The Resolution of Land Claims in Ontario:
A Background Paper

Ontario Native Affairs Secretariat
Presented to the Ipperwash Inquiry - Part 2
Land Claims in Ontario

April 27, 2005
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In this paper, the term “First Nation” refers to Indian Act bands; the term “Aboriginal community” includes Indian Act bands, but may also include communities that are not recognized as bands under the Indian Act.
I Introduction

On November 12, 2003, the Government of Ontario established the Ipperwash Inquiry under the Honourable Sidney Linden with a mandate to inquire into and report on events surrounding the death of Mr. Dudley George and to make recommendations that would avoid violence in similar circumstances. The Inquiry has separated its activities into two phases reflecting the two parts of its mandate. Part I will deal with the events surrounding the death of Mr. George while Part 2 will examine relevant policy issues and make recommendations directed at the avoidance of violence in similar circumstances.

The Inquiry has established two objectives for Part 2, namely, to undertake a forward looking, purposeful, independent and evidence-based analysis of relevant policy issues, and to ensure that parties with Part Two standing and interested members of the public have a meaningful and ongoing opportunity to participate. To achieve these objectives, the Inquiry has adopted a process that involves commissioning expert research and policy papers on topics the Inquiry considers relevant, inviting submissions from parties with standing, organizing conferences, meetings and consultations and holding limited, non-adversarial evidentiary hearings. Among the topics to be addressed in Part 2 is land claims in Ontario.

The purpose of this paper is to provide background information and analysis that may assist the Inquiry in its consideration of issues relating to the settlement of land claims. This paper describes the historical origins of land claims and the impact of land claims on the parties involved. There follows a description of the types of land claims in Ontario and the province’s current policy and practices concerning land claims. The paper concludes with a discussion of the challenges confronting the negotiation of land claim settlements and the role that can be played by other processes in helping the parties to reach settlements.

Land claim settlement agreements seek to resolve historical grievances through the discharge of the Crown’s legal obligations to First Nations in a manner that suitably addresses the interests of third parties and secures clarity and legal finality. For governments, the resolution of land claims is a matter of justice and honour. With roots planted in the early European settlement of Canada, land claims are extraordinarily complex to resolve in the modern day. They represent a challenge to any sense of a common historical experience. They highlight social and economic inequalities and question the extent to which fundamental values are shared. They concern rights claimed in land to which a multitude of other rights and interests have, since European settlement, become attached thereby seeming to offer benefits to some and losses to others.

At first blush, land claims are anything but unifying. And yet, at the heart of every claim is the acknowledgement of a relationship and the desire to explore greater mutuality. The act of settling a land claim is an act of reconciliation across
history and societies. Indeed, the settlement of land claims is part of the reconciliation of Canada's existence with the prior occupation of the land by Aboriginal peoples. Negotiation is uniquely suited to this purpose for it is enormously flexible and demands responsibility on the part of all parties for the outcome. The difficulties for all parties in negotiating land claim settlements should not be discounted. The time and effort spent is considerable. Nonetheless, the achievement of just settlements through joint activity warrants that time and effort.

II An Overview of Treaty-Making in Ontario

In Canada, the Crown has interposed itself between Aboriginal communities and non-Aboriginal people in transactions involving Aboriginal rights in land. This relationship between the Crown and Aboriginal communities finds expression in the Royal Proclamation of 1763 and the successive statutes dealing with Aboriginal land, including the current federal Indian Act.

Treaties are the primary means through which Aboriginal rights in land are reconciled with the Crown's use of the land and resources for purposes of national development. Treaty-making in what is now Ontario began over two hundred years ago and continues to this day. The process may generally be divided into four periods.

The American Revolution precipitated treaty-making in what is now Ontario by creating an urgent need on the part of the Crown to use lands for the settlement of some 7000 loyalists and 2000 Six Nations allies displaced from the United States and to undertake measures for the defence of what remained of British North America.

The Crown attempted to achieve these interrelated objectives by negotiating treaties with the Aboriginal groups occupying what is now Ontario. A series of treaties, beginning with the Crawford Purchases of 1783-4 and ending with the Toronto Purchase of 1805, provided land for settlement and allowed land-based transportation along the north shore of the St. Lawrence River and fronts of Lake Ontario and Lake Erie. In the same time period, acting on its need to establish an alternative to the vulnerable lower lakes route into the interior, the Crown also entered in a series of treaties with respect to "carrying places" — the transportation routes between Lake Ontario and the chain of inland lakes and rivers that provided a route to Georgian Bay.

A second series of treaties followed the War of 1812, as continued immigration from the United States and England created pressure on the Crown to open land for settlement beyond the first tier cessions.
By the 1830s, the focus of the Crown in entering into treaties shifted from making lands available for settlement to addressing Aboriginal rights through treaties that would provide for the transition of Aboriginal communities to a settled agricultural economy integrated with the wider society. Treaties with the Ojibwa of Saugeen and the Ojibwa and Ottawa living on Manitoulin Island were concluded in 1836. These treaties were followed in 1850 by the Robinson Huron and Robinson Superior Treaties with the Aboriginal people inhabiting the northern shores of the Upper Great Lakes inland to the height of land.

After Confederation, between 1871 and 1930, Canada entered into what is known as the “numbered treaties”. Three of the numbered treaties affect lands in Ontario: Treaty #3 (1873), Treaty #5 (1875) and Treaty #9 (1905/06 with its adhesion in 1929/30). In 1923, the Williams Treaties were negotiated with the Chippewa of Lakes Simcoe and Huron and the Mississaugas of Rice Lake, Scugog, Mud Lake and Alderville.

The Crown and First Nations today often have very different understandings of what was intended or achieved by the treaties.

Most modern land claims arise from assertions that Aboriginal rights, or the rights of First Nations arising from the treaties, or the provisions of the Indian Act that provide for Canada’s administration of First Nation affairs, have not been fulfilled or have been breached. Land claims assert a failure on the part of the Crown to live up to the promises made to Aboriginal people and the duties in law owing to them.

### III The Division of Federal and Provincial Responsibilities for Land Claims

The Constitution Act, 1867 assigns to the Parliament of Canada under s. 91(24) the jurisdiction to make laws in relation to "Indians, and Lands reserved for the Indians". In part this jurisdiction was assigned to the federal government in an attempt to protect First Nations from the interests of local settlers, who were more likely to wield influence with provincial governments and attempt to dispossess First Nations of their lands and treaty rights. It was also intended to ensure that uniform national policies could be adopted with respect to First Nations and their lands.

Section 109 of the Constitution Act, 1867 assigns to the provinces the ownership of the lands and natural resources within the boundaries of the province, subject to any interest other than that of the provinces in those lands and natural resources. In addition, s. 92(5) gives provinces jurisdiction over the management and sale of provincial lands. Courts have determined that certain Aboriginal interests in land constitute an encumbrance, that is "an interest other than that of the province" in provincial Crown land.
Provinces also have the jurisdiction under the *Constitution Act, 1867* to regulate certain activities on lands in the province, pursuant to their jurisdiction over "Property and Civil Rights in the Province" (s. 92(13)), "Generally all Matters of a merely local or private Nature in the Province" (s. 92(16)), and non-renewable natural resources, forestry resources and electrical energy (s. 92A).

Division of powers issues have resulted in uncertainty in some circumstances about which government has administration and control of certain lands and, in particular, of "Indian lands" upon their surrender to the Crown. Some of this uncertainty was resolved by a 1924 agreement between Canada and Ontario, confirmed by reciprocal legislation enacted by each government and by a subsequent agreement made in 1986 and also confirmed by reciprocal legislation.

The Constitutional division of powers means that, in many cases, the participation of both the federal and provincial governments is required to address the full range of issues associated with land claims. Legal issues relating to the legal duties of the Crown toward First Nations and the respective obligations of the federal and provincial government to satisfy claims, including claims that arose prior to Confederation, must be addressed by the parties in the context of an evolving and dynamic legal environment.

### IV The Significance of Land Claims

The Government of Ontario is committed to settling land claims with First Nations in the province and with the Government of Canada. Outstanding land claims can become a source of tension between Aboriginal and non-Aboriginal communities. The historical events at the heart of long standing land claims may have had significant impacts on the social and economic circumstances of First Nations and may continue to do so in the present. The disadvantages experienced by First Nations may impact the social and economic fabric of the broader society. Land claims may also create uncertainty regarding title to land and rights and interests to natural resources within the area of the claim, leading to further economic and social impacts within the wider community. Clearly, it is in the public interest to find a fair and balanced resolution to Aboriginal land claims.

1. **First Nations**

Obviously First Nations are in a better position than is the Ontario government to describe the importance to their communities of settling land claims. But based on the views some have expressed and the representations some have made in a variety of fora, including at land claim negotiating tables and in recent
processes to engage First Nations in a dialogue with Ontario, we can begin to understand the significance to them of achieving honourable settlements.

