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Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future

*Michael Coyle**
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OVERVIEW

The purpose of this report is to provide a description of the land claims process in Ontario, to set out the challenges presented by that process, and to suggest alternative approaches to land claims and other disputes over First Nations land rights.

This report begins by examining why Aboriginal land rights remain an outstanding issue 350 years after the first European settlement in Ontario. It will consider the legal basis of Aboriginal rights relating to land, the historic approach of governments and the courts in addressing these rights, and some of the key historical circumstances that have prevented resolution of the issues in the past. It will review recent Canadian court decisions, both to understand the nature of the Aboriginal rights in question and to understand why, as helpful as the courts have been in recent years in setting out the general legal principles that apply, the courts cannot be expected to resolve the backlog of outstanding claims in the foreseeable future.

The report provides an overview of the number and types of outstanding Aboriginal land claims in Ontario, and discusses the distinct roles and responsibilities of the federal and provincial governments in relation to land claims. It will review in some detail the current federal and provincial processes that apply to land claims in Ontario, and suggest that current federal and provincial policies are not capable of resolving the majority of claims in a timely way. It will also consider what features in the policies make them ineffective at resolving disputes.

A review of the recent record of the current federal and provincial land claims policies in Ontario indicates that, although there have been some notable successes in individual cases, the policies have not met their stated goals of resolving outstanding claims in a timely and cost-effective manner. The overall number of unresolved land claims within the federal and Ontario claims processes has risen significantly in recent years. This report will note that the unresolved claims currently in the Ontario negotiation process have been in the system for an average of more than

* Opinions expressed are those of the author and do not necessarily reflect those of the Ipperwash Inquiry or the Commissioner

19 years and that the Ontario claims process contains no mechanisms, other than further discussion, for resolving disagreements among the parties.

Technical solutions have been presented over the past 25 years, and in reviewing past analyses of the claims processes, this report will show that critiques by neutral parties have been remarkably similar in their diagnoses. Yet the land claims processes used in Ontario have changed very little over that period.

Any study of Aboriginal land rights in Ontario must also come to grips with the fact that the Constitution of Canada protects “existing Aboriginal and treaty rights.” Since 1990 the Supreme Court of Canada has confirmed that Aboriginal peoples have constitutionally protected harvesting rights on their traditional lands and that governments have a legal obligation to consult with Aboriginal groups when they propose to authorize activities that would interfere with those rights. Yet this review concludes that, in general, the ministries of the Ontario government have no policies, laws, or regulations to guide them on how to ascertain what treaty rights may exist in lands affected by their decisions, or how and when they should consult with Aboriginal peoples where government actions may interfere with treaty rights.

Throughout the report, alternative approaches will be highlighted that appear to offer practical ways of improving the current situation. Some of these alternatives build on past critiques, others on practices used with success in Ontario and elsewhere. In considering these alternatives, however, an interested observer might well wonder why Ontario has not already moved to address the challenges and change its land claim practices. This report will suggest that a key part of the answer may be that there are important systemic disincentives that discourage governments from dealing with the outstanding issues more quickly. The report will suggest that addressing those disincentives may well be a critical part of any successful effort in Ontario to Aboriginal land and treaty claims effectively.

I. HISTORY

WHY ARE THERE OUTSTANDING LAND GRIEVANCES IN ONTARIO?

INTRODUCTION

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected.¹

The statement quoted above is from a unanimous judgment of the Supreme Court of Canada in 2004. That judgment, which will be examined later, arose in the context of a claim in British

¹ *Haida Nation v. B.C. (Minister of Forests)*, 2004 SCC 73 at para. 25 [*Haida Nation*].

Columbia that the provincial government had failed in its legal obligations to consult the Haida Nation about timber cutting. However, the court's comments refer to three important starting points for understanding the basis of land claims in Ontario. First, as the Supreme Court makes clear, to understand the source of Aboriginal land claims requires some appreciation of the history of Aboriginal–Crown relations in this province. Second, the basis of Aboriginal land claims is Canadian law. Third, not only is there a legal basis for land claims arising from Canada's history, but Aboriginal peoples have continuing rights in relation to land that are protected by the Canadian Constitution. The starting point for this report, therefore, will be to describe the historical foundation of land claims in this province, the law relating to historical claims, and the governments' legal obligation to respect continuing Aboriginal land rights.

The words “rights,” “claim,” and “grievance” are central to this report, and it is important to clarify how they will be used. The term “rights” will be used to refer to a situation where a legal obligation is owed by one group to another; “Aboriginal land rights” will describe situations where governments owe a duty to an Aboriginal group under Canadian law in connection with land. The term “land claim” will be used to describe a formal allegation by an Aboriginal group that a government has dealt with its lands in a manner contrary to Canadian law. This is the sense in which “land claim” is usually understood in the context of government negotiation processes and in disputes before the courts. It should be noted, however, that many Aboriginal people object to the term “land claim.” For some, it implies that their historic rights are less important than those of non-Aboriginal Canadians. Why, they ask, should Aboriginal people have to make treaty “claims” while other Canadians enjoy the benefits of the treaties in the ordinary course, without having to seek formal recognition of their rights? In other words, why should disagreements about the meaning of a treaty be framed as “claims” that the Aboriginal side must pursue before the courts and before non-Aboriginal governments?² This is an important concern that this report will return to later.

In its ordinary meaning, a “grievance” is a complaint arising from a sense that one has been wronged. The wrong in question may or may not have a legal basis, but any grievance that goes unaddressed may lead to conflict. A grievance may arise from a particular dispute (in the context of this discussion, for example, over an alleged breach of a treaty promise). Alternatively, it may describe a general dissatisfaction with the way a person or group has been treated over time. In this sense, it might be said that Aboriginal people have a “grievance” based on the fact that large numbers of settlers have come to Canada, leaving Aboriginal peoples marginalized. To avoid confusion, for the purposes of this report “grievance” will be used to refer to a specific concern by an Aboriginal group that their interests in, and relationship to, the land have not been properly respected. Although the concern may be one that Canadian courts have yet to recognize, it may still be critically important for non-Aboriginal governments to address such a grievance (in the interests of social fairness, for example). Just as importantly, if a grievance does have a basis in

² Others question why land claims should be defined by their foundation in Euro-Canadian law, when the settlement of this country involved the coming together of peoples governed by Aboriginal laws as well as peoples governed by what has come to be Canadian law. Does defining land claims in terms of Canadian law not risk perpetuating colonialism? Prominent Aboriginal scholars have recently focused on the risks to Aboriginal groups of permitting Canadian courts and Canadian philosophical values to define the place of Aboriginal peoples within Canada. See, e.g., John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission,” (2001) 46 *McGill Law Journal* 615, and Gordon Christie, “Law Theory and Aboriginal Peoples,” (2003) 2 *Indigenous Law Journal* 67.

Canadian law, then “resolving” the legal issues may be pointless if the resolution process itself ignores or aggravates the underlying concern.

THE HISTORICAL BASIS OF LAND AND TREATY CLAIMS

Pre-contact and Treaty Making

According to Indian and Northern Affairs Canada there are now 139 outstanding land claims in Ontario that have been filed against the federal government.³ A further 41 claims are in litigation. Many of these claims have been filed against the provincial government as well, and new claims are filed each year. A glance at the federal government’s description of the claims⁴ reveals that almost all of the claims allege that the government has violated basic legal norms that are taken for granted by Canadians. There are claims that formal agreements have been breached, that First Nation assets were taken by fraud, that First Nation reserve lands were taken by government without proper payment, that specific First Nation lands were taken without any legal authority, that lands were transferred to the government for sale but were not sold or were sold for less than their value. How could it come to pass that one group within society has so many legal claims against the government? Why would so many of these claims still be outstanding decades after the events in question? To understand this requires a review of the history of government dealings with Aboriginal peoples and their lands in Ontario.

It is estimated that some 500,000 Aboriginal people inhabited what is now Canada in the year 1000, the time of the first known contacts with Europeans on this continent.⁵ The largest populations seem to have been on the Pacific Northwest coast and in what is now southern Ontario.⁶ When French traders and missionaries came to what is now Ontario in the early 1600s, the Aboriginal peoples they encountered included the Huron, Algonquin, Ojibwe, Odawa, Cree, and Iroquois.⁷ Living in organized societies—they were referred to as “nations” by the Europeans—they had defined territories and sophisticated trade networks.⁸ In the case of the Huron and Iroquois, substantial villages of longhouses had developed of up to 1,500 residents each.⁹ As in Europe, of course, there was a diversity of languages and cultures. Still, without exception, Aboriginal societies seemed remarkably egalitarian to the Europeans.

³ See Indian and Northern Affairs Canada, “Mini Summary by Province—Specific Claims Branch,” online: <http://www.ainc-inac.gc.ca/ps/clm/msp_e.html> (accessed March 30, 2005). The figures were accurate as of December 31, 2004. We will describe the status of claims filed against the province of Ontario later in this paper. The Ontario government lists approximately 60 land claims against Ontario that are under review or in negotiation. These do not include claims against Ontario that are before the courts. See Ontario Native Affairs Secretariat, “Negotiations Branch Overview,” online:

<<http://www.nativeaffairs.jus.gov.on.ca/english/landclaims/landclaims.htm>> (accessed March 30, 2005).

⁴ See Indian and Northern Affairs Canada, “Claims Status Maps by Province,” online: <http://www.ainc-inac.gc.ca/ps/clm/csm_e.html> (accessed March 30, 2005) for a short description of every land claim from Ontario that has been filed with the federal government.

⁵ Olive Patricia Dickason, *Canada’s First Nations: A History of Founding Peoples from Earliest Times*, 2d ed. (Toronto: Oxford University Press Canada, 1997) at 43 [Dickason]. Dickason notes that some estimates are as high as 2 million persons.

⁶ *Ibid.*

⁷ The names used are those most familiar to non-Aboriginal Canadians. In their own languages the Algonquin, Ojibwe, Mississauga, and Odawa peoples refer to themselves as Anishnaabeg; the Cree are the Ininew or Ililew; the Hurons are the Wendat; and the Iroquois are the Haudenosaunee.

⁸ See, e.g., Dickason, note 5 at 56.

