estimates have been done for particular claims but no formal studies.

Failure to settle claims also undercuts Aboriginal leadership, especially in the view of younger people. They see leaders unable to deliver results.

d) Third parties

How can third parties (municipalities, property owners, etc.) be brought along to help resolve land claims?

Ontario, by policy, will not expropriate third parties to resolve a claim. You have to educate people to identify their interests. Keep them informed on the status of negotiations. Do a communications plan.

e) "Surrender" of lands

Can this term be done away with, considering how offensive it is to First Nations? In the paper, Coyle used the phrase, "land covered by treaty." It appears that the Indian Act requires it. An alternative, "transfer and release" may not hold up in court.

f) Whether to negotiate

Could Ontario set a policy to negotiate in every case where there's an outstanding legal obligation? Doubt that such a declaration would be the interest of First Nations. Might stack the decision against finding that there is a Crown liability in the first place.

Courts have never ordered land to be surrendered to a First Nation in Ontario. There are better prospects to get land through negotiation.

g) Public needs to know

The public don't know the basics about land claims. Don't know that these cases are about law, that governments have not followed the law. It's not about "helping poor people."

Ideas on how to educate the public on land claims:

- Annual "Ontario treaty day." Would show the history of Aboriginal land rights and agreements.
- Municipalities can bring issues forward, like Brantford.
- Academic groups could hold events to get governments' attention. Would generate insights and create forums now missing in the land claims arena. Example: the Australian Institute of Aboriginal and Torres Strait Islander Studies (http://www.aiatsis.gov.au/) is a statutory body that publishes wide-ranging research on legal and cultural issues, including Aboriginal rights and litigation. Publishes monthly newsletter. Canada doesn't have a centre for Aboriginal studies jointly owned and operated by governments and First Nations.
- Canadian Bar Association, law and public administration schools, and public management organizations could take on the issue
- Ongoing forum for academics and practitioners to meet and debate the issues. Could prepare papers and share experiences.

- Ministry of Education, currently consulting on improving Aboriginal curricula, could include land claims and treaty rights.

How to get politicians "to take the whole thing seriously:"
- Create accountability on land claim processes, costs and results. Courts, Provincial Auditor and public reporting requirements could help.
- Ontario should provide full public information on each land claim (who made the claim, when, what settlement is sought, what Ontario has spent on the claim to date, current status, etc.)

h) Federal-provincial roles

Ontario and Canada could negotiate through the issues to settle who's responsible. Court references could be used where needed or governments could issue a policy asserting jurisdiction. This would be a long-term approach.

After Ontario decides to negotiate, the federal government may not be ready. Sometimes, the First Nation may not file with the right government. Canada may not tell the First Nation to file with Ontario. The First Nation may go to Canada first because Canada has a process and funding. A preliminary meeting at the front end can save much time.

In civil law, there is the joint and several liability remedy in the case of multiple defendants. Why not apply that to Native land claims? Could Ontario and Canada meet annually to review all claims, assess the risk and decide which government should take the lead on each file? They could have a framework agreement providing that governments could act for each other, within certain rules, and decide on an allocation of costs in advance (such as 90 percent/10 percent, where the liability is skewed to one level or the other).

i) Old, bad case law

How to deal with "old, bad law," cases like St. Catharines Milling that still crop up and shape Ontario's position negatively?

Needs a policy shift by governments to set it aside. Courts probably won't do it.

j) Treaty rights

Why are there no provisions in Ontario legislation to respect treaty rights? When First Nations come before a provincial tribunal, they are at a disadvantage because they have to argue that the Constitution applies to their treaty rights. The tribunal doesn't see that in their legislation.

k) New Aboriginal policy

Last July Ontario put out a discussion paper on a new approach to Aboriginal issues. The government is consulting Aboriginal groups and a new policy is expected in the coming months.

Appendix A – List of Participants

Peter Russell – Ipperwash Inquiry Research Advisory Committee member and Chair of roundtable

Candice S. Metallic - Associate Legal Counsel, Assembly of First Nations
Darlene Johnston – Ipperwash Inquiry Research Advisory Committee member
Doug Carr - Acting Assistant Deputy Attorney General and Secretary for
Jeffrey Stutz – Senior Policy Advisor, Ipperwash Inquiry
Len Rotman – Law Professor, University of Windsor
Michael Coyle – author of the Land Claims in Ontario paper
Nathalie Des Rosiers - Dean, Civil Law, University of Ottawa
Native Affairs and former Director of Negotiations at ONAS
Noelle Spotton - Policy Counsel, Ipperwash Inquiry
Nye Thomas - Director of Policy and Research, Ipperwash Inquiry
Ralph Brant - Director of Mediation, Indian Claims Commission
Ria Tzimas –Counsel, Aboriginal litigation group at the Crown Law Office, Civil
Robert Winogron – Senior Counsel
Sidney Linden – Ipperwash Inquiry Commissioner