First Nations invest a great deal more in land claims than a mere expectation of a remedy for an injurious act. In the words of Dr. Lloyd Barber, the Commissioner on Indian Claims from 1969 to 1977:

"...most Indian claims are not simple issues of contractual dispute to be resolved through conventional methods of arbitration and adjudication. They are the most visible part of the much more complex question of the relationship between the original inhabitants of this land and the powerful cultures which moved in upon them." (Commissioner on Indian Claims, A Report, 1977, p. 2)

While land claims speak to legal entitlements, they also have the aspect of a programmatic statement about the Aboriginal community’s continuing attachment to the land. The relationship between Aboriginal people and the land, we are told, is at the heart of Aboriginal identity.

"Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies." (Royal Commission on Aboriginal Peoples, Report, 1996, vol. 2, p. 448)

First Nations tell us that they take a broad view of the potential inherent in claim settlements. The critical importance of the relationship of First Nations to the land combined with the progressive dislocation of Aboriginal communities from the land means that, today, First Nations view land claims as a means of regaining a land and resource base. Accordingly, the settlement of land claims is part of the task that First Nations have set for themselves of strengthening their communities.

"The fundamental concern of Aboriginal people, as expressed throughout the hearings, was that the resolution of land and resource concerns -- including the recognition, accommodation and implementation of Aboriginal rights to and jurisdiction over lands and resources -- is absolutely critical to their goals of self-sufficiency and self-reliance." (Royal Commission on Aboriginal Peoples, Report, 1996, vol. 2, p. 447)

The historic experience of Aboriginal people is one of increasing dependency as their relationship to land became eroded. It is their view, as we understand it, that the treaties failed to provide them with the necessary protections and support for their way of life. Some commentators have suggested that Aboriginal people underwrote the development of Canada with little apparent return on their
investment. This perception has fuelled a resistance to any further diminution of their original land base.

“The Indians tend to view their reserves as remnants of what was once entirely sovereign Indian territory. Because of this, the reserves are to them much more than pieces of land held in trust by the Government for a group of citizens. Reserves are the Indian domain. The alienation of reserve land is, therefore, often seen as an act which transgresses the sanctity of not only the Indian's land but his entire heritage.”

(Commissioner on Indian Claims, A Report, 1977, p.25)

When Ontario engaged with First Nations in the autumn of 2004, seeking their input on the province’s proposed New Approach to Aboriginal Affairs, First Nation organizations often cited the resolution of land claims as an important element in First Nations’ relationship with the province.

2. The Crown

Since the landmark decision of the Supreme Court of Canada in Calder in 1973, it is clear that Aboriginal rights in land have survived at law and that courts are prepared to consider actions brought for the breach of such rights. The honour of the Crown and the public interest compel the federal and provincial governments to negotiate land claims.

a. Canada

At Confederation, the Crown in right of Canada was accorded the responsibilities of the Imperial Government for Aboriginal affairs and the authorities commensurate with its responsibility for national development. Under the Constitution Act, 1867, the federal Crown has the authority to enter into treaties and reserve land surrenders with First Nations and Parliament may legislate in respect of “Indians, and Lands reserved for the Indians”.

Generally, the treaties of the federal Crown with Aboriginal communities in Ontario were also concluded for nation-building reasons. Through its negotiation and implementation of the treaties with Aboriginal communities and its administration of First Nation assets, including reserve land, Canada has direct responsibility for the great majority of land claims in the province. By the same token, Canada’s involvement in the resolution of land claims is required in order to achieve comprehensiveness and certainty. Canada, therefore, has the primary responsibility for the settlement of land claims in Ontario. The settlement of land claims, contributing as it does to the reconciliation of the prior occupation of Canada by Aboriginal peoples with the sovereignty of the Crown, is a critical aspect of the federal Crown’s overall responsibilities for nation building. Courts have encouraged Canada, along with provincial governments, to negotiate the
resolution of land claims in order to assist in the achievement of this reconciliation in a practical manner.

Having interposed itself between First Nations and others in transactions involving Aboriginal rights in land, the federal Crown has trust-like obligations to First Nations in respect of land surrenders and the transactions that flow from them. Given Canada’s exclusive authority in respect of treaty-making and the surrender of reserve land, the federal government’s fiduciary duty is an issue in most land claims in the province.

Land claim negotiations also provide a means through which Canada can assist the development of First Nations. Many First Nations are without the geographical location, natural and financial resources and human skills necessary for sustained economic growth in the modern world. Unavoidably, the federal government, along with the province, assumes the costs associated with the disadvantages experienced by First Nations through their demand for ordinary government programs. Land claims can constitute one means by which Canada channels funds into First Nation communities for developmental purposes.

b. Ontario

Although Ontario may be involved in land claims by virtue of its own actions in relation to reserve lands, Ontario’s primary involvement stems from the fact that lands administered by the province as Crown lands are generally the subject of such claims. Under the Constitution Act, 1867, the lands and natural resources of the province belong to Ontario, and the province has the legislative authority to provide for their management. Ontario also has jurisdiction over property and civil rights in the province.

Ontario enters into the negotiation of land claim settlements in order to discharge its legal obligations to First Nations. In doing so, Ontario is guided by its understanding of the law respecting Aboriginal and treaty rights and its perception of the public good that it is bound to promote, including the promotion of harmonious relations among peoples, the prudent management of public finances and resources, the maintenance of respect for the administration of justice across the province, the protection of property and civil rights in the province, the assurance of a stable investment climate and the preservation of regulatory integrity.

Ontario’s participation in the negotiation and settlement of land claims is guided by the principle of reconciling the rights and interests of First Nations with the rights and interests of other communities in the province. While Ontario’s participation in land claims reflects the duty and concern it shares with Canada to discharge the Crown’s legal obligations to First Nations in a manner befitting the honour of the Crown and to have regard for the economic development of those
communities, Ontario, in addition, must act in a manner that ensures that the rights and interests of all residents of the province are appropriately considered in the negotiation and settlement of land claims. Accordingly, guided by the twin principles of preserving the honour of the Crown and protecting the public good, Ontario aims to establish understanding, balance and fairness in the negotiation of the issues among the parties.

3. Third Parties

A claim may have impacts on municipalities, commercial interests and private property owners. Third parties may seek Ontario’s participation in claim negotiations even when Ontario is not a party to the negotiations.

While the residents of Ontario generally support the resolution of land claims, third party interests may coalesce into opposition to the negotiated resolution of a land claim in particular instances. In most cases, the action taken by third parties is not intended as a denial of the validity of Aboriginal land claims but as a challenge to a negotiating process that they do not believe properly represents their rights and interests.

a. Municipalities

Municipalities whose lands are located within or near a claimed area often have a direct interest in the claim resolution process. Municipal interests may include the provision of municipal services such as roads, hydro, gas, sewer and water, solid waste disposal and recycling; the provision of emergency services such as ambulance, fire and policing; the integrity of planning and development controls and environmental protection; and ensuring the integrity of the municipal tax base.

Municipalities may view claims as having the potential to create a significant hole in the fabric of municipal authority, financial base and service delivery systems. The issue that is presented is how the boundary of any new or expanded reserve will be managed across this range of services. Further, as elected leaders of the community, municipal officers are often called upon to represent their constituents across the whole range of claim issues. Municipalities often turn to Ontario, under whose legislation they are established, to express their concerns over the potential impact of land claims on their communities, with the expectation that the province will attempt to mitigate any such impacts.

b. Commercial Interests

Commercial businesses may be affected by land claims through the potential loss or restriction of access to Crown land and natural resources and the resulting impact on business revenues. Businesses having such interests may include tourist outfitters; mining and forestry companies; non-utility hydro
generators; and communication and transmission companies. Provincially regulated businesses may approach the province seeking to ensure that their interests are considered in the negotiation and settlement of a land claim.

c. Private Property Owners and Recreational Users of Crown Land

The interests of private individuals may also be affected by land claim settlements. Land that is the subject of a claim may encompass or be owned by these individuals, or be used by them for recreational purposes or to gain access to other lands.

Owners of property within or adjacent to an area subject to a land claim and individuals and associations making use of Crown land subject to a land claim tend to direct their concerns about the potential impact of the claim to the province, seeking to ensure that their interests are appropriately considered and addressed in the negotiation and settlement of the claim. Property owners and Crown land users are not always reassured at the outset by the province’s undertaking to respect their property rights and consider their interests in the context of the negotiation and settlement of the claim. As with Aboriginal claimants, the trust and confidence of third parties in the negotiation process is hard won, and is essential if a lasting settlement is to be achieved. The need to create an environment conducive to the resolution of difficult legal and social issues has led Ontario to establish a process for consulting with third parties and involving, as appropriate, representatives of third parties in the negotiation process.

It should be clearly understood that by introducing third parties into the discussion of land claim issues, Ontario is not permitting a third party veto over land claim settlements. Ontario’s purpose, instead, is to configure the negotiation process in such a manner that the parties move closer together rather than farther apart. It is well appreciated that according third parties a veto, whether express or implied, would destroy the negotiation process. The section below takes up this point under the discussion of current land claim negotiation practices.