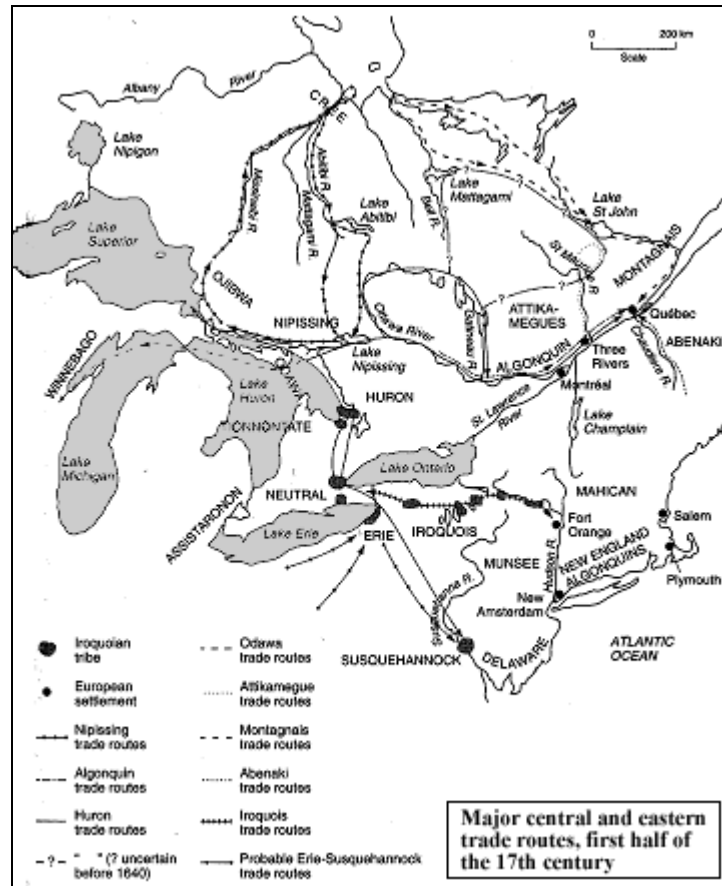
⁹ *Ibid.* at 49.

Unusual too, from the European perspective, was the closeness of the relationship between Aboriginal peoples and the land. The land was used for hunting, fishing, and gathering, as well as for the farming of crops such as corn, squash, and beans. The spiritual connection of Aboriginal people with the land is well known. Less well known, perhaps, is how intensely Aboriginal peoples historically used the land in what is now Ontario. According to Dickason, “by the early seventeenth century, the Huron had about 2,833 hectares (7,000 acres) under cultivation, and it was reported of Huronia that ‘it was easier to get lost in a cornfield than in a forest.’”¹⁰ The Huron, situated on the eastern shore of Georgian Bay, traded through the Ottawa River to the St. Lawrence. In the year 1632 alone, at the height of the fur trade with the French, the Huron sent canoes to Quebec carrying about 15,000 kilograms of pelts harvested in what is now Ontario.¹¹ Beyond farming and hunting, Aboriginal people also made intensive use of herbs and plants as medicines. Comparing Aboriginal knowledge in this area to European, the French missionary Chrestien LeClerq wrote the following from Acadia in the late seventeenth century: “[Amerindians] are all by nature physicians, apothecaries and doctors, by virtue of the knowledge and experience they have of certain herbs, which they use successfully to cure ills that seem to us incurable.”¹²

¹⁰ Ibid. The original observation was made by Father Gabriel Sagard in his book *The Long Journey to the Country of the Hurons*, trans. H.H. Langton (Toronto: The Champlain Society, 1939) at 104.

¹¹ Dickason, note 5 at 102–103.

¹² Chrestien Le Clercq, *New relation of Gaspesia: With the customs and religion of the Gaspesian Indians*, ed. and trans. by William F. Ganong (Toronto: The Champlain Society, 1910) at 296.



Source: Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2d ed. (Toronto: Oxford University Press Canada, 1997) at 113.

The first Europeans to settle widely in what is now Ontario were the British. When the British won control of New France in 1763 they had no intention of risking war to gain Aboriginal lands. Instead, on October 7 of that year, King George III issued a Royal Proclamation to provide for the administration of the new colonies. One third of the Royal Proclamation dealt with the protection of Aboriginal lands. The procedures set out in the Proclamation became the basis of treaty making in what is now Ontario. The Royal Proclamation of 1763 is now referred to in the Canadian Constitution¹³ and has been described in a Supreme Court of Canada judgment as the “Indian Bill of Rights.”¹⁴

Three aspects of the Royal Proclamation are particularly noteworthy as they relate to Aboriginal land rights:

1. The Proclamation did not purport to be an act of generosity or tolerance toward Aboriginal people. It stated that “it is *just and reasonable, and essential to our Interest*

¹³ *Canadian Charter of Rights and Freedoms*, s. 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 25 provides that Charter rights and freedoms shall not be interpreted to derogate from “any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.”

¹⁴ Per Hall J. in *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 at 395 [Calder], quoting Gwynne J. in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.) [*St. Catherine's Milling*].

and the Security of our Colonies, that the several Nations or Tribes of Indians with whom we are connected, and who live under our Protection, not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them ... as their Hunting Grounds.”¹⁵

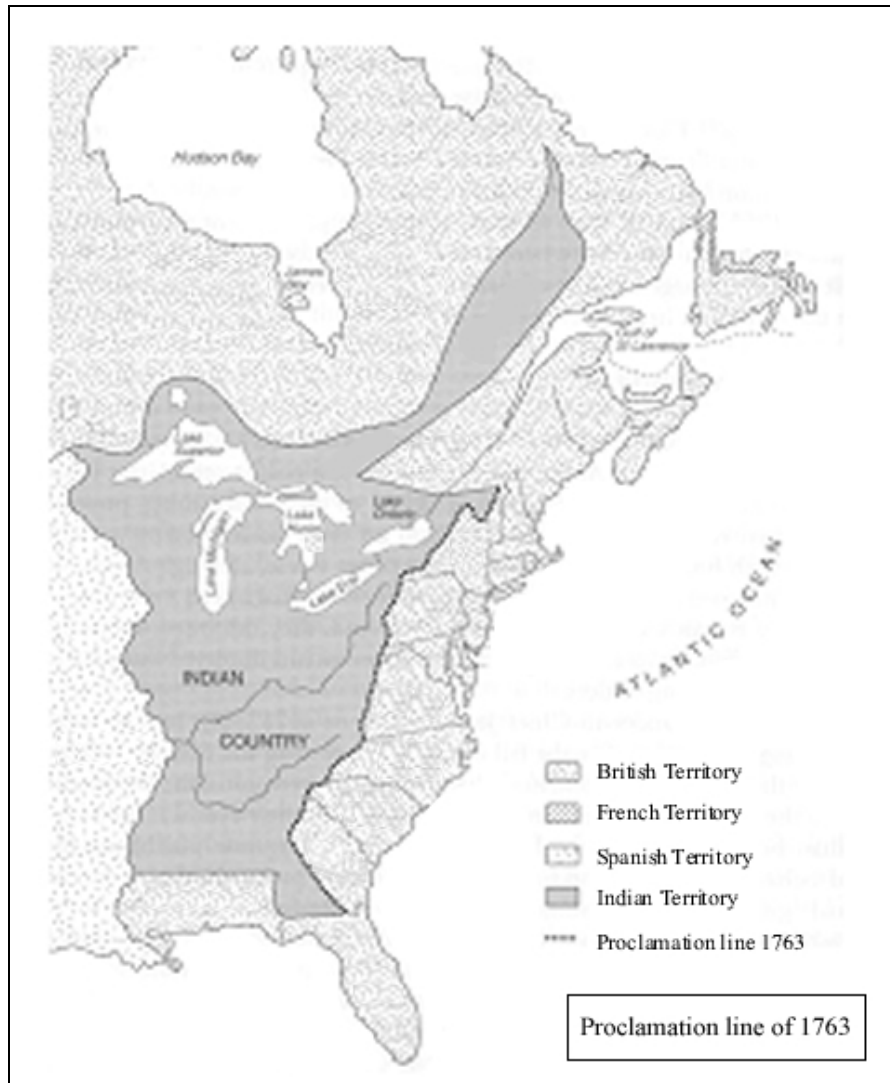
2. The Proclamation set aside a vast area in the interior of North America for the Aboriginal peoples who lived there and forbade British subjects from settling on those lands, unless they had been purchased by the Crown.
3. The Proclamation stipulated the manner in which the British Crown would purchase lands from Aboriginal peoples. It noted that in British North America “great Frauds and Abuses [had] been committed in purchasing Lands of the Indians, to the great prejudice of our Interests, and to the great dissatisfaction of the said Indians.” It then set out the procedures to be followed in Crown purchases. The relevant section of the Proclamation reads as follows: “[I]f at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose....”¹⁶

As noted above, the purchase procedure contained in the Proclamation became the model for treaty making throughout Ontario, and the rule that only the government can purchase Aboriginal lands is now enshrined in the *Indian Act*. It is a rule that gave considerable economic power to the government when First Nations wished to sell some of their lands, since the First Nations were not allowed to find other potential purchasers. On the other hand, by requiring that the government receive every transfer of an Aboriginal land interest, the rule has meant that the government can be held legally accountable where it has acted improperly in dealing with that land interest.¹⁷

¹⁵ (Emphasis added). For the text of the Proclamation, see R.S.C. 1985, App. II, No.1.

¹⁶ Ibid.

¹⁷ For details of how the law works, see the discussion of fiduciary duty in the next section of this report.



Source: Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2d ed. (Toronto: Oxford University Press Canada, 1997) at 154.

The Crown moved quickly to convey the terms of the Royal Proclamation to First Nations. In 1764, on behalf of the Crown, Sir William Johnson convened a peace conference at Niagara that was attended by some 2,000 First Nation delegates. Johnson (Warraghiyagey, “He Who Does Much Business”) reiterated the Proclamation’s promises of land protection. In exchange, he asked for and received assurances that First Nations would keep the peace and maintain relations of friendship with the British. Another agreement provided for the use by British settlers of the portage at Niagara in return for trade commitments. Throughout the negotiations at Niagara, Johnson scrupulously followed Aboriginal treaty protocols. Thus, he presented the First Nation leaders with rich belts of wampum beads, confirming the nations’ alliance and respect for each other’s customs and laws.¹⁸

¹⁸ For a description of the negotiations at Fort Niagara, see John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997), 155.

The Crown's demonstration of respect for First Nation land rights, through the Proclamation and again at Niagara, was a reflection of the military strength of the First Nations. Just six months before the Proclamation was issued, First Nation warriors, upset with British policies, had successfully taken 9 of the 12 British forts in the Great Lakes area. As for the British adoption of Aboriginal treaty protocols at Niagara, this continued a long tradition of British–Aboriginal treaty making that dated back more than a hundred years. Using the wampum belts he presented at Niagara, William Johnson relied on the symbolism of the traditional “Covenant Chain” that would bind the British and the First Nations firmly together. Like any chain it would need to be “polished” from time to time by the nations involved, so that its bonds would remain strong and bright.¹⁹ The imagery of the Covenant Chain reflected the Aboriginal view of treaties: that they established relationships, which needed to be renewed as circumstances changed.

A long and intense period of treaty making followed the meeting at Niagara. In all, about 32 treaties were signed between 1764 and 1862.²⁰ Written records of these treaties largely focus on what mattered to the British: acquiring the right to use or settle on Aboriginal lands. A number of treaties were signed immediately following the American Revolution. These were intended to allow for the settlement of some 7,500 British and Aboriginal people who had supported the Crown during the Revolution and now wished to move north.²¹ By 1812, 14 treaties covered the shorelines of the lower Great Lakes and the upper St. Lawrence. Some of these treaties covered extremely large areas. For example, a 1790 treaty with the Ojibwe covered some 2 million acres of land between the Thames River and Lake Erie. (In return, the Ojibwe received £1200.)²² Some 75,000 non-Aboriginal people then lived in what is now Ontario.²³

Still, as one historian has pointed out, in many cases the pressures created on the Aboriginal way of life by the early treaties may have been small. Describing the willingness of First Nations to share the land, R.J. Surtees has written the following:

Perhaps the most significant factor that inclined the Indians to sell land was their prevailing concept of land ownership. The Europeans had a highly developed sense of private property and private ownership; this was alien to the Indian mind which thought in terms of shared and communal land belonging to the band as a group.... They were aware, of course, that whites had different ideas: they had seen traders build houses or fence off portions of land for livestock.... It was a large intellectual leap however, from such limited holdings to an organized town, township or county. And in the wilderness, in 1783-84, Indians could not

¹⁹ For a description of the symbolism of the Covenant Chain and Iroquois treaty protocols, see “Iroquois Alliances in American History” in Francis Jennings et al., eds., *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse: Syracuse University Press, 1985), 38.

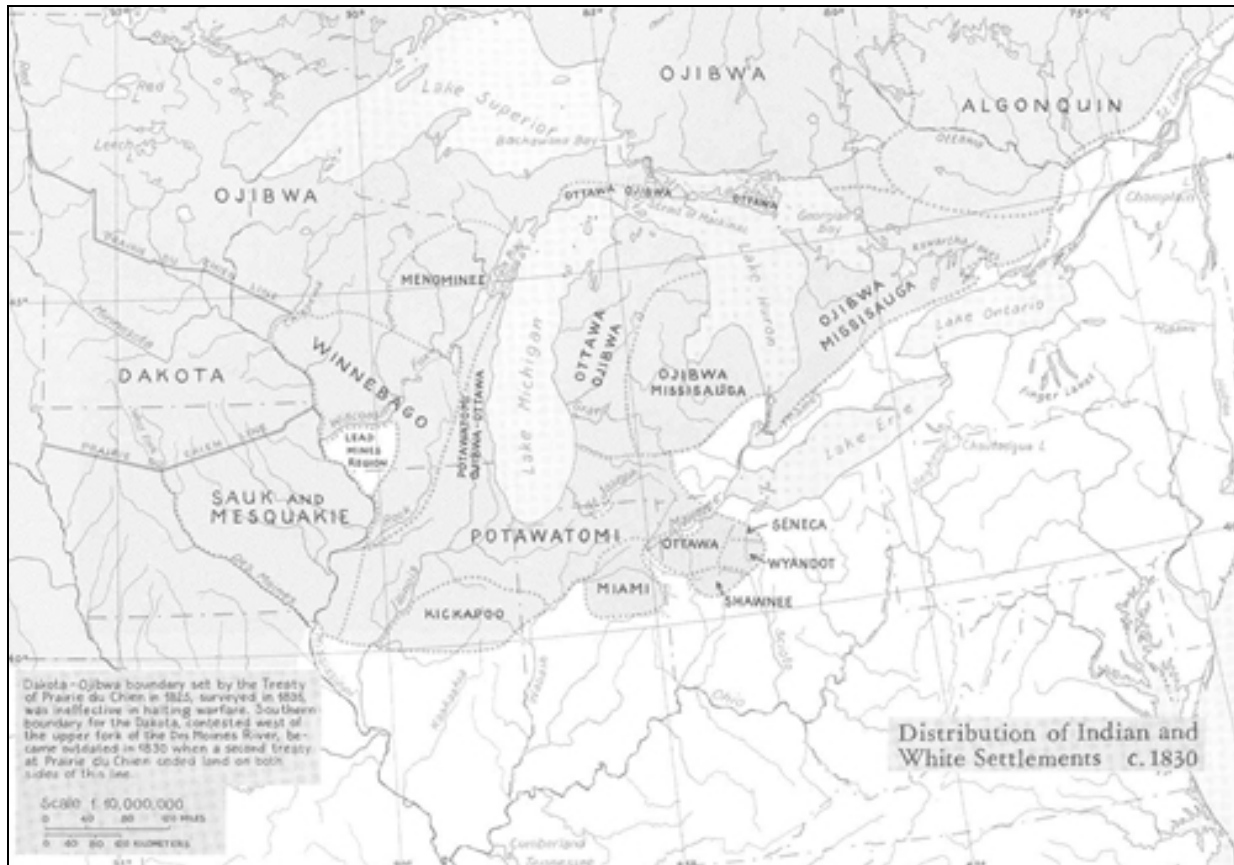
²⁰ R.J. Surtees, *Indian Land Surrenders in Ontario 1763–1867* (Ottawa: Indian and Northern Affairs Canada, 1984) at 1 [Surtees].

²¹ Ibid. at 9.

²² Dickason reports that First Nations at this time regularly received between 1/2 and 1/5 of the then current price of “wild” land in Upper Canada. See *Dickason*, note 5 at 163.

²³ Helen Hornbeck Tanner, ed., *Atlas of Great Lakes Indian History* (Norman: University of Oklahoma Press: 1987) at 96 [Tanner].

envisage that a land sale around the Bay of Quinte, for example, would result in a widespread white community. Indeed, for decades it did not....²⁴



Source: Helen Hornbeck Tanner, ed., *Atlas of Great Lakes History* (Norman: University of Oklahoma Press, 1987) at 123.

Some, in hindsight, have suggested that Aboriginal peoples in Ontario did not have a clear sense at the time of the treaties that they were entitled to the use and benefit of their traditional lands. The record suggests otherwise. For example, in 1763 Ojibwe Chief Minavana had advised a British trader, “Although you have conquered the French, you have not conquered us.... These lakes, these woods and mountains were left us by our ancestors. They are our inheritance and we will part with them to none.”²⁵ In 1849, when mining and timber companies had begun to make serious incursions onto traditional Ojibwe territories in the area of Lake Huron and Lake Superior, two Crown commissioners were sent to the area. Their mandate was to investigate Ojibwe grievances prior to the negotiation of the Robinson Treaties. They had this to say about traditional Ojibwe land uses in the area:

Long established custom, [which among these uncivilized tribes is as binding as its obligations in law in a more civilized nation,] has divided this territory among several bands each independent of the other and having its own Chief or Chiefs and possessing an exclusive right to and control over its own hunting grounds; —

²⁴ Surtees, note 20 at 10.

²⁵ Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991) at 64.

the limits of these grounds especially their frontages on the Lake are generally well known and acknowledged by neighbouring bands....²⁶

To the same effect, during the negotiations that led to Treaty 3, Chief Ma-we-do-pe-nais of Fort Francis is quoted in the treaty commissioner's reports as follows: "[Y]ou have said the Queen gave you her goodness, her charitableness in your hands. This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property."²⁷

The Crown's records of many of the early treaties and the negotiations that led up to them are sparse. The British drafted the agreements as legal deeds of land, although often the descriptions of the land involved and the terms of the agreement on which the Crown relied are plagued by uncertainty. A treaty with the Mississaugas in 1783 at the Bay of Quinte, for example, described the land involved as extending "so far as a man can travel in a day."²⁸ Another transaction with the Chippewas at Lake Simcoe in 1785 is apparently not supported by any deed or description of the area purchased and included no payment by the Crown.²⁹ The uncertainty of these early transactions has led to land claim disputes that continue to this day.

After 1815, the pressures of European settlement on Aboriginal lands increased significantly and with them the desire of the Crown to acquire much larger areas of land. During the War of 1812, Aboriginal people had been critical to the defence of Canada and they still occupied by far the greatest part of the land, even in what is now southern Ontario. However, the colonial government was energetically encouraging immigration, and by 1830, Aboriginal people represented only slightly more than 5 percent of the population of Upper Canada.³⁰ Treaties were then signed that covered ever-increasing areas of land. By 1850, with the exception of small First Nation reserves, all of southern Ontario to the north shore of Lake Superior was treaty land. By 1929 the Crown could assert that, with more than 35 treaties covering the province, all of Ontario was the subject of a treaty.³¹ As a result, all non-Aboriginal people residing in Ontario today are the beneficiaries of treaties.

²⁶ *Report of Commissioners A. Vidal and T.G. Anderson, 1849*, quoted in *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group Publishing, 1996) at 2:454 [RCAP vol.2].

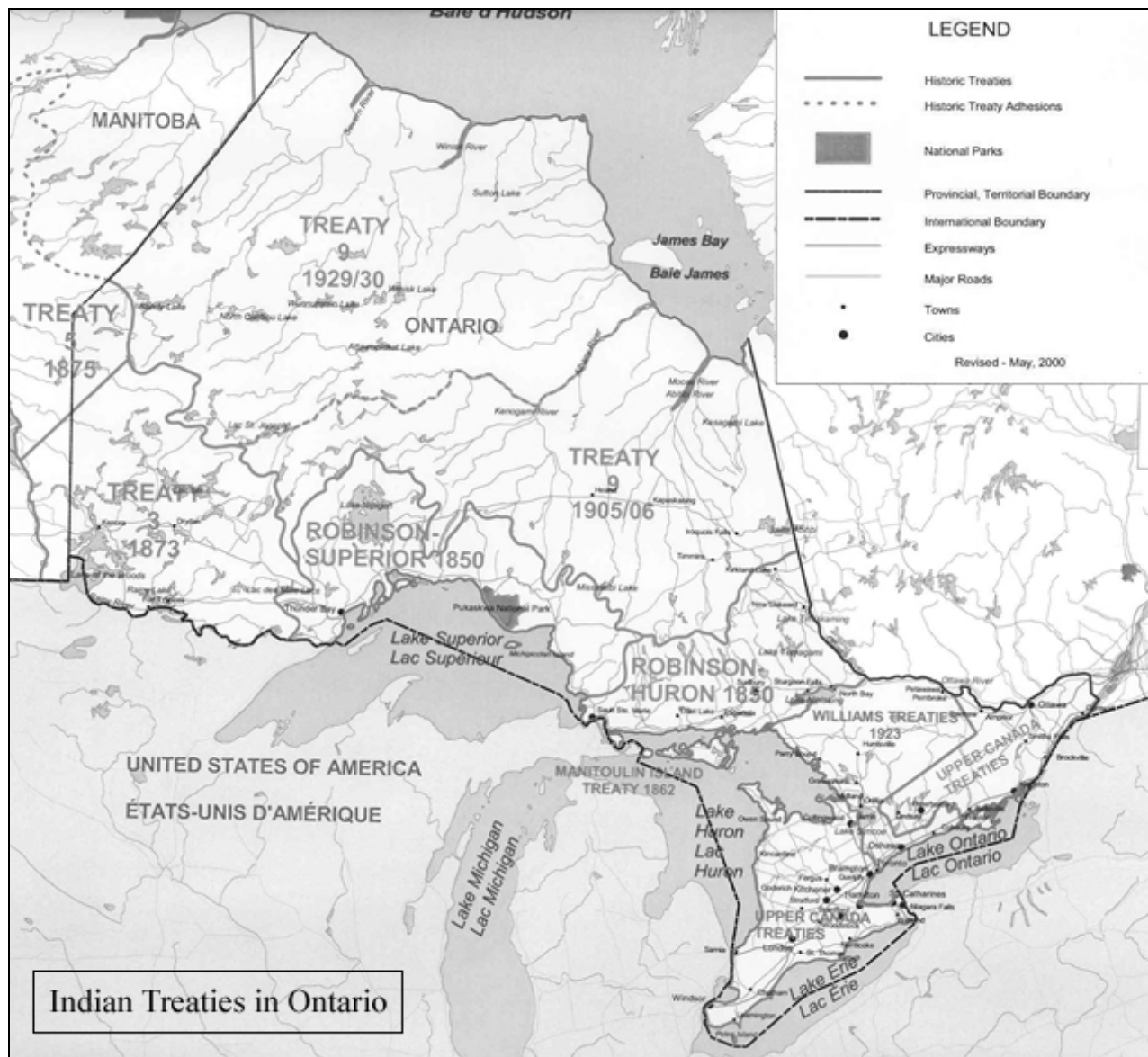
²⁷ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Prospero Books, 2000) at 59 [Morris].