V The Approach of Ontario to the Resolution of Land Claims

1. Definition of Land Claim

Ontario defines a land claim as a formal assertion by an Aboriginal community that it has a legal entitlement in respect of land. This definition has two aspects.

First, since the Aboriginal interest in land is communal in nature, it is the community as a whole and not its individual members that hold and may assert Aboriginal and treaty rights to land. An individual may not make a claim to his or
A land claim is advanced on behalf of the entire community and individuals benefit from the settlement of the claim as members of that community. Accordingly, a land claim must be presented by duly authorized representatives of an Aboriginal community. Among First Nations, it is the government of the First Nation that submits a claim, typically by means of a band council resolution.

Second, a claim is an assertion of a breach of legal obligation owed by the Crown to a First Nation or an Aboriginal community.

That claims are entitlements based in law is also apparently accepted by Canada. Canada's so-called “specific claims” policy states that Canada’s “...primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.” (Outstanding Business, p. 19). It further states in the same policy document that,

"[t]he government’s policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding 'lawful obligation', i.e., an obligation derived from law on the part of the federal government." (p. 20)

Subsection 26 (1) of the federal Specific Claims Resolution Act [not in force] defines an admissible claim, in part, as a claim based on any of the following...(a) breach of – or failure to fulfil – a legal obligation of the Crown, including a fiduciary obligation...”.

Generally, the professional community involved in land claims accepts that land are rooted in legal entitlement. For example, in a commentary on land claim negotiations in Canada, Professor Michael Coyle, who was the Director of Land Claims with the Indian Commission of Ontario at the time, states that:

“...at the heart of every land claims negotiation in Canada today is a claim by an Aboriginal community that a government in Canada has violated or failed to address that community’s legal rights to its land.” (M. Coyle in Aboriginal Issues Today, 1997, p. 54)

In the same article, Professor Coyle observes the distinction between land claims and generalized but nonetheless pressing grievances concerning social and economic conditions.

“...land claims are not an attempt to address some generalized sense of dissatisfaction on the part of an Aboriginal community with their lot in contemporary society. Nor do claims negotiations involve applying vague moral standards to reassess in hindsight the treatment of Aboriginal people by Canadian governments. Instead, Canada’s land claims policies
require a basis in Canadian legal principles before the government of Canada will enter into negotiations." (M. Coyle in *Aboriginal Issues Today*, 1997, p. 54-55)

2. **Types of Land Claims**

Land claims in Ontario fall into three broad categories.

a. **Aboriginal Title Claims**

Aboriginal title claims are claims to land brought by an Aboriginal community on the basis that the Aboriginal rights of the community in land were never surrendered to the Crown. Ontario is involved in such claims by virtue of the effect of such claims on the Ontario's administration of lands and natural resources within the province, and by virtue of any legal obligations Ontario may owe to the Aboriginal community asserting such rights.

b. **Reserve Land Claims**

Reserve land claims are claims brought by one or more First Nations that land intended to be reserved for them, usually under a treaty, has been denied to them or that reserve land has been unlawfully taken from them or has suffered injury in some fashion through an act of the Crown. Ontario becomes involved in these claims when land administered by the province as Crown land is required to be set aside as reserve land in satisfaction of the claim or where the province has, through its conduct, played a role in the circumstances giving rise to the claim.

c. **Unsold Surrendered Reserve Land Claims**

The law relating to Aboriginal rights places First Nations, as holders of rights in reserve land, in the anomalous position of having to deal with their reserve land rights through the agency of the federal government. First Nations cannot put up their land for sale without first surrendering it to the federal government. In the past, when First Nations surrendered reserve land they could not withdraw the land from the market by virtue of the fact that upon surrender administration and control of the lands passed to Ontario. So long as administration and control of unsold surrendered reserve land was in the hands of the province, Canada could not sell the lands and First Nations could not be assured that the proceeds of sale would accrue to them rather than Ontario.

Recognizing this problem, in 1924 Canada and Ontario negotiated and adopted by statute an agreement confirming the validity of federal patents issued to that date in respect of surrendered reserve land and providing for the authority of Canada to patent reserve land surrendered after that date. However, the *1924 Indian Lands Act (ILA)* does not explicitly address the matter of land surrendered
prior to 1924 but remaining unsold as of that date. The 1924 agreement also provided that Ontario would receive 50% of the proceeds of mineral development on reserve. These issues were addressed by Canada and Ontario, with the involvement of First Nations, in 1986 when the 1986 Indian Lands Agreement was implemented by reciprocal federal and provincial statutes. The 1986 ILA establishes a process for resolving these issues. Accordingly, First Nations which surrendered land for sale prior to 1924 that remains unsold to this day and First Nations whose oil and mineral revenues are retained by Canada in trust for Ontario, may enter into negotiations with Canada and Ontario under the 1986 ILA for the return of land to reserve status, for the purchase by Ontario of lands that cannot, as a practical matter, be returned to reserve status, and for the release of the province’s interest in revenues from minerals on reserve.

3. Current Land Claims Policy

In 1995, the Government of Ontario adopted a policy framework that emphasized the fulfilment of legal obligations, economic development and public consultation as the primary objectives to be pursued in land claim negotiations. At the same time, Ontario committed itself to the development of a formal land claims policy and instituted a review of all claims involving the province. The land claims policy was completed in 1998 and subjected to a review by Aboriginal organizations and the public.

Ontario’s land claims policy provides that Ontario:

- will meet its legal obligations in respect of Aboriginal people;
- wishes to negotiate rather than litigate the resolution of valid land claims;
- will consider claims for negotiation only after a comprehensive historical, legal and policy review;
- will use the public consultation process to increase public involvement in land claims to allow for an open, efficient and accountable process and to address the rights and interests of Aboriginal and non-Aboriginal people affected by the claim;
- will focus on land claims with a high potential for successful and lasting settlements that consider the interests of all those affected in the claim area;
- will not expropriate private property to achieve settlements;
- will not revoke leases, licenses and permits for Crown land and natural resources during their term to achieve a settlement without the consent of the holder;
- requires that settlements achieve closure and certainty to land and legal issues;
- will strive to create a public environment for economic development on and off reserve through the resolution of land claims.
The land claims policy also established new management measures, including:

- a "fast track" process for claims for monetary compensation only, up to $1 million;
- the provision of negotiating support funding to Aboriginal claimants by way of loans; and
- negotiations with Canada to coordinate the use of government resources to create efficiencies in the land claim resolution process.

4. Current Practice

The removal of all interests in a tract of land for the purpose of transferring that land to Canada to be set aside as a reserve – which are federal lands to which provincial laws do not always apply - can be a publicly controversial matter. As explained in the section dealing with the significance of land claims, many rights and interests are attached to land that is subject to claim. Just as importantly, a relationship to the land informs the identity of not only First Nations but non-Aboriginal communities as well. While it is understood that the issues giving rise to a land claim are legal and social in nature, the multitude of interests attaching to land means that the satisfaction of a land claim is pre-eminently a matter of the public good. Thus, claim settlements need to be carefully constructed and must provide redress to the claimant community in a manner that recognizes and considers the important interests of others.

Decisions regarding the inclusion of land in a claim settlement are of importance to the provincial government. The land claim practices developed by the province are intended to ensure that claim settlement negotiations are forward-looking and promote harmonious relations between communities. Flexibility and innovation are required in order to find solutions that bridge the gaps between the law uniquely applicable to Aboriginal rights and the law generally applicable in the province. These intersecting demands define the practices developed to resolve land claims in the province.

a. Cabinet Responsibility

All settlements involving the transfer of provincial Crown land require Cabinet consideration and approval. This is true for two reasons. First, Ontario administers the public lands and natural resources in the province and has jurisdiction for their management. Pursuant to these authorities, Ontario exercises a broad range of legislative regimes that have created rights and interests in Crown lands and natural resources. The government of the day is accountable to the Legislature and the people of Ontario for the administration of the lands and natural resources of the province. As discussed previously, land claims may affect a wide range of private rights and interests. At the same time, the Crown must account for any breach of its legal obligations to First Nations.
Given the legal, policy and inter-community implications of land claims, the resolution of land claims in the province is approved by Cabinet.