²⁸ *Ibid.* at 24.

²⁹ *Surtees*, note 20 at 36.

³⁰ *Tanner*, note 23 at 122.

³¹ It should be noted that this claim is disputed by some First Nations, who assert that they still hold Aboriginal title to lands outside their reserves that are not covered by the terms of any of the treaties they signed.



Source: *Indian Treaties in Ontario, Canada* (Natural Resources Canada, 2000).

Historical Treatment of Land and Treaty Rights: Why Claims Are Outstanding

Claims Relating to First Nation Lands and Assets

Many of the treaties signed in Ontario gave rise almost immediately to concerns by First Nations that the Crown had not lived up to its treaty promises. In some cases, such as the Robinson Treaties of 1850, several First Nations believed that the reserves ultimately set aside for them were significantly smaller than those promised in the treaty.³² In other cases, First Nations

³² This was the case, for example, of the Mississagi First Nation near modern Blind River, Ontario. Its claim, that its reserve as surveyed was much smaller than that promised by the Robinson-Huron Treaty, was not finally resolved until the 1990s, after an independent surveyor's report substantiated the First Nation's claim.

offered evidence that their understanding of what they agreed to retain as reserve land differed from the written words of the treaty text.³³

A striking example of a concern that the Crown did not live up to its treaty promises regarding reserve land is the case of Treaty 3. This treaty, negotiated in 1873, covers some 30,000 square miles in northwestern Ontario. In return for agreeing to transfer this land to the Crown, the First Nations received a number of promises from the Crown. These included an agreement that the federal government would set aside reserves for the First Nations from their traditional territories. Unfortunately for the over 11 First Nations that participated in Treaty 3, 15 years after the treaty a court's decision³⁴ ruled that, once the treaty was signed, their traditional lands became the exclusive property of the provincial government. As a result, the federal government now had no authority to fulfill its treaty promise. In the end, it took 41 years for the Ontario government and the federal government to agree on the reserve selection, by which time third parties had taken much of the more valuable lands agreed on by the federal government and the First Nations. One First Nation, which lived on land particularly desired by the province, lost its entire reserve, apparently at the insistence of the province.³⁵

In other cases, shortly after a treaty was signed, freeing up a large area of land for settlement, the Crown, under pressure from non-Aboriginal interests, took portions of the reserves set aside for the First Nations without the First Nations' consent. In addition, in many cases non-Aboriginal squatters were permitted to encroach on reserve lands. Nor was the problem of interference with reserve lands a sporadic one. In 1844, a Parliamentary Commission reviewed the question of Aboriginal lands. The chairman was Sir Charles Bagot, who had earlier negotiated the international boundary between Canada and the United States. After reaffirming the principles of the Royal Proclamation, the Bagot Commission concluded that provincial governments had failed to protect First Nations from widespread theft of their lands, leaving the First Nations in poverty.³⁶ The Commission recommended that First Nation lands remain under the protection of the British Crown, not under provincial control, and that measures be taken to protect these lands from trespass and theft.³⁷ In fact, from the late 1830s until the end of the nineteenth century, a number of statutes were enacted to protect First Nation lands, but these seem to have met with limited success.³⁸

³³ Such claims under the Robinson-Huron Treaty of 1850 were ultimately accepted by the federal and provincial governments in the 1990s.

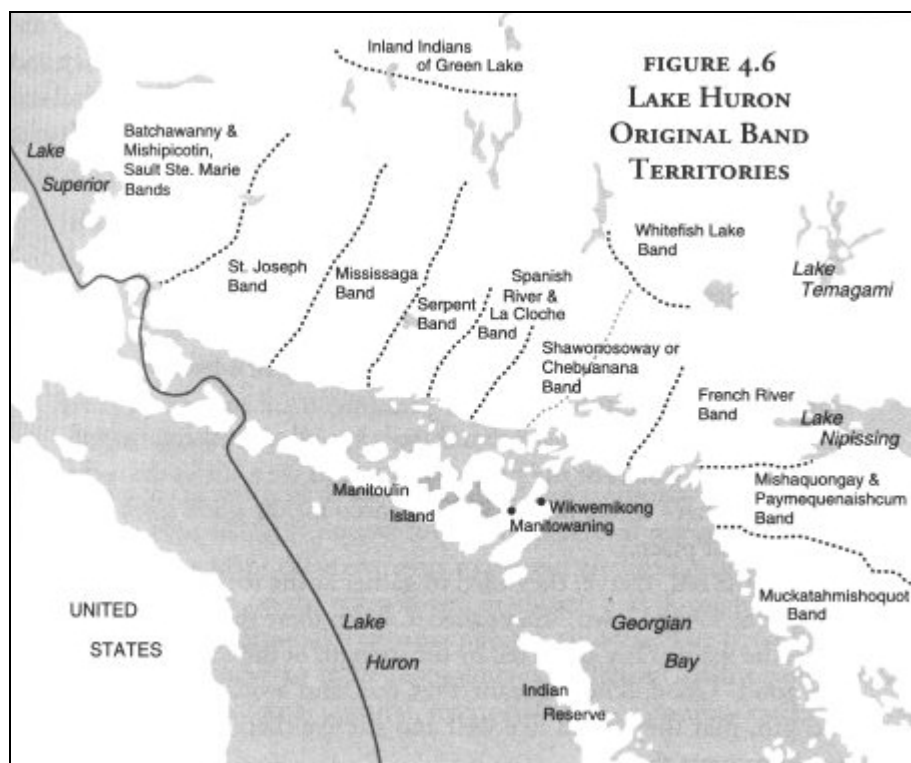
³⁴ *St. Catherine's Milling*, note 14.

³⁵ To learn more about how the Sturgeon Lake First Nation lost its reserve, and about Ontario's historical treatment of Treaty 3 reserves, see David T. McNab, "'Principally Rocks and Burnt Lands' Crown Reserves and the Tragedy of the Sturgeon Lake First Nation" in Kerry Abel and Jean Friesen, eds., *Aboriginal Resource Use In Canada* (Winnipeg: University of Manitoba Press, 1991), 157. See also Leo G. Waisberg, Joan A. Lovisek, and Tim E. Holzkamm, "Ojibwa Reservations as an 'Incubus Upon The Territory': The Indian Removal Policy of Ontario 1874-1982" (N.p., 1996) [*Waisberg*]. This is accessible online at: <<http://www.treaty3.ca/pages/tarr.html>> (accessed March 30, 2005).

³⁶ Sidney L. Harring, "'The Liberal Treatment of Indians': Native People in Nineteenth Century Ontario Law" (1992) 56 *Saskatchewan Law Review* at 305 [*Harring*].

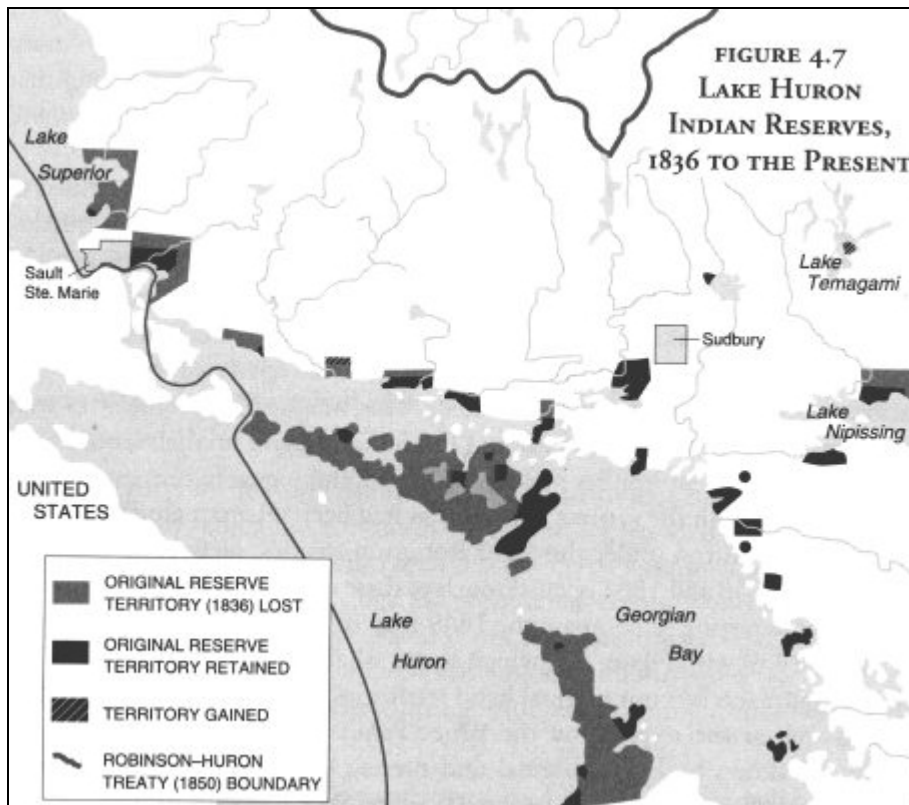
³⁷ For a discussion of the Bagot Commission's recommendations, see J. Leslie and R. Maguire, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Department of Indian Affairs and Northern Development, 1978) at 16-22 [*Leslie*].

³⁸ For a thorough discussion of the challenge of protecting First Nation lands in the nineteenth century and the various statutes enacted in response, see *Leslie*, *ibid.* at 23-76. The authors note the ongoing difficulties encountered



Source: *Report of Commissioners A. Vidal and T.G. Anderson, 1849*, quoted in *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group Publishing, 1996), 455.

in preventing interference with First Nation lands at, e.g., 17, 20, 23, 59, and 60. On the same subject, see J.E. Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas, 1841–1867* (Toronto: University of Toronto Press, 1965) at 208–216.



Source: *Report of Commissioners A. Vidal and T.G. Anderson, 1849*, quoted in Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group Publishing, 1996), 474.

In addition to claims that the Crown either did not provide or protect lands promised to First Nations under treaty, there were other claims that concerned the government's dealings with First Nation assets. Some were based on concerns that the Crown, which controlled First Nation trust funds, had dealt with those funds negligently or fraudulently. Others related to reserve lands that First Nations surrendered to the Crown for sale or lease. By law, First Nation reserve lands could not be transferred to anyone other than the Crown. Thus, if a First Nation wished to earn revenue by leasing or selling part of its reserve, it first had to surrender that part of its reserve to the Crown.³⁹ It then had to rely on the Crown to act in its best interests in dealing with the surrendered lands. Claims arose that in particular cases the Crown did not deal with the lands as intended, or did not remit the proceeds of sale to the First Nation.