Second, Cabinet must be satisfied that claims are settled within the context of fiscal responsibility. To this end, the Ontario Native Affairs Secretariat is required, as an element of its annual business planning process, to identify land claims under negotiation and to plan for the province’s eventual financial contribution to their settlement. The financial component of settlements are treated as pressures against the province’s contingency fund. As specific land claim settlements are being considered, parallel discussions take place to secure access to the necessary funds.

b. Ministerial Responsibility

For practical reasons, a single Minister of government is required to represent the provincial Crown in settlement negotiations and to coordinate and direct, on an ongoing basis, the activities of the province required to address the issues raised by land claims. The Minister Responsible for Native Affairs discharges these responsibilities and, therefore, executes all settlement agreements on behalf of Ontario. Other Ministers may also be involved; in particular, in negotiations involving the transfer of Crown land to Canada, the approval of the Minister of Natural Resources, which has responsibility for the administration and disposition of Crown lands, is required for negotiating mandates and final settlements in addition to that of the Minister Responsible for Native Affairs.

c. Line Ministry Responsibilities

Issues arise in land claim negotiations relating to the past and future exercise of line ministry authorities. For example, the establishment of highways, the development of mineral occurrences, the protection of the environment, and the management of natural resources may be affected by land claims. The interests of these ministries, and others, need to be taken into account in land claim negotiations and the Ministers with responsibilities in these areas need to be assured that their responsibilities are appropriately addressed in any land claim settlement. Accordingly, line ministries may be represented on Ontario’s negotiating team or included on an internal advisory committee or simply consulted in the course of negotiations depending on the scope of negotiations and the matters under consideration. In addition, line ministries have an opportunity to review final settlement agreements prior to their referral to Cabinet for its consideration.

d. Delegation of Negotiating Authority

As a result of the substantial responsibilities involved in land claim negotiations, the nature and extent of the authority that is delegated to provincial negotiators is related to particular phases of the negotiation process. For example, at the
outset of the negotiation phase an Ontario negotiator may be accorded a mandate to:

- request the assistance of line ministries in preparing for settlement negotiations,
- discuss issues with the other parties to the negotiation,
- establish a process for public consultation,
- make commitments of a procedural nature,
- discuss the apportionment of settlement costs with Canada, and
- make recommendations of a substantive nature to government concerning the land claim negotiations.

At later stages of the negotiation phase, more substantive and detailed mandates may be issued relating to such things as the elements of a final settlement and Ontario's contribution to a final settlement. Authority to sign framework agreements and agreements in principle and to initial proposed final settlement agreements is secured as appropriate.

e. Review of Claims

Ontario's accountability for its decision to enter into negotiations on any particular land claim combined with its responsibility for private rights and interests attached to land require a careful assessment of historical evidence, any legal obligation and public impact regarding land claims. A decision to enter into negotiations that may remove land from the province's administration and control must be justified on the basis of fact and law and reveal a knowledge and consideration of the rights and interests of affected third parties. Unless the public is satisfied that a claim involving land has been submitted to a thorough examination and that the decision to negotiate the claim has been taken in view of the full range of interests affected by it, the public may not regard the negotiation process as legitimate.

The province requires from a claimant a clear statement of the nature and basis in law of the land claim as well as a historical report outlining the events from which the claim arises. These are to be accompanied by legible copies of the historical documents relied upon as evidence for the claim. Ontario conducts a preliminary review of the claim and the historical report to assist it in the preparation of terms of reference for research for its own historical report. This research commissioned by Ontario is intended to fill gaps in the historical account, to clarify any apparent inconsistencies and to investigate in detail the actions of the province in the events giving rise to the claim. When Ontario is satisfied that it has as full and complete a record of the relevant historical events as possible, the claim and the historical materials are referred to lawyers for an opinion addressing Ontario's legal obligations, if any, in relation to the claim.
The legal advice delivered is based on an examination of the legal issues arising from the facts of the claim in the light of the law as it has evolved through decisions of the courts.

When an opinion is delivered supporting the negotiation of a land claim, Ontario begins an investigation of the interests within the area impacted by the claim, the values attached to the land and the recent history of the local communities, including the relationship between the Aboriginal claimant community and its neighbours and between those communities and the province. Ministries having knowledge of the area are contacted during this process for information and advice. Based on this information, a preliminary assessment is made of the likelihood of the parties being able to reach a negotiated settlement, a recommendation is formulated concerning whether to negotiate the claim, and that recommendation is submitted for direction.

f. Efficiencies

Wherever possible, Ontario seeks to achieve efficiencies in a process that can be long and difficult for all concerned. Ontario tries to maintain an orderly process for the review of land claims by reviewing claims in sequence based on the date of the land claim submission and systematically working through the claim submission from historical research to legal assessment to policy review. This “first in-first out” approach is tempered by the need to spread provincial negotiating resources across the province. In practice this means that the province will generally pursue the settlement of only one claim at a time with a community.

Ontario has instituted a “bundling” approach to assessing land claims arising from the same basic fact situations, such as flooding claims in the Treaty 3 area, and treaty land entitlement claims arising under Treaty 9. This approach applies to the historical research as well as to the legal analysis of the claims. The effect of the bundling of claims can be readily seen in tables 1 and 2 below. Associated with this approach is the specialization, as a practical matter, of professional staff in the Ontario Native Affairs Secretariat in certain areas of the province and/or certain types of land claims. In addition, Ontario sometimes works with the other parties, primarily Canada, to undertake joint historical research.

The Ontario Native Affairs Secretariat and the Ministry of Natural Resources have agreed on administrative measures to streamline the approval process for minor changes in negotiating mandates and the authority of negotiators to initial agreements when land is a subject of the negotiations.

Public consultation activities are designed to also meet statutory requirements relating to the disposition of Crown land.
Ontario has established the “Fast Track” process for claims involving monetary compensation alone to a maximum value of $2 million. Claims eligible for “fast-tracking” are those that do not raise new legal issues, have a relatively simple and clear factual basis and do not require land as a component of settlement. This process is expected to expedite eligible claims because it is likely to entail less need for extensive historical research and legal analysis, and fewer requirements for public consultation and the delegation of decision-making.

g. Public Consultation

In situations where land is likely to be transferred as a result of a land claim settlement, Ontario engages in an extensive process of public consultation. The negotiated settlement of a land claim is, among other things, a process of community development and the promotion of harmonious relations between Aboriginal and non-Aboriginal communities. A land claim negotiation must look forward to the day that land becomes reserve land and attempt to create an environment supportive of that eventuality. Public consultation is critical to this process since it provides for three factors in making a land claim settlement a success.

First, public consultation allows for the presentation and discussion of information relative to First Nations in the province, the status of Aboriginal and treaty rights generally under the laws of Canada, the basis of the claim under negotiation and the process through which Ontario and Canada negotiate the resolution of claims, including the active involvement of interested and affected parties.

Second, public consultation provides a means of improving the technical aspects of a land claim settlement through public discussion of settlement options and the ways in which they might affect and accommodate the rights and interests of the Aboriginal claimant and of interested and affected third parties.

Finally, public consultation can become a vehicle through which members of the local non-Aboriginal community achieve a sense of “buy-in” to the settlement proposals or, at the very least, are prepared to acknowledge that the process has appropriately considered their interests.

As mentioned above, while public consultation is integral to the practice of land claim settlements, it can also be constituted to serve the statutory requirements associated with the disposition of Crown land under the Environmental Assessment Act.

Public consultation usually begins as soon as a negotiator is given a mandate to enter into negotiations with the First Nation claimant and Canada. It is important at the outset that the provincial negotiator establishes face-to-face relations with key leaders in the affected non-Aboriginal community in order to provide information, create a point of contact for interested community members and
begin building the understanding and trust essential to the successful conclusion of the negotiations.

Public consultation typically involves a variety of approaches. These include:

- one-way distant communication events such as media releases, media interviews, fact sheets, newsletters and a website;
- responsive distant communication events such as tear off mail-ins and 1-800 lines which allow members of the public to direct inquiries, comments and suggestions to the provincial negotiating team and receive replies;
- two-way communication events such as open houses, information centres, stakeholder forums, focus groups, meetings with key leaders, community events, neighbourhood walkabouts;
- two-way interactive mechanisms such as workshops, local advisory committees and the inclusion of key stakeholders on the negotiating team;
- two-way communications such as correspondence and telephone calls between members of the provincial negotiating team and interested members of the public; and
- three-way interactive mechanisms such as side tables where stakeholders, Ontario (and Canada as appropriate) and the Aboriginal claimant discuss issues related to and arising from the claim negotiations.

Public consultation can be a demanding and time-consuming undertaking. In virtually every consultation process, the negotiator is confronted at one time or another by people who feel anxious or angry about the claim. It takes considerable time and effort to create a public environment conducive to the resolution of the issues in the land claim. Given the constant need to provide information to the local community and to keep lines of communication open as developments occur, the consultation process extends well into the implementation of the land claim settlement. It is, therefore, a process co-extensive with the negotiations themselves. It is not unusual to find Ontario negotiating team members spending approximately one half of the time they devote to the negotiation of a land claim engaged in public consultation activities.

h. Funding First Nation Participation in Claim Negotiations

The Ontario Native Affairs Secretariat provides support to First Nations engaged in land claim negotiations with the province. The Secretariat has separated the negotiation and community support functions in order to avoid the potential for, or appearance of a conflict of interest. Funding guidelines have been prepared by ONAS and distributed to First Nations across the province. Since 1999, funding has been provided by way of repayable grants similar to the federal government's practice. Negotiations begun on the basis of non-repayable grant funding for negotiation support have continued on that basis.
5. Accomplishments

To date, Ontario has been party to eleven land claim settlement agreements involving the transfer of over 175,000 acres of land and the payment of financial compensation by Ontario of almost $30,000,000. In addition, Ontario is also party to three agreements in principle presently being drafted into final settlement agreements that, if ratified by the parties, would increase the amount of land transferred to First Nations by the province to about 275,000 acres and the financial compensation payable by Ontario to First Nations claimants to approximately $85,000,000. Finally, Ontario is party to nine active land claim negotiations that, if successfully concluded, will substantially add to these totals (see Appendices).