A striking example of such a claim is that of the Wauzhushk Onigum First Nation in Treaty 3. When gold was discovered on part of its reserve, that part was surrendered to the Crown in return for a promise that royalty payments would go to the First Nation. Although the resulting gold mine was immensely profitable, the First Nation asserts that it never received any of the promised royalties. In part, this resulted from a court decision that ruled that the First Nation interest even in reserve land was too weak to support any claim of mineral rights. Mineral rights, the court ruled, belonged to the province, and in making the treaty the federal government had no

³⁹ Under the *Indian Act*, R.S. 1985, c. I-5, this rule still applies to sales and long-term leases of reserve land.

power to make an agreement with the First Nation about mineral rights on its reserve.⁴⁰ It did not matter that it was a condition relied on by the First Nations in entering the treaty that the First Nations would enjoy the full benefit of any minerals found on the reserves set aside under the Treaty.⁴¹

Claims Relating to Other Treaty Rights

Another treaty promise that was regularly ignored across the province virtually as soon as the treaties were made was the assurance that Aboriginal people could continue to sustain themselves on their traditional lands. The understanding that First Nations people could continue to engage in their traditional activities was common to virtually all of the treaties. Sometimes this promise was made orally and did not appear in the published treaty document, although it was confirmed in treaty commissioner reports.⁴² On other occasions, such as the Robinson Treaties of 1850, Treaty 3 in 1873, and Treaties 5 and 9 of 1905 and 1929, the written treaties provided explicitly for continuing harvesting rights on the lands they covered—perhaps three-quarters of Ontario's land mass.

Throughout the nineteenth and most of the twentieth centuries, the provincial and federal governments passed game and fish laws that made no mention of these treaty rights.⁴³ During this time Aboriginal people in Ontario were regularly prosecuted when they attempted to exercise what they understood to be their treaty rights.⁴⁴ In this way the traditional economies of First Nations were sterilized. Yet it is clear that promises of continued harvesting rights were vital to the conclusion of many of the treaties. Reporting on his negotiation of the Robinson-Huron Treaty, for example, William Robinson advised his superiors:

In allowing the Indians to retain reservations of land for their own use I was governed by the fact that they in most cases asked for such tracts as they had heretofore been in the habit of using for the purposes of residence and cultivation, and by securing these to them and the right of hunting and fishing over the ceded territory, they cannot say that the Government takes from their usual means of subsistence....⁴⁵

⁴⁰ See *Ontario Mining Company, Limited and Attorney-General for Canada v. Seybold et al. and Attorney-General for Ontario*, [1903] A.C. 73 (P.C.) [*Ontario Mining Company v. Seybold et al.*].

⁴¹ For a description of the treaty condition, see the judgment of Strong J. (dissenting) in *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1.

⁴² One such promise was made to the Chippewa Nation in a land treaty of 1818. The treaty right was not honoured until 1981, during a prosecution of a First Nation member for catching bullfrogs out of season. See *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.) [*Taylor and Williams*].

⁴³ Even the present provincial *The Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41, makes no provision for treaty rights.

⁴⁴ One particularly tragic example is the case of Pierre Hunter, an Ojibwe from Sioux Lookout who was jailed in 1915 for selling moose. He was then released from prison with no money some 200 miles from home and froze to death trying to make his way back. Asked to file a report after the death, the Ontario game officer who had arrested him reportedly indicated that he had no regrets, as "sending him to jail done him no harm ... but it did the Indians around here considerable good." See *Harring*, note 36. For more information on the effect of Ontario's game and fish policies on Aboriginal people, see Frank Tough, "Ontario's Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892–1930" (Toronto: Ontario Native Affairs Secretariat, 1991) [*Tough*].

⁴⁵ Robinson's report is given in a book by another Crown treaty representative; *Morris*, note 27 at 19.

The published treaty reads:

[Her Majesty] hereby promises and agrees ... to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government.⁴⁶

As indicated above, the laws and regulations subsequently enacted by the federal and provincial governments did not acknowledge these treaty promises. Indeed, in at least two cases, despite recent treaty promises, the Government of Ontario established large game preserves surrounding lands selected for reserve, making all fishing and hunting there illegal.⁴⁷

In several cases, access to other resources on their traditional lands, such as timber and minerals, was also an important focus of the First Nations in entering treaties, as the government negotiation record of the Robinson Treaties and Treaty 3 make clear. Yet, as described later in this report, First Nations members were largely excluded from the economies generated by these resources on their traditional lands.

Breaches of agreements to set aside reserve lands, breaches of trust, illegal takings of reserve lands, misadministration of trust funds, breaches of formal promises to provide access to resources in return for the transfer of interests in land—all were the subject of formal petitions for redress by First Nations after the treaties were signed. All of these concerns, whatever the merits of a particular case, are at least understandable in terms of ordinary legal norms. Yet the vast majority of these grievances were left outstanding until late in the twentieth century. To understand why this occurred requires a review of the legal and political barriers that historically faced Aboriginal people in Ontario.

Historical Barriers to Resolving Land and Treaty Claims

We ask of you please to forward this our petition to the Department at Ottawa.

The Chief and councillors assembled to consider our miseries, how we are prevented to fish, how we are put in prison for fishing.

It was established by Treaty that here where we live only Indians should dwell, and that the fisheries should be our fisheries all round, this was agreed on Aug. 9th, 1836 by Sr. F.B. Head. Since that time we never did make any other Agreement with the Government by which the Government could come in possession of what belonged to us, until this day we have never received anything

⁴⁶ The full treaty text is in *Morris*, *ibid.* at 302.

⁴⁷ This was the case of the Brunswick House First Nation in Treaty 9, for example. Unable to survive and persuaded they would receive another reserve, they were compelled to surrender their reserve. They spent the next 21 years without any land whatsoever.

for which we should cease to own
what our forefathers owned of old.

—Petition from Wikwemikong, on Manitoulin Island,
to the Department of Indian Affairs, dated July 9, 1894⁴⁸

Lack of Access to First Nation Records

Government archives in Ontario are filled with particularized petitions by First Nations for government action to redress violations of their land and treaty rights. Today most of the issues raised in those petitions remain unresolved. One obstacle historically faced by First Nations was that the records relating to their treaties, land transactions, and trust funds were kept by the federal government. Until late in the twentieth century, First Nations had very limited access to these records. First Nation requests for information about their land dealings were often denied. Thus, in the 1830s when the Mississaugas of New Credit, concerned about encroachments on their lands near Toronto, asked for a formal confirmation of their landholdings in order to enforce their rights, they were refused. Their Chief, an educated Methodist Minister named Peter Jones (Kahkewaquonaby), went so far as to petition the Queen in England. His request was ultimately denied, on the basis that the Mississaugas were not capable of handling such responsibility.⁴⁹

Even as recently as 1957, when the Musqueam First Nation surrendered part of their land in downtown Vancouver so that it could be leased to a golf club, the First Nation did not learn from the federal government the terms of the lease until 12 years later.⁵⁰

Lack of Access to Lawyers

Another historical obstacle for First Nations who wished to press claims was that they generally did not have access to lawyers who could bring their case to the courts if governments did not act. Until 1860, the British Crown's appointees, and, after Confederation, the federal government, controlled First Nation spending. Further, until the 1960s, federal "Indian agents" supervised all significant First Nation activities, including band council meetings.⁵¹ Federal officials regularly declined to approve the hiring of lawyers—apparently to protect First Nations from exaggerated expectations and from the payment of excessive legal fees.⁵² Indeed, in 1927, faced with rising pressure from First Nations on land claims, the federal government passed the following amendment to the *Indian Act*:

Every person who, without the consent of the Superintendent General ... receives,
solicits or requests from any Indian any payment or contribution ... for the

⁴⁸ This quotation is taken from Mr. Justice S. O'Neill, "Aboriginal and Treaty Rights in Ontario," presented in Orillia on September 10, 2002.

⁴⁹ On the Chief's meeting with Queen Victoria, see D. B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians* (Toronto: University of Toronto Press, 1987) at xi–xxiv. On the government's response to the New Credit request, see *Leslie*, note 37 at 18–20. See also *Dickason*, note 5 at 209.

⁵⁰ See *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at paras. 76–90 [*Guerin*].

⁵¹ For an interesting example of the influence of an Indian agent over a First Nation's affairs, see *Guerin*, *ibid*.

⁵² For examples of the federal government's reluctance to permit First Nations to pay lawyers involved in their claims, see, Richard C. Daniel, *A History of Native Claim Processes in Canada 1867-1979* (Ottawa: Department of Indian Affairs and Northern Development, 1980) at 61–62, 67–68, 74, and 128–29 [*Daniel*]. Daniel quotes the House of Commons discussion on the issue of exploitation at 53.

prosecution of any claim which the tribe or band of Indians ... has ... for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence.⁵³

This prohibition on legal representation for First Nations remained in effect until 1951.

The Historical Approach of the Courts

Unsurprisingly, there were not many decisions by Canada's senior courts about land or treaty rights until the second half of the twentieth century.⁵⁴ Due to the impediments described above, in almost all of the reported cases affecting their rights during this period, First Nations were not parties to the proceedings, they were not represented, and their evidence was not heard. Instead, these were disputes between the federal and provincial governments, or between governments and corporations. The arguments concerned who could benefit financially from the lands affected by First Nation treaties.

Significantly for First Nations, the *British North America Act, 1867*⁵⁵ had given Canada a federal system of government. Legislative powers were now divided between federal and provincial governments. The Act gave the federal government exclusive jurisdiction over "Indians, and Lands reserved for the Indians."⁵⁶ The provinces, on the other hand, were given ownership of Crown lands within their borders and the right to legislate in regard to natural resources.⁵⁷ This immediately created complications for the exercise of First Nation land and treaty rights.

Although the new Constitution protected the rights of the French minority, as well as the Roman Catholic and Protestant minorities in Ontario and Quebec, it offered no protections for Aboriginal rights. In the past, First Nations land dealings had involved the Crown and it was clear who could make commitments on behalf of the Crown. Now two levels of government could affect the enforcement of land and treaty claims through their actions. The question of First Nation rights on reserve lands was clearly within the jurisdiction of the federal government.⁵⁸ However, unless both governments acted in concert, it had become much more difficult to enforce First Nation rights outside of the reserves. Would Ontario governments respect the off-reserve harvesting rights guaranteed in the treaties? How would the courts deal with First Nations' off-reserve land and treaty rights in Ontario?

⁵³ *Indian Act*, S.C. 1926–27, c. 32, s.6.

⁵⁴ There appear to be only two reported cases between 1800 and 1960 in which First Nations in Ontario were able to petition the courts about their land rights. The first was *Henry v. R.* (1905), 9 Ex. C.R. 417 (Ex.Ct.) [*Henry*], discussed below, in which the Mississaugas of New Credit successfully recovered treaty annuities owing under an 1818 treaty. The second was *Miller v. R.*, [1950] 1 D.L.R. 513 (S.C.C.) [*Miller*] in which Six Nations sued Canada for flooding damage to its reserve lands, compensation for surrendered lands, and theft of band funds; the case is discussed below. In both of these cases the Department of Indian Affairs refused to permit the First Nation's lawyer to be paid by the First Nation. See the references in note 52.

⁵⁵ The Act is now called the *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c.3 [*Constitution Act, 1867*].

⁵⁶ *Ibid.* at s. 91(24).

⁵⁷ For provincial ownership of Crown lands, see s. 109 of the *Act*. Most provincial legislative powers are set out in s. 92 of the *Act*, with right to regulate natural resources being covered by sections 92 (5), (13), and (16).

⁵⁸ By the *Constitution Act, 1867*, note 55 at s. 91(24).

The first major court decision affecting First Nation land rights, and the leading case in Canada for almost a century, was *R. v. St. Catherine's Milling and Lumber Company*.⁵⁹ In that case, the Ontario government sought to prevent a federally-licensed lumber company from cutting timber on lands ceded by the Ojibwe under Treaty 3. There were major commercial interests at stake: in 1883 the company had cut two million feet of timber from the traditional lands of the Ojibwe. The federal government and the Ontario government each wanted the right to issue timber licenses in the area. No one appears to have argued that the treaty First Nations had any rights to these resources after the signing of the treaty, and First Nations were not represented in the case. In the end, the Judicial Committee of the Privy Council, then the highest court in the British Empire, decided in favour of the province.

The decision in *St. Catherine's Milling* hinged on how to interpret the *British North America Act, 1867*. Under that Act, the province owned all "Crown land" within its borders at the time of Confederation. Since Treaty 3 was not signed until 1873, was the Ojibwe interest in their traditional lands prior to the Treaty equivalent to full ownership of the land, or was their traditional land "Crown land" at Confederation, even before they signed the Treaty? If the Ojibwe had a full property interest, then under the *British North America Act, 1867* the territory covered by the Treaty might now belong to Canada. In the end, the Privy Council decided that even before negotiating with the Ojibwe, the Crown had a "present proprietary estate in the land, upon which the Indian title was a mere burden."⁶⁰ Thus, despite the Royal Proclamation,⁶¹ traditional Aboriginal lands had "all along" belonged to the Crown, although subject to an Aboriginal interest. As Crown land at the time of Confederation, therefore, the territories covered by Treaty 3 belonged to Ontario. The treaty itself had removed any Aboriginal interest, all for the benefit of the province.

The court in *St. Catherine's Milling* found that Aboriginal people did have a legal interest in their traditional lands, but it was a mere "personal and usufructuary right" that did not amount to full ownership of the land. The court did not expand further on the nature of Aboriginal rights beyond noting that, under the Treaty, the First Nations still enjoyed the "privilege" of hunting and fishing on their traditional lands.⁶² After the decision the federal government continued to negotiate treaties in Ontario and elsewhere to obtain a release of the Aboriginal interest in their traditional lands.⁶³ As for reserve lands, they continued to be held in trust for First Nations by the federal government.

⁵⁹ *St. Catherine's Milling*, note 14.

⁶⁰ *Ibid.* at 58.

⁶¹ The court ruled that the Royal Proclamation could be the only possible source of any property interest that Aboriginal peoples might hold in their traditional lands, and, according to the court, the terms of the Proclamation showed that it was not intended to recognize any such property interest. The Supreme Court of Canada has since rejected this reasoning, ruling that the interest of Aboriginal peoples in their traditional lands is a right that existed at common law, because of their occupation of the lands. See the discussion below under "The Current Law."

⁶² *St. Catherine's Milling*, note 14 at 60.

⁶³ Perhaps as significant for most First Nations in Ontario as the actual ruling in *St. Catherine's Milling* were the attitudes toward Aboriginal people shown by many of the lawyers and judges involved in the case. The Premier of Ontario, who argued the case personally, submitted at the trial that treaties had been negotiated in Ontario, not because they were required, but "only out of endeavour to satisfy the Indians." As for Chancellor Boyd, the trial judge, in considering the property rights of Aboriginal people, he described them as "heathens and barbarians" unqualified to own land. For him, the Treaty 3 First Nations were "the rude red-men of the North-West." The "inevitable problem" created by the advance of settlers in Ontario was "how best to protect and encourage the

The immediate result of the decision in *St. Catherine's Milling* for the First Nations who had signed Treaty 3 was to nullify their legal right to the reserves they had agreed upon. The court, after all, had ruled that before the treaty Ontario already owned the Ojibwe lands, including the lands on which their reserves had been selected. Neither the First Nations nor Canada had any legal interest whatsoever in those lands after the signing of the Treaty. In effect, the First Nations had made a fatal constitutional mistake in transferring their interest in 30,000 square miles of land to the Crown without making sure that they first had a commitment from the provincial government to honour the Crown's treaty promise. As noted earlier in this report,⁶⁴ because of Ontario's concerns about the commercial value of the reserve lands, it took 42 years for Ontario and the federal government to agree upon which of the selected reserves the First Nations would be entitled to retain.⁶⁵

While *St. Catherine's Milling* undermined the ability of First Nations to enforce treaty promises of reserve land, it does not appear to have occurred to the federal and provincial governments to legislate to protect treaty rights to hunt, fish, and trap. Instead, federal and provincial game and fish laws were drafted as if the treaty promises did not exist, and Aboriginal people in Ontario were regularly prosecuted and convicted in the lower courts when they attempted to enforce their treaty rights.⁶⁶ Perhaps because First Nations defendants lacked resources, their treaty rights to hunt, fish, and trap do not appear to have been considered by the highest courts in Canada prior to the 1960s.

One of the few reported cases (which has since been repudiated by the Supreme Court of Canada⁶⁷) was *R. v. Syliboy*,⁶⁸ decided in 1929. In that case, a Mi'kmaq Grand Chief was prosecuted for unlawful possession of game. The defendant alleged that he had a right to hunt and trap under a treaty entered into in 1752. The Nova Scotia County Court held that the treaty,

individual settler, and how best to train and restrain the Indian so that being delivered by degrees from dependency and pupillage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship.”

Of course, there were always prominent Ontarians who were supportive of Aboriginal interests. The work of the Bagot Commission is one example. Another is the effort of John A. Macdonald to enfranchise Indians in 1885. During the debate in Parliament Macdonald expressed his view as follows: “Indians carry out all the obligations of civilized men ... in every respect they have a right to be considered as equal with whites.” See *Dickason*, note 5 at 263.

⁶⁴ See the discussion above under “The Legal Basis of Land Claims.”

⁶⁵ One of the First Nations (Sturgeon Lake) never received a reserve at all. Another, which had sold part of its selected reserve to receive the royalties from a gold mine on the land, never received those royalties. In the case of *Ontario Mining Company v. Seybold et al.*, note 40, the court ruled, following *St. Catherine's Milling*, that neither the First Nation nor Canada had any legal interest in the selected reserve, as the province had not consented to its creation. As in *St. Catherine's Milling*, the First Nation was not a party to and was not represented in the case.

⁶⁶ For a general review of the history of the treatment of treaty harvesting rights in Ontario by governments and the courts, see Peggy J. Blair, *For Our Race Is Our Licence: Culture, Courts and Conflict over Aboriginal Hunting and Fishing Rights in Southern Ontario*, LL.D. thesis, University of Ottawa, 2003. See also *Tough*, note 44.

⁶⁷ In *R. v. Simon*, [1985] 2 S.C.R. 387, the Supreme Court of Canada reviewed the same Peace and Friendship Treaty of 1752 and ruled that its guarantee of hunting rights superseded provincial regulations. The court rejected the judge's conclusions in *Rex. v. Syliboy*, [1929] 1 D.L.R. 307 (NS Co.Ct.) [*Syliboy*] and noted (at para. 21) that “the language used by Patterson J. ... reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law.”

⁶⁸ *Syliboy*, *ibid.*

which guaranteed First Nation hunting rights, offered no defence for Mr. Syliboy. Although it was a formal document issued by the Governor of the province that called itself a “treaty,” in the opinion of the judge, Aboriginal people did not in fact have the capacity to enter into an enforceable treaty and neither had the Governor. Treaties were agreements between independent nations—a group that did not include the Mi’kmaq. Mr. Syliboy was convicted.⁶⁹

Some measure of protection for First Nation treaty harvesting rights arrived in 1951. In that year the federal government passed what is now section 88 of the *Indian Act*, which provided that provincial laws of general application were subject to the treaties. Now at least First Nation defendants could bring evidence of a treaty promise as a defence when they were prosecuted under provincial game laws.⁷⁰ When the courts had an opportunity to consider section 88 they proved willing to interpret the word “treaty” broadly and to include oral promises, and they ruled that treaty promises should always be interpreted in a manner that upholds the honour of the Crown.

Federal fish and game laws were not affected by section 88 of the *Indian Act* and they did not necessarily give protection to treaty rights. Thus, in several cases treaty rights were held to be no defence to prosecutions under the federal *Migratory Birds Convention Act*.⁷¹ In one of them, *R. v. Sikyea*, the Court of Appeal noted that the federal government had solemnly assured the First Nations that in signing the treaty their hunting and fishing rights would not be curtailed—and then proceeded to limit their right to hunt game birds to one and a half months a year. For the court, the government’s “apparent breach of faith” in reneging on a fundamental treaty promise seemed to be “a case of the left hand having forgotten what the right hand had done.”⁷² Nonetheless, Mr. Sikyea was convicted and the federal government has never amended the Act to acknowledge its treaty promises.

To summarize the approach of the courts prior to 1982, the courts declined to give legal effect to treaty promises unless the government had enacted legislation to acknowledge those promises. After 1867, the courts would not even enforce treaty promises to set aside reserve land unless both governments agreed. After 1951, section 88 of the *Indian Act* allowed the courts to offer some protection to treaty rights, but it had no application to fisheries regulations, which are under federal jurisdiction, or to other federal legislation that curtailed treaty rights.

⁶⁹ Ibid. Interestingly, the judge had this to say (at 314): “Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities....” For a more sympathetic view of the legal effect of treaty promises from the same time period, see *R. v. Wesley*, [1932] 4 D.L.R. 774 (Alba.CA). In this case, the court set aside convictions under Alberta’s *Game Act* because the court ruled that the Act should be construed so as to be consistent with treaty promises of a right to hunt for food. In doing so, McGillivray J.A. concluded (at para. 65), “It is satisfactory to be able to come to this conclusion and not to have to decide that ‘the Queen’s promises’ have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be ‘convinced of our justice and determined resolution to remove all reasonable cause of discontent.’”

⁷⁰ For two examples of a successful treaty defence under this section, see *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.); affirmed by the S.C.C. at (1965), 52 D.L.R. (2d) 481; and *Taylor and Williams*, note 42.

⁷¹ See, for example, *R. v. Sikyea*, [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267 (S.C.C.); and *Daniels v. White*, [1968] S.C.R. 517 (S.C.C.).

⁷² See *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T. C.A.) at para. 28.