The simple description of the accomplishments the parties have been able to achieve through the negotiation of land claims does not reveal the very significant improvements in the negotiation process that become evident by looking at milestones achieved longitudinally. The tables below are intended to provide such an historical perspective. A word of caution is in order with these tables. The database maintained by the Ontario Native Affairs Secretariat from which the figures in these tables were extrapolated is more accurate in relation to recent data; the data from earlier time periods, when record-keeping was not as rigorous as it has become, may be somewhat less reliable. While best efforts have been used to reconstruct the number of historical reports written, legal opinions prepared and mandates provided in the earliest period, some inaccuracy is inevitable. The inaccuracies tend toward an underestimation of the numbers. Accordingly, although we are confident that the overall trends revealed in the data are real, the figures for the early period should be used cautiously.

Table 1 shows that Ontario is taking significant steps to reduce the backlog of land claims awaiting internal provincial review. For instance, of the 26 land claims submitted to the province in the period from 1973 to 1985, all but one has now undergone historical review and all but four have been assessed by lawyers. Similarly, in the period from 1996 to the end of 2004, 41 land claims were submitted to Ontario. Through the use of bundling techniques and foundation historical research and legal analysis, many of these claims are now at the point where it is appropriate to consider whether a mandate should be given to negotiate a settlement.

Table 2 shows the nature and scope of internal activity by period. In the period from 1973 to 1985, for example, Ontario

- received 26 land claims
- subjected 13 of them to further historical research
- reviewed 7 in terms of Ontario’s legal obligations.
- began negotiations on two land claims
- was not able to conclude any claim settlements.
By contrast, in the period from 1996 to the end of 2004, 
- the number of active claims jumped to approximately 81
- 39 claims were submitted to an historical review
- 36 were the subject of a legal opinion
- 26 mandates to negotiate were extended to provincial negotiators
- 5 claim settlements were reached.

### Table 1: Milestones Reached by Date Claim Received

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<th>Period</th>
<th>Claims Rec'd</th>
<th>Historical Review</th>
<th>Legal Review</th>
<th>Minister’s Decision</th>
<th>Not Accepted</th>
<th>AIP</th>
<th>Final Agrm’t</th>
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<td>23</td>
<td>7</td>
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### Table 2: Land Claim Milestones Achieved by Period

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<tr>
<th>Period</th>
<th>Active Claims</th>
<th>Historical Review</th>
<th>Legal Review</th>
<th>Minister’s Decision</th>
<th>Not Accepted</th>
<th>AIP</th>
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</table>

## VI The Nature and Scope of Modern Land Claim Settlements

Land claim settlements seek to resolve historical grievances through the discharge of the Crown’s legal obligations to First Nations in a manner that suitably addresses the interests of third parties and secures legal finality and certainty. While land claim settlement agreements could take a variety of forms and still accomplish the objectives of the parties, in fact land claim settlements have tended toward an increasingly standardized format. This has occurred largely as a result of the desire to expedite the drafting process but it is also impelled by the need for clarity in the meaning of modern land claim settlement agreements that is assisted by working toward consistency in the documents themselves.

The actual drafting of a land claim settlement agreement is usually undertaken by a lawyer for Canada and Ontario. While the lawyer for one of the Crown governments may “hold the pen”, the other parties’ lawyers actively participate in the drafting process through written comment, joint drafting in meetings and, on occasion, drafting by the party having the greatest experience or interest in a particular matter or area of law. Finally, the negotiator for each of the parties
initials a final version of the proposed agreement indicating that each takes responsibility for the terms of the agreement that has emerged from their common work and agrees to recommend it to their constituents or principals for ratification.

Typically, a land claim settlement agreement will:

- contain recitals briefly setting out the circumstances of the claim settlement;
- define the terms employed in the text of the settlement agreement;
- provide for the surveying of the lands to be transferred to Canada to be set apart as a reserve;
- address:
  - matters related to the continued administration of the lands by the province prior to the transfer of those lands to Canada;
  - the conduct, by Canada, of environmental site assessments to ensure the environmental integrity of the lands;
  - the transfer of administration and control of the lands to Canada and Canada's acceptance of the lands;
  - the setting apart of the lands by Canada as a reserve;
  - the creation of legal interests in the reserve lands to accommodate uses by third parties;
  - the waiver by Ontario of its interest in the revenues from the minerals on reserve;
  - the payment of financial compensation to the First Nation and, usually, the creation of a trust by the First Nation to receive and administer the financial compensation for the benefit of the First Nation;
- contain releases and indemnities from the First Nation in favour of Canada and Ontario, and the dismissal of legal proceedings, if there are any;
- if applicable, provide for the surrender of the First Nation's legal interests in lands that are not going to be transferred to reserve status;
- describe the ratification processes to be employed by the parties and the ballot question or questions that will be voted on by First Nation members in the community ratification vote; and
- provide for the creation of a committee with representatives of the parties to guide the process of implementing the settlement agreement.

VII Challenges in the Negotiation of Land Claim Settlements

Negotiations are a method for resolving conflict. In land claim negotiations, conflict typically occurs over multiple issues. Negotiations themselves are not about the validity of a claim. Instead, negotiations concern a host of issues fundamental to the claim, including: the basis of the claim, the valuation of loss, the nature and scope of compensation including land, the apportionment of
federal and provincial contributions to a settlement, the addressing of third party
interests and the mechanisms for achieving finality. The parties take differing
views on these issues. These are complex issues with significant implications for
each of the parties. They are nuanced matters of law, history, policy, precedent
and practicality. Parties put forward their views about these issues forcefully.

It is of benefit to the parties to structure their negotiating activities in such a way
that they can see a progressive movement toward the common objective of
securing a settlement. The rational sequencing of decision points and the
creation of milestones to confirm agreement at critical stages are important both
to assist the parties to break down difficult issues they must address and make
them manageable, and for the building of the relationship among the parties. As
the parties work through issues piece by piece, they gain a sense of mutual
accomplishment that underpins a shared commitment to continue addressing
issues in a collaborative way. A phased process also aids the principals and
local stakeholders to come to terms with the emerging settlement. Accordingly, a
multi-stage process has evolved for the negotiation of land claims. Ontario’s
process, referred to in the section above, was designed not only to meet the
province’s needs but also to be consistent with the process employed by
Canada. Because of the number and complexity of the issues at play in each
land claim negotiation and the need for time to establish cooperative
relationships, it is an unavoidably lengthy process. A brief review of the stages in
the land claim negotiation process is useful to underscore this point.

Ontario’s land claim negotiation process has four phases. The first of these
phases, the land claim submission phase, includes the following steps.

- Provide information about Ontario’s land claims and community support
  funding programs to the prospective claimant and answer questions the
  community may have about these matters.
- Review the statement of land claim and accompanying documentation
  submitted by the claimant for clarity and completeness.
- In the context of an Aboriginal title claim, determine the status of the
  claimants to ensure that they are authorized representatives of the
  Aboriginal community entitled to advance the claim to the exclusion of
  other Aboriginal communities.

The second phase is the land claim pre-negotiation phase, which includes the
following steps.

- Review and discuss with the claimant the historical documentation
  provided and prepare terms of reference for additional historical research,
  issue and manage a contract for that research, assess the results of that
  additional research and finalize a comprehensive research report.
- Hold a case conference to transfer the final research report and complete
documentation for legal review.
• Prepare a legal opinion on the land claim.
• Hold a case conference to transmit the final legal opinion for policy review.
• Obtain the assistance of other provincial ministries to develop a community profile and land values map including an initial identification of patented properties.
• Prepare a policy review of the land claim including a suggested initial mandate and communication materials as appropriate.
• If the claim is accepted for negotiation, appoint a negotiator, brief staff in other ministries, undertake site visits, review negotiation mandate and prepare public education materials.
• Advise and discuss Ontario's willingness to participate in claim negotiations with the claimant community and Canada.
• Coordinate with Canada negotiations support funding arrangements and enter into agreements with the claimant for such funding.

The third phase is the land claim negotiation phase and it includes the following steps.