Historical Policies Concerning Claims and Treaty Rights

With limited access to information, restricted access to lawyers, and court decisions that declined to give legal effect to treaty promises unless they were reflected in statutes, in general only the political avenue was historically available for the enforcement of Aboriginal land and treaty rights. However, as a minority, Aboriginal people lacked political power and politicians' attitudes toward Aboriginal people were often not sympathetic.⁷³ In fact, status Indians were not even granted the right to vote in federal elections in Canada until 1960.⁷⁴ Although hunting and fishing had been the mainstay of First Nation economies and a key focus of the treaties, most Aboriginal people were not given commercial hunting and fishing licences to develop their economies.⁷⁵ Equally, First Nations in Ontario were virtually excluded from the economic benefits offered by other resources within their traditional territories.⁷⁶ This is a grievance that remains outstanding to this day.

Neither the federal or provincial government had any general policy for addressing Aboriginal land and treaty grievances until 1974, when the federal government established the Office of Native Claims. Until that time First Nations claims were dealt with on an *ad hoc* basis by both governments and few claims were resolved. In 1890 and 1891, for example, the governments of Canada, Ontario, and Quebec established a board of arbitration to hear a number of disputes among themselves, some of which involved First Nations lands and moneys. The board appears to have proved ineffective in dealing with First Nation claims,⁷⁷ although it did deal with some important disputes between Ontario and Canada about who should be responsible for making treaty annuity payments. One claim that it dismissed was a claim by the Mississaugas of New Credit for, among other things, unpaid annuities from a treaty signed in 1818. The First Nation appealed to the courts and was successful in obtaining the annuities.⁷⁸

Negotiation, rather than arbitration, was attempted unsuccessfully in the case of another major nineteenth-century claim, this time involving the Six Nations of the Grand River. According to a commissioner appointed by the Department of Indian Affairs, from 1834 to 1842 the governments of Upper Canada and the Province of Canada⁷⁹ had taken some \$160,000 from Six

⁷³ For example, when the government of John A. Macdonald introduced legislation granting First Nations people the right to vote, in 1885, members of Parliament raised a hue and cry about "scalping." Although the bill passed, it was repealed in 1898, according to the government, because it was "an insult to free white people in the country to place them on a level with pagan and barbarian Indians." See *Dickason*, note 5 at 263–264. Such attitudes were not unusual. In 1905 the Treasurer of Ontario referred to the Ojibwe as an "incubus upon the territory." See *Waisberg*, note 35.

⁷⁴ All adult status Indians were granted the right to vote in federal elections by *An Act to Amend the Canada Elections Act*, S.C. 1960, c. 7. Indians had received the right to vote in Ontario provincial elections in 1954. For a historical review of the legal handicaps imposed on status Indians, see Wendy Moss, *Aboriginal People: History of Discriminatory Laws* (Ottawa: Library of Parliament, 1992).

⁷⁵ For a general review of the harm caused to First Nations by Ontario's historical game and fish policies, see *Tough*, note 44.

⁷⁶ See, e.g., E.P. Hartt, *Report of the Royal Commission on the Northern Environment: Interim Report* (Toronto: Royal Commission, 1978) [Hartt].

⁷⁷ See *Daniel*, note 52 at 56–62.

⁷⁸ The case was *Henry*, note 52. According to *Daniel*, *ibid.*, the federal government refused to allow the First Nations to pay the lawyer who had represented them in court. The lawyer was paid only after a reference to the Exchequer Court of Canada. See *Daniel*, *ibid.* at 58–62.

⁷⁹ Upper Canada and Lower Canada joined to form the Province of Canada in 1841.

Nations' band accounts without their consent.⁸⁰ The moneys had been used to invest in the Grand River Navigation Company, whose efforts were being promoted by the government and opposed by Six Nations. All of the Six Nations' money was lost when the company went bankrupt. In 1886, the Six Nations' claim was taken to the Department of Indian Affairs. After decades of settlement discussions, this and two other Six Nations' claims ended up before the courts. Ultimately the Supreme Court of Canada referred the Grand River Navigation claim back to the lower courts to make certain determinations of fact.⁸¹ Further settlement discussions failed to resolve the issue, which is the subject of an outstanding claim today.

Finally, in one other case the governments of Ontario and Canada created a special commission of inquiry to investigate and settle a land claim. In the 1870s seven Chippewa and Ojibwe First Nations had submitted a claim that they had never surrendered their northern hunting grounds. A commission of inquiry was finally created in 1923. After two weeks of hearings on the reserves, the commission concluded that the claim was valid. In return for a release of their claims (the "Williams Treaty"), the First Nations received \$500,000.

The Williams Treaty appears to be the only case prior to the 1980s in which a formal process established by government settled a land claim in Ontario.⁸² In the 1960s the federal government considered legislation to create an independent body to adjudicate claims, but (in the face of Aboriginal opposition to its "White Paper") this proposal was ultimately dropped. Like the question of treaty rights, outstanding land claims in Ontario were left by government policy to be dealt with by later generations.

II: THE SITUATION TODAY

CURRENT STATE OF THE LAW

TREATY RIGHTS

The starting point for the current Canadian law of treaty rights is section 35 of the *Constitution Act, 1982*. Section 35 provides:

35. (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "Aboriginal peoples" includes the Indian, Inuit and Metis peoples of Canada.

⁸⁰ *Daniel*, note 52 at 122–130.

⁸¹ The court's judgment is reported in *Miller*, note 54. The other two claims against the federal government were dismissed on constitutional grounds, because that they were based on events that occurred prior to the union of the two Canadas. The court ruled that the statute creating the union did not provide for the new Province of Canada to take on the debts of Upper Canada. For a description of the court case in which Six Nations sought an order that Six Nations be allowed to pay him, see Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 80–82.

⁸² Apart, of course, from the original treaties, which addressed the First Nations' Aboriginal title.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.”

When Canada patriated its Constitution in 1982, it had promised that it would uphold Aboriginal rights.⁸³ Section 35 was the result, entrenching Aboriginal and treaty rights in the Constitution. In the past, as we have seen, Canadian courts had been reluctant to enforce the treaty rights of Aboriginal people unless they were directed to consider treaty rights by a Canadian statute. With section 35 the rules of the game had changed. Existing treaty rights were now recognized in the supreme law of Canada.

In the first case to consider section 35, *R. v. Sparrow*,⁸⁴ the Supreme Court of Canada drew attention to the fundamental change that had occurred. Describing the previous state of the law, a unanimous court said:

For many years, the rights of the Indians to their Aboriginal lands—certainly as legal rights—were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises.... For fifty years after the publication of Clement’s *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, Aboriginal claims were not even recognized by the federal government as having any legal status.⁸⁵

Explaining the overall effect of section 35, the court quoted with approval Professor Noel Lyon: “The context of 1982 is surely enough to tell us that this is not just a codification of the case law on Aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for Aboriginal peoples.” Further, according to the court, “The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of Aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.”⁸⁶

Ordinarily, a law or government action that violates the Constitution will be held to be invalid. In *Sparrow*, the court decided that a different approach applies to the rights guaranteed by section 35. If a law is found to violate a treaty right, for example, the law can still be saved if the Crown proves that the violation is justified. To do this the court must be satisfied: 1) that the law has a valid objective, and 2) that the law is consistent with the “honour of the Crown” and “the special trust relationship and the responsibility of the government vis-à-vis Aboriginals.”⁸⁷

⁸³ See *R. v. Secretary of State for Foreign and Commonwealth Affairs (U.K.)*, [1982] 2 All E.R. 118 (C.A.). In a famous passage from its judgment at 129–130, the court said, echoing the language used by the Crown in Treaty 3: “No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada as long as the sun rises and the river flows. That promise must never be broken.”

⁸⁴ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

⁸⁵ *Ibid.* at 1103.

⁸⁶ *Ibid.* at 1106.

⁸⁷ *Ibid.* at 1113–1114.

Finally, in considering whether a law that violates a treaty or Aboriginal right is justified and therefore constitutional, the court has said that the following questions may be relevant: “whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, [in harvesting rights cases] whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.”⁸⁸

In brief, governments may still regulate the exercise of treaty or Aboriginal rights, or infringe those rights, but only if they can satisfy the courts that they had a valid legislative objective and that their actions are consistent with the honour of the Crown. The rule applies equally to federal and provincial laws. Further, the courts have held that governments will not be able to meet this justification test in cases where they create an unstructured administrative scheme that risks violating section 35 rights in a substantial number of situations. Instead, the law or regulation must “outline specific criteria ... which seek to accommodate the existence of Aboriginal rights.”⁸⁹

In deciding what constitutes a “treaty” under section 35, the Supreme Court has made clear that it will not focus on formalities. The word simply means “agreements in which the ‘word of the white man’ is given and by which the latter made certain of the Indians’ co-operation.”⁹⁰ And in deciding what obligations the Crown undertook in a treaty, the courts will consider oral promises⁹¹ and implied terms of the written agreement.⁹² Finally, in interpreting written treaty promises—given that it is known that the Crown drafts did not always include all of the terms negotiated—no appearance of “sharp dealing” by the Crown will be tolerated and ambiguities will be interpreted in favour of the First Nations.⁹³

It should be noted that section 35 protects only “existing” rights. Here the Supreme Court has ruled that treaty and Aboriginal rights will still be considered to exist unless they have been clearly and plainly extinguished by a federal law. Past government regulations that infringe the

⁸⁸ Ibid. at 1119.

⁸⁹ See *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 54 [*Adams*]; and *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 64 [*Marshall*].

⁹⁰ *R. v. Sioui*, [1990] 1 S.C.R. 1025 at para. 44 [*Sioui*]. According to the Court at para. 43, “what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”

⁹¹ See *Taylor and Williams*, note 42.

⁹² See *Marshall*, note 89 at para. 14. The court will review the historical and cultural context of the treaty in interpreting what was agreed. In *R. v. Horseman*, [1990] 1 S.C.R. 901 at para. 5, Justice Wilson described the reason for this approach as follows: “These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party’s understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.”

⁹³ These treaty interpretation principles, which were developed by the courts over a number of years, are summarized in *Marshall*, note 89 at paras. 49–51.

treaty right or government actions, like the patenting of lands, that are inconsistent with the right are not enough to take away its current constitutional protection.⁹⁴

Thus far, Supreme Court decisions interpreting treaty rights since 1982 have upheld Aboriginal hunting practices in a provincial park,⁹⁵ fishing for a moderate livelihood off reserve,⁹⁶ and the practice of Aboriginal ancestral customs in a provincial park.⁹⁷ In July 2005, the Supreme Court of Canada ruled that commercial logging rights are not protected by treaty in New Brunswick.⁹⁸ Given the variety of treaty promises that were made in Ontario, the scope for First Nations treaty claims in Ontario appears broad.⁹⁹

ABORIGINAL RIGHTS

Section 35 of the Constitution also protects traditional Aboriginal activities on lands off-reserve even where the treaties do not refer to such activities. Where the activity is one that was integral to the distinctive culture of the Aboriginal society at the time of contact with settlers¹⁰⁰ it is protected as an “Aboriginal right” under section 35 unless the right was given up in the treaty, incompatible with the sovereignty of the Crown, or eliminated by a federal law which showed a clear and plain intention to extinguish the right.¹⁰¹

Unlike treaty rights, Aboriginal rights flow from the common law.¹⁰² As set out by the Supreme Court of Canada, quite apart from treaties, the common law of Canada recognizes that, long before European settlement of North America, Aboriginal peoples used the land in organized societies. Aboriginal rights “are a form of intersocietal law that evolved from long-standing practices linking the various communities.”¹⁰³ Accordingly, “Aboriginal interests and customary

⁹⁴ See *Sparrow*, note 84 at 1099. For the provinces’ inability to extinguish a section 35, see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 178 [*Delgamuukw*].

⁹⁵ See *R. v. Sundown*, [1999] 1 S.C.R. 393 [*Sundown*], where building a traditional hunting cabin in violation of provincial park regulations was held to be valid exercise of a treaty right to hunt within the meaning of section 88 of the *Indian Act*.

⁹⁶ See *Marshall*, note 89, where fishing to earn moderate livelihood was held to be a treaty right and the regulations prohibiting Aboriginal fishing were ruled invalid.

⁹⁷ *Sioui*, note 90. Here the court held that cutting trees and making fires in a provincial park was a valid exercise of a treaty right within the meaning of section 88 of the *Indian Act*. It is worth noting that in this case, as in *Sundown*, note 95, the court ruled that this treaty right could only be exercised where to do so would be compatible with the current use of the land.

⁹⁸ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220. The Supreme Court of Canada overturned the lower court’s decision in *R. v. Bernard*, 2003 NBCA 55 [*Bernard*] in which a majority of the New Brunswick Court of Appeal found harvesting and selling logs to be a protected treaty right.

⁹⁹ One treaty claim that has been rejected was the claim that Treaty 8 included a promise to exempt First Nation members forever from taxation. See *Benoit v. Canada* (2003), 228 D.L.R. (4th) 1 (F.C.A.). Leave to appeal to the Supreme Court of Canada was denied: [2003] S.C.C.A. No. 387.

¹⁰⁰ For Métis people in Ontario the relevant time is later than contact. See the discussion of Métis rights in footnote 104 below. For a full statement of what is required to establish an Aboriginal right, see *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 44–75 [*Van der Peet*]. In this case Dorothy Van der Peet was convicted for selling 10 fish, because, the court found, she had failed to establish that her selling of the fish constituted an Aboriginal right of her First Nation.

¹⁰¹ See *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 10 [*Mitchell*].

¹⁰² See *R. v. Cote*, [1996] 3 S.C.R. 139 at para. 49 [*Cote*].

¹⁰³ See *Van der Peet*, note 100 at para. 42.

laws” are presumed to survive the Crown’s assertion of sovereignty and to continue today unless they have been extinguished in one of the ways described in the preceding paragraph.¹⁰⁴

Like treaty rights, existing Aboriginal rights may be infringed or regulated by the provincial or federal government, but only if the government has a valid objective and acts in a manner consistent with the honour of the Crown. And like treaty rights, Aboriginal rights cannot be extinguished by a provincial government.¹⁰⁵ Unlike treaty rights, Aboriginal rights are also enjoyed by Métis communities in Ontario.¹⁰⁶ The Aboriginal rights of the Métis, as we saw above, are expressly recognized by section 35.

The courts have ruled that each Aboriginal community that wishes to assert an Aboriginal right must prove that right on a case-by-case basis. Not surprisingly, given that there are over 1,000 First Nation communities in Canada, the Supreme Court has repeatedly urged governments to consult and negotiate with Aboriginal communities to clarify their rights.¹⁰⁷ As the court stated in *R. v. Sparrow*, section 35 “provides a solid constitutional base upon which subsequent negotiations can take place.”¹⁰⁸

Traditional practices that have been recognized by the courts in individual cases as protected Aboriginal rights include hunting and fishing on traditional lands, as well as the commercial sale of fish spawn.¹⁰⁹ Further, the Supreme Court has ruled that in some cases Aboriginal rights may go beyond the right to engage in traditional practices on the land. If a First Nation or group of First Nations can show that its people were the exclusive occupants of a tract of land at the time the Crown first asserted sovereignty in the area then it has a right to the land itself.¹¹⁰ This interest in the land, called “Aboriginal title,” is not based simply on the Royal Proclamation of 1763: it arises, much like common law rights based on possession, out of the fact that the

¹⁰⁴ See *Mitchell*, note 101 at para. 9.

¹⁰⁵ See *Delgamuukw*, note 94 at para. 178. Only the federal government had the power, prior to 1982, to extinguish Aboriginal rights.

¹⁰⁶ See *R. v. Powley*, [2003] 2 S.C.R. 207 [*Powley*]. This case recognized the Aboriginal rights of a hunter from a Métis community near Sault Ste. Marie. Section 35 protected his right to hunt in a manner prohibited by Ontario’s hunting regulations, which did not recognize a Métis right to hunt for food. Note that by definition the time frame for defining a Métis Aboriginal right cannot be the time of contact. In *Powley*, the court ruled (at para. 37) that the correct time for defining Métis Aboriginal rights is the time when Europeans first exerted political and legal control in a particular area.

¹⁰⁷ See, for example, *Delgamuukw*, note 94 at para. 186. Chief Justice Lamer noted as follows:

“Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, note 82 at para. 53, s. 35(1) ‘provides a solid constitutional base upon which subsequent negotiations can take place.’ ... the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.”

¹⁰⁸ *Sparrow*, note 84 at 1077.

¹⁰⁹ See, for example: *Sparrow*, note 84; *Cote*, note 102; *Adams*, note 89; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*] (where the Supreme Court of Canada ruled that the commercial sale of herring spawn was an Aboriginal right, and ordered a new trial on the issue of justification of the relevant fishing regulations); and *Powley*, note 106.

¹¹⁰ See *Delgamuukw*, note 94 at para. 143. The courts will also require that the First Nation have maintained a substantial connection to the land since the assertion of sovereignty: *Delgamuukw*, note 94 at para. 154. What counts as “exclusive possession” will be judged from the Aboriginal perspective as well as the common law: *Delgamuukw*, note 94 at para. 156.

Aboriginal group occupied the lands when settlers arrived. Like other Aboriginal rights, Aboriginal title to traditional lands continues to exist today unless it has been given up by treaty or extinguished prior to 1982 by a federal law.¹¹¹

In Ontario, most, if not all of the province, is the subject of a land treaty. However, certain First Nations assert that they have not surrendered some or all of their traditional lands. Their claims are known to the government and they remain outstanding today.¹¹²

THE DUTY OF THE PROVINCIAL AND FEDERAL GOVERNMENTS TO CONSULT WITH ABORIGINAL PEOPLES ABOUT S. 35 RIGHTS

As noted, if a government wishes to interfere with Aboriginal or treaty rights it must show not only that it has a valid legislative objective but also that it is acting in a manner consistent with the honour of the Crown. The courts have made clear that in most cases this will mean that the government is legally obliged to consult with the Aboriginal groups affected in an effort to accommodate their interests.¹¹³ The duty to consult applies to the provincial as well as the federal government. In a wide range of areas involving land and resources, the province has the constitutional ability to enact general legislation that may affect Aboriginal rights and interests. In the words of Chief Justice Dickson, speaking for the Supreme Court of Canada in *R. v. Sparrow*, section 35 of the Constitution “affords Aboriginal peoples constitutional protection against provincial legislative power.”¹¹⁴

The extent of the consultations required where section 35 rights will be affected by government action depends on the degree of the proposed government interference and the type of section 35 right involved. If the proposed infringement is relatively minor, the duty may simply require prior discussions with the Aboriginal group affected. If the interference with section 35 rights will be significant, the government is required to engage in meaningful consultations in an effort to accommodate the interests of the Aboriginal group. Finally, if the interference will be very serious or if an Aboriginal title interest will be affected, the government’s duty requires negotiations leading to a just settlement of the Aboriginal group’s claims.¹¹⁵

The common element in all cases is that the Crown must act honourably, given its special relationship with Aboriginal peoples. The concept of the “honour of the Crown” cannot be understood or applied in a mechanical way. It is a concept that the Supreme Court has said lies at

¹¹¹ To the best of the writer’s knowledge, no such law was enacted prior to 1982.

¹¹² Unsurrendered Aboriginal title was the basis of the land claim of the Teme-Augama Anishnabek in *Ontario v. Bear Island v. Island Foundation*, [1991] 2 S.C.R. 570 [*Bear Island*]. The court denied the claim, holding that any Teme-Augama title had been extinguished by the Robinson-Huron Treaty, to which, the court found, the First Nation had adhered by its actions after the treaty. Aboriginal title is the basis of current claims in Ontario by the Walpole Island (Bkejwanong) First Nation and the Algonquins of Golden Lake.

¹¹³ This principle has been repeated on several occasions by the Supreme Court of Canada. See, for example, *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110, and *Gladstone*, note 109 at para. 64.

¹¹⁴ *Sparrow*, note 84 at para. 1105.

¹¹⁵ *Haida Nation*, note 1 at paras. 20, 24, and 25. For a good description of the requirements of the Crown’s duty to consult with First Nations when it proposes an action that threatens to interfere with section 35 rights, see S. Lawrence and P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79 *Canadian Bar Review* 252. This article was written before the *Haida Nation* decision, but is cited with approval at para. 38 of the court’s judgment.

the heart of section 35. Its most recent judgment in this area sheds light on the meaning and significance of the concept:

The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. *In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.* Nothing less is required if we are to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”¹¹⁶

The above quotation is from the Supreme Court of Canada’s judgment in *Haida Nation v. British Columbia (Minister of Forests)*, decided in November 2004. It should be noted that this decision held that a province had failed in its obligation to consult with a First Nation about section 35 rights. In addition, the court ruled that the province had a duty to consult the First Nation even though the First Nation’s section 35 rights had not yet been established in court. It was sufficient for the duty to arise that the Crown knew of the potential existence of an Aboriginal right and contemplated conduct that might interfere with such a right.¹¹⁷

In *Haida Nation*, the court found that the First Nation had a strong *prima facie* case that it had section 35 rights to harvest timber. These would be infringed by the province’s decision to approve a timber-cutting licence on the First Nation’s traditional lands. Accordingly the province had a legal duty to consult the Haida meaningfully prior to approving the license.¹¹⁸ In sum, the provincial and federal governments must act in a manner consistent with the honour of the Crown when they consider actions that may affect treaty and Aboriginal rights. This means that they have a duty to consult with Aboriginal groups whenever they are aware that their action might infringe treaty or Aboriginal rights. Treaty and Aboriginal rights exist in Ontario, yet there are currently no general policies to guide such consultations in the province. While the nature and scope of some of these section 35 rights may take time to clarify, governments are not legally permitted simply to ignore them in the meantime. In the words of the Supreme Court of Canada from the *Haida Nation* case, “[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.”¹¹⁹

¹¹⁶ Ibid. at para. 17 (emphasis added). Where the Crown has a duty to consult, there is a corresponding duty on the Aboriginal side to participate in good faith: *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74 at para. 42 [*Taku River*]. In *Taku