• Announce the commencement of claim negotiations in concert with other parties, contact key stakeholders and begin a process of public consultation that will extend through the entire settlement negotiation and implementation processes.
• Negotiate, seek approval for and sign a framework agreement setting out the basis of the claim, the potential elements of settlement, the basis for the apportionment of federal and provincial responsibilities for settlement, and the activities, timeframe, funding commitments and protocols to govern the subsequent negotiations and the public consultation process to be followed.
• Prepare terms of reference for settlement studies, including loss of use studies, land appraisals, title searches and surveys if appropriate at this stage, contract and manage those studies and review the results of those studies.
• Prepare an offer of settlement, seek internal approval for that offer, present the approved offer of settlement to the other parties, receive counteroffers from the other parties and negotiate an agreement on the elements of settlement to be included in an agreement in principle (AIP).
• Prepare internal materials, including briefing notes and submissions, required to seek approval for the AIP and execute the AIP.
• Negotiate and draft the legal text of the settlement agreement.
• Secure clarity on implementation obligations and appoint ministry leads for delivering implementation commitments.
• Secure internal authority for the negotiator to initial the finalized text of the proposed settlement agreement.
• Await the results of the First Nation's ratification vote.
• If the First Nation ratification vote succeeds, provincial ministers ratify agreement.
• The federal minister ratifies the agreement.
• Plan and conduct a signing ceremony.

The implementation phase is the final phase.

• Prepare the materials required to secure the release of any settlement funds and to flow funds as may be required by the agreement.
• Review draft plan of survey, contracted by the federal government, with the Ministry of Natural Resources and sign off on plan of survey.
• Prepare legal authorities to clear lands of legal interests as set out in the agreement.
• Provide Canada with environmental data as required by the agreement.
• If necessary, address environmental issues of concern to Canada.
• Upon the review and approval of plan of survey, prepare the legal authorities required to transfer the administration and control of land to Canada as provided by the agreement.
• Enact or amend legislation, or make regulations, as may be required to address particular issues.

However diligently the parties proceed through the discussion of a claim and the construction of a settlement, there is an inescapable issue of time. So long as claims to land are to be demonstrated on the basis of fact and law and so long as the settlement of such claims is to bear a relationship to the entitlement of the First Nation that could be determined by the courts, it is unlikely that alternatives to negotiation will produce more expeditious results. This is not to say that the parties should not strive for greater timeliness. Tables 1 and 2, above, demonstrate Ontario’s commitment to moving claims more quickly through that part of the land claim settlement process over which it has exclusive control, namely, the internal review and approvals processes. A greater number of claims are moving more quickly through the historical and legal review processes with the result that more decisions are being made by Ontario about whether to enter into negotiations than ever before. Ontario has learned a great deal about the process and practice of settling land claims and, in extending an ever-increasing number of negotiation mandates, it is revealing its confidence that fair and balanced resolutions can be achieved. In streamlining its approvals procedures and consolidating consultation processes, Ontario has demonstrated its commitment to continuing to find ways to expedite the resolution of land claims. The practice of land claim negotiations in the province is maturing with a consequent quickening in the pace of settlements.

The process of negotiation, of course, involves other parties. Ontario’s ability to control timelines ends with the conclusion of its internal review process. From that point forward, the parties as a whole assume responsibility for the timeline within which a settlement is achieved. Indeed, an important reason for preferring
negotiation rather than adjudication as a method of resolving claims is that negotiation empowers each of the parties to make responsible choices about the settlement they are entering into and the manner in which they do so. Such empowerment means that, just as no one party has control over or exclusive responsibility for the shape of a settlement, no one party has control over or exclusive responsibility for the negotiation process. Empowerment in this sense necessarily implies that each of the parties has its own internal procedures and dynamics that will have an effect on the timeframe in which an outcome is achieved. There are many internal factors among the parties contributing to the time required to settle land claims. While it is sometimes tempting to attribute the timelines required to achieve negotiated settlements to one party, a review of the factors causing delay demonstrates that all parties bear some responsibility for the time needed to resolve land claims. These factors may generally be divided into those matters that arise at the pre-negotiation, negotiation, and ratification and implementation stages of a negotiation. The list of factors set out below is not exhaustive by any means.

Land claim negotiations take place within a legal environment that is complex, evolving and uncertain at this point in time. Disagreements concerning matters of law are inevitable and may diminish as the law is clarified. As discussed in the section dealing with the significance of land claims, the disagreements among the parties are not over negligible matters. They are about rights and responsibilities of profound importance to First Nations and to Crown governments. While it is true that these disagreements should not become protracted to the disadvantage of First Nations, it is also true that due weight must be given to the importance of the issues under consideration.

1. Claim submission and review stages

Timing of submission of claims
Ontario has no control over the timing of the submission of land claims to it. While a First Nation may have spent considerable time in the research and preparation of its claim submission, there is often an expectation that the province will review the claim, including conducting supplementary research and legal reviews, in very short order following receipt of the claim submission and regardless of the number or complexity of other claim submissions – including sometimes from the same community – that preceded the submission of the claim. Generally, and understandably, communities are concerned primarily with their own claim submission, and may not appreciate the difficult task of the province to extend even-handed treatment to claimant communities by addressing their claims in an orderly and fair manner.

Submission of claim to one government
First Nations sometimes submit a claim to one Crown government – in that case, usually to Canada – but not to the other. Where the claim is reviewed by the government to which it has been submitted and a recommendation is made to
negotiate the claim, but it is also considered necessary for the other Crown
government to participate in the resolution of the claim, the commencement of
the claim negotiation may be delayed by the need for the First Nation to submit
the claim to the other Crown government and await its determination concerning
whether it will participate in the negotiation of the claim.

Historical Review of Claims
Canada and Ontario generally commission the preparation of historical reports in
relation to claims submitted by First Nations. While First Nations usually provide
a historical report and copies of relevant historical records with their claim
submissions, it is often necessary, and generally helpful, to conduct additional
research to ensure the completeness and accuracy of the historical record
related to the claim. Researchers retained by the province are usually provided
with the materials that were submitted by the claimant First Nation and are
asked, among other things, to assess the thoroughness and accuracy of that
research, to determine whether assertions are supported by the historical record,
and to identify relevant information which has not been included in the claim
submissions and supporting materials. Ontario prefers, where possible, to
commission research reports jointly with the federal government, and this has
proven successful where it has been agreed to. There is a limited pool of
accomplished historical researchers in the private sector, their services are in
high demand, and some of them choose not to be retained by Crown
governments. As a result, the number of historical reports that can be
undertaken at any one time is limited by the availability of professional
researchers. While the idea of Ontario, Canada and a First Nation jointly
commissioning such research has some attraction, and may be possible in some
instances, the province does not have the financial resources to fund research
into numerous claims, some of a speculative nature.

Coordination of claim reviews
Where a claim has been submitted to both Crown governments, Ontario attempts
to coordinate the review of those claims with Canada so that both governments
will be positioned to negotiate meritorious claims without unnecessary delays.
However, on occasion Ontario has been advised by Canada that the federal
government has accepted a claim for negotiation but will not commence
negotiations without the participation of the province, or that the negotiations
have commenced on a bilateral basis but will be suspended until Ontario
determines whether it will join the negotiation. This places considerable pressure
on the province to expedite the review of that claim; when that can be
accommodated, there are consequent disruptions to the orderliness of the
province’s claim review process, strains on human and other resources, and
potential unfairness to other First Nations whose claim submissions preceded the
submission of the claim that the province is being asked to expedite.

Recently improved relations between the research staffs of the Ontario Native
Affairs Secretariat (ONAS) and of the Specific Claims Branch (SCB) of the
Department of Indian Affairs has led to better coordination, through joint projects, for example, of the historical research phase of the review process. However, the subsequent sections of the review process are more difficult to coordinate. ONAS now generally conducts its research, legal review and policy review in three consecutive fiscal years, and the close working relationship between ONAS' Negotiations and Legal Services Branches means that legal opinions are completed in the same fiscal year in which they are requested. The Department of Justice generally requires more time to produce legal opinions for the SCB, and as a result the two governments' claim review processes can fall out of step.

2. Claim Negotiation Stage

Different views of historical facts
The parties often have very different views of the historical facts underpinning a claim, or of the inferences or conclusions to be drawn from those facts. It can require a great deal of time, at the outset of claim negotiations, for the parties to discuss their respective views on these matters, to consider competing interpretations, and to attempt to reconcile these. It is often the case that a reconciliation of their views is not possible to achieve and, in these situations, the parties must attempt to develop a claim settlement model that bridges the gap between them and does not undermine the principled views and approaches of each of the parties. This entails considerable flexibility and creativity on the part of the negotiating teams, and time to reach fruition.

Different views of the law
The parties usually hold differing views concerning the legal principles applicable to the claim, and concerning the results of applying those principles to the claim. This is hardly surprising given the historic basis of claims and the dynamic and uncertain legal environment in which claim negotiations are conducted, and it is a tribute to the parties that they should attempt the resolution of land claims in that legal environment – but these issues are not easily or quickly resolved. A particularly thorny issue in many claim negotiations concerns the legal basis for, and the nature and extent of the respective contributions of Ontario and Canada to the claim settlement.

Negotiating capacity and experience
Most First Nations are first-time partners to land claim negotiations. As a result, they sometimes do not have the same capacity as government to negotiate a claim, or the experience of government in the language and practice of land claim settlements. First Nations are advised by their own legal counsel and professional consultants but may require time to digest the advice provided and make decisions. Attempts by a Crown government to move negotiations forward more quickly than a claimant community is comfortable with can emphasize and exacerbate the lack of trust which is often present in the relationship. As a result, provincial and federal negotiating teams must often undertake their work
recognizing that the negotiation of a land claim may not progress as quickly as it might if the parties were similarly situated.

**Finality of Claim Negotiations**
Compounding the issue described above is the fact that a First Nation will have only one opportunity to resolve its long-standing land claim. Unlike in a labour relations context, where the parties have ongoing negotiating relationships and, as a rule, the opportunity to attempt to achieve in a subsequent round of negotiations that which could not be achieved in an earlier one, land claim negotiations are, of necessity, conducted once and for all time. As a practical matter, this diminishes, for all of the parties, opportunities for compromise and contributes to the length of time required to resolve a claim. For First Nation negotiating teams in particular, and for the communities they represent, the finality of land claim settlements can create pressure to ensure that their claims are addressed in a manner that will not subsequently engender second thoughts, and this necessarily has an impact on the duration of land claim negotiations.

**Community issues**
Important issues can arise in the course of negotiating the resolution of a land claim which the parties could not have anticipated at the outset of the process. Issues of which community, or communities, are entitled to advance the claim; community membership and self-identity; and community governance can divert a great deal of the energy and attention of a claimant First Nation from the negotiating table and dictate that the pace of the negotiations be slowed to allow underlying community issues to be addressed. If these issues are not permitted to be addressed to the satisfaction of community members, the ratification of the settlement agreement may be jeopardized.

**Community consultation**
First Nation members must ratify a proposed claim settlement. The result of a ratification vote is most likely to be successful where the First Nation’s council and negotiating team members have consulted consistently with community members, throughout the negotiations, about the issues under discussion in claim negotiations; where members have participated in community discussions about options for settling the claim and have canvassed, articulated and debated their preferences; where a measure of consensus has taken shape among members; where, in short, members consider the processes internal to the community (as well as at the negotiating table) to have been inclusive, transparent and thorough. Community consultations require time if they are to achieve that goal.

**Public consultation**
The necessity for, and importance of, consultation with interested and affected members of the public, including municipalities, has been discussed earlier in this paper, as has the time required to conduct an effective public consultation process.
**Settlement Studies**
The settlement of land claims involving the payment of financial compensation require support in studies jointly commissioned by the parties in the course of the negotiations. Settlement studies, which may take a year or more to commission, research and table, are conducted by professionals experienced in the theory and methodology of these types of studies. Settlement studies typically include the examination of any financial losses suffered by the claimant as a result of being denied the use of the land subject to claim and the current fair market value of the lands. They may also include specialized studies such as hydrological analyses and GIS mapping. The studies are subject to internal review by the parties. Considerable time and effort is spent by the parties satisfying themselves that the studies reflect as accurately as possible the losses of the claimant. The parties rely upon the results of these studies to formulate and justify proposals for settlement.

**The Indian Act**
The timely conclusion of land claim negotiations is frequently affected by the limited range of mechanisms available under the *Indian Act* to address land-related matters. The ability of the negotiating parties to construct settlements that are responsive to each of their needs, and that will appropriately address the interests of third parties after a reserve has been established or enlarged, can be severely circumscribed by the requirements of the *Indian Act*. For example, if a First Nation wishes to lease some of its reserve lands, the members of the First Nation must vote to designate the lands. The *Act* does not permit designations of land to be taken prospectively, prior to their being set apart as reserve lands. This prevents the parties from settling claims on the basis that, for instance, Crown lands will be transferred to Canada and set apart as a reserve, and Ontario will reacquire a leasehold interest in those lands thereby providing a stream of rental revenue to the affected First Nation. Since a designation vote cannot take place concurrently with the vote to ratify a settlement agreement but must instead occur after the lands have been transferred to Canada and set apart, Ontario cannot be assured of acquiring the leasehold interest through a successful designation vote, and so may find itself unable to agree to provide the lands to Canada and the First Nation at all. The search for alternative settlement models in situations such as this can be difficult and time-consuming.

**Ontario and Canada have different approaches to resolving land claims**
Ontario assesses the validity of land claims submitted to it, and the province’s obligations to a claimant First Nation, based on the application of legal principles and an assessment of the possible result if the claim were to be litigated. This legal risk assessment establishes the general framework within which the province negotiates the resolution of the claim.

Canada assesses these matters in accordance with policy criteria aimed at determining whether Canada has an outstanding “lawful obligation” to a First
Ontario in respect of its claim. While in most respects the analytical framework
employed by Canada is probably similar to Ontario’s, it appears that policy
considerations may play a role in Canada’s assessment of the obligations owed
to a First Nation that are not present in Ontario’s approach. In tripartite claim
negotiations, the fusion by Canada of policy objectives and legal obligations can
make it difficult in some circumstances for the Crown governments to develop a
common view of the claim and its resolution. It can result in disagreements
among the parties concerning the nature of any breach of treaty complained of,
the extent and location of lands affected by the breach, the nature and quantum
of compensation owing to the First Nation, and the respective obligations of the
province and the federal government to contribute compensation to resolve the
claim.

Federal claims policies can constrain the ability of the negotiating parties to
fashion settlement models that in some respect depart from, or are not
contemplated by, those written policies. Because those policies are applicable
to claims throughout the country, federal negotiators and lawyers need to
consider the potential effects of proposals made at one table on negotiations
occurring, or that may in the future occur, elsewhere in the country, often
involving very different fact situations, treaties, and legal and constitutional
arrangements. As a result, in their application claims policies are not always
responsive to the circumstances of a particular claim under negotiation. The
policies may have been developed in contexts very different from that of the
claim under negotiation, without reference to the context of the particular claim
under negotiation, and without consulting First Nations and the provinces.
Where the application of federal claims policy fails to address the actual
circumstances of the claim under negotiation, progress on a claim that may
otherwise be amenable to resolution can be hindered.

Changes of government
Each of the parties is likely to experience a change of government, perhaps more
than once, in the course of a land claim negotiation. At a minimum, the new
government must be briefed about and acquaint itself with the claim under
negotiation. But a new government also may wish to review the claim under
negotiation leading to an interruption in the process. The review, itself, may
result in a change to the mandate accorded the party’s negotiator, which, in turn,
may lead to lengthy discussions as the other parties seek to understand the
implications of the new direction being presented

3. Ratification and Implementation Stages

Surrender votes
Many land claim settlements involve the surrender by First Nations of lands that
cannot be restored to the community’s reserve land base. In these cases, the
procedure adopted for the ratification of the claim agreement must also satisfy
the Indian Act requirements for a surrender vote. To be successful, a proposed
surrender must be approved by a majority of all community members who are entitled to vote. In effect, then, the decision by an eligible voter to not cast a ballot, or his or her failure to do so for any reason, counts as a "no" vote in the context of a surrender vote. Band members who live off reserve – and in many cases these constitute a majority of the band's voting members – may not maintain a close connection to the reserve community, making it difficult to contact those members in the event of a ratification vote and often difficult, as well, to persuade them that they have an interest and a stake in the land claim settlement, and that their vote is critical to the success of an agreement. Although the results of a ratification vote may support the proposed land claim settlement, the failure to attract the votes of fifty per cent plus one of the band's voting members necessitates a second vote to ratify a claim settlement. Ratification issues can cause significant delays in concluding a final settlement agreement.

**Canada's administrative processes**

Where Crown land is to be transferred to Canada and set apart as reserve land for a First Nation, the implementation of a land claim settlement agreement can take many years. The lands to be transferred must be surveyed, and in accordance with its internal policies Canada must conduct environmental site assessments of the relevant lands to ensure that they are not contaminated, ensure the remediation of contaminated lands, and carry out various administrative and technical processes before it will accept administration and control of the lands from Ontario and set them apart as reserve lands. Ontario is generally in a position to transfer the lands to Canada considerably earlier than – sometimes years before – Canada considers itself to be in a position to accept the transfer, but First Nations often direct at both governments their frustration concerning the slow pace of those land transfers.

The above discussion 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 efforts of any particular party. Land claims arise from a call for justice and opportunity. The people of Ontario, and more particularly the First Nations in Ontario, rightly expect that the federal and provincial governments will work with First Nations to resolve land claims in a timely fashion. At the same time, it is expected that settlements will discharge the Crown's legal obligations consistent with the responsibilities of the federal and provincial governments while appropriately addressing the rights of affected third parties and advancing the public good. This is a weighty expectation placing, as it does, demands upon expeditiousness, on the one hand, and fairness on the other. Land claims are not resolved through a cookie-cutter approach. The law remains uncertain in many respects, the facts are different from claim to claim, the claimants have varying expectations of a settlement and third parties' interests may be more or less intense. Innovation is required to respond to disparate circumstances. But innovation within a legal and governance system based upon precedent and
consistency is often the bane of timeliness. Departures from the known and routine require extensive consideration by all parties. Good solutions need time to be conceived, refined and adopted.

VIII Processes Adjunct to Land Claim Negotiations

Proposals for the reform of the land claims process commonly take the view that third party intervention is necessary to resolve impasses in claim negotiations, in some measure to ensure that governments to respond to claims and negotiate them seriously and expeditiously. 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. The discussion above of the challenges in the negotiation of land claims suggests that not all of the matters that contribute to the length of time required to negotiate land claim settlements would be assisted by resort to dispute resolution processes. The fact is, simply, that the settlement of land claims takes time.

That said, third party intervention could prove useful to assist the parties to achieve agreement concerning some of the difficult matters that arise in land claim negotiations. However, it is not at all clear that third party intervention is likely to be necessary or useful in all claim negotiations, or at every stage in any single claim negotiation, and in these respects the nature and timing and utility of such intervention should be balanced against the costs, and possibly extra time, associated with it.

In the past, for example, First Nations, Ontario and Canada selected an institutionalized form of third party intervention by establishing the Indian Commission of Ontario. This decision was taken at a time when professional alternative dispute resolution did not enjoy its current prominence and there were few providers of such services. Today, the landscape is rather different, and consideration must be given to whether the retention of such services by the parties, on an as-needed basis at appropriate junctures in a claim negotiation, would serve their needs as well or better, and in a more cost-effective manner, than recreating an institutional service-provider — which carries with it significant overhead costs — would do. Where they are employed, dispute resolution processes would be adjunct to the negotiations themselves in the sense that the negotiations would remain the core process for the resolution of the land claim and the other processes would situate themselves around it to be accessed as needed. In this way, the primary responsibility for shaping of land claim settlements would remain with the parties.
Generally, there are considered to be five types of intervention available to the negotiating parties.

1. **Facilitation**

Facilitation consists of the use of a neutral person to assist with process matters associated with the claim negotiations. A facilitator thereby frees the parties to focus on matters of substance. Facilitation was used extensively in land claim negotiations through the services of the Indian Commission of Ontario and through private contractors. Neutral third party facilitation can be of assistance to the overall negotiation process by virtue of the skills a facilitator brings to structuring the joint process, clarifying views, encouraging communication, chairing meetings, recording commitments, monitoring the completion of undertakings, and coordinating or preparing reports.

Since the demise of the Indian Commission of Ontario in 2000, most claim negotiations in Ontario have proceeded without the assistance of a facilitator, the parties usually agreeing to assume administrative responsibilities on a rotating basis.

2. **Mediation**

In mediation, a neutral person interposes himself or herself between the contending parties with a view to moving them toward an amicable settlement of their dispute. A mediator, thus, becomes involved in the substance of the issue in dispute and offers proposals for its resolution.

The types of issues amenable to third party mediation are generally those in which the law regarding the rights and duties of the parties is certain and the interests, rather than the rights, of the parties are at issue. Matters of interest, however, are not those that typically forestall progress in land claim negotiations. Issues of the nature of negotiating mandates, positions on the scope of constitutional rights, the apportionment of settlement responsibilities and the acceptability of settlement proposals are not readily amenable to mediated solutions. Neutral third party mediation, accordingly, while perhaps useful in getting the parties to the point of an issue, may not be of material benefit in addressing complex legal and political issues.

3. **Arbitration**

Arbitration is the reference of a dispute to an impartial third party chosen by the parties to adjudicate the dispute, sometimes as an alternative to litigation in the courts. The arbitrator issues a decision after a hearing at which the contending parties are heard, or after considering the written submissions of the parties. Arbitration, which can be set up to be binding or not depending on the
preferences of the parties, is intended to avoid the formality, delay, expense and antagonism of litigation.

While there is intuitive appeal to the notion of an arbitration system that would produce good and quick results, the reality is that any system of binding arbitration is, arguably, costly, adversarial and therefore damaging of relationships, and likely to produce results of a “winner take all” nature. The decisions of an arbitrator cannot substitute for claim negotiations; the resumption of negotiations following the arbitration process and any decisions made in its course may be fraught with anger and tension and be not especially conducive to making progress on the remaining issues. If the arbitration process contemplates a right of appeal, arbitration may become simply an added layer of litigation.

Unlike in mediation, the matters that would likely be directed to an arbitrator would concern disputes about the law rather than differences among the parties rooted in their respective interests. In an environment where the law is uncertain and evolving, and especially if there is no right of appeal to the courts, there is clearly a potential for arbitration to produce decisions about the law that are inconsistent with the jurisprudence that develops in the courts.

The advantages of a system of binding arbitration over resort to the courts in the context of land claims would need to be clearly identified and the system itself carefully designed in relation to the issues it is intended to address.

4. Litigation

Litigation has a place in the settlement of land claims between First Nations and the Crown, but is not to be preferred. There are some cases where, either because of the novelty of issues and consequent uncertainty in the law or where the stakes are very high in financial or other terms, it may be preferable to have the certainty of a court’s determination. The risks inherent in litigation, and the ill effects of the litigation process on relationships between the parties, mean that all parties in a land claim generally see it as the least preferred, but sometimes necessary, alternative.

5. Agenda setting

Agenda setting would entail the involvement of a neutral third party to assist negotiating parties to organize priorities, develop workplans, and establish goals for the negotiation of a single claim or, alternatively, across a number of claims. The process could involve periodic reports back to the third party neutral by the parties to the negotiation, and possibly the production of reports by the third party neutral for submission to the principals for each of the negotiating parties, including any suggestions the third party neutral may have concerning the negotiations.
This alternative would have the effect of leaving with the parties the responsibility to fashion claim settlements that are satisfactory to them, while ensuring the accountability of the parties to someone outside the negotiations for the progress of those negotiations.
### Appendix A:
The Financial Compensation and Crown Land Ontario has Contributed to the Settlement of Land Claims

<table>
<thead>
<tr>
<th>Final Settlement</th>
<th>Cash ($000's)</th>
<th>Land</th>
<th>Value ($000's)</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Chiefs and Councillors of Manitoulin</td>
<td>5,380</td>
<td>45,000</td>
<td>1,620</td>
</tr>
<tr>
<td>Mississauga #8 Northern Boundary</td>
<td>5,620</td>
<td>40,000</td>
<td>1,880</td>
</tr>
<tr>
<td>Garden River</td>
<td>6,345</td>
<td>23,100</td>
<td>1,155</td>
</tr>
<tr>
<td>Brunswick House</td>
<td>2,300</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wikwemikong (Point Grondine)</td>
<td>300</td>
<td>24,000</td>
<td>3,000</td>
</tr>
<tr>
<td>Nipissing</td>
<td>32,864</td>
<td></td>
<td>1,634</td>
</tr>
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<td>Whitefish River</td>
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<td>1,850</td>
<td>925</td>
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<tr>
<td>Assabaska</td>
<td>1,565</td>
<td>2,700</td>
<td>585</td>
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<tr>
<td>Big Grassy</td>
<td>1,500</td>
<td>650</td>
<td>300</td>
</tr>
<tr>
<td>Thessalon</td>
<td>453</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wahta</td>
<td>3,788</td>
<td>8,300</td>
<td>2,410</td>
</tr>
</tbody>
</table>
Appendix B:

ONTARIO NATIVE AFFAIRS SECRETARIAT
NEGOTIATIONS BRANCH OVERVIEW

PRE-NEGOTIATIONS: Approximately 48 claims are in the pre-negotiations stage where they are under historical, legal and policy reviews after which a decision can be made on whether to negotiate.

CURRENT LAND CLAIM AND LAND-RELATED NEGOTIATIONS:

Algonquins
Couchiching
Michipicoten
Pays Plat
Wasauksing

Chapleau Cree
Fort William
Missanabie Cree
Wabigoon
Wauzhushk Onigum

5 negotiations have reached the Agreements-in-Principle stage
Rocky Bay (1998)
Wasauksing (1998)
Temagami (Framework Agreement 2000)
Lake Nipigon Ojibway (2002)
Pic Mobert (2002)

Final Agreements Awaiting Ratification
Tyendinaga (Turton-Penn)
Rainy River
Sand Point

RECENT LAND CLAIMS SETTLEMENTS AND AGREEMENTS:

Final Settlement Agreements being implemented:
Wahta (2004)
Assabaska (2000)
Manitoulin Settlement Agreement (1990)

Implemented Agreements
Big Grassy (2000)
Whitefish River, Phase I (1998)
Mississauga #8 Northern Boundary Settlement Agreement (1994)

Other Agreements
Cat Lake (administrative transfer) (2000)
Eabametoong (Fort Hope) Specific Agreement (1995)
Sarnia Specific Agreement (1994)
Shoal Lake Watershed Agreement (1994)
6 NAN Bands Agreement (1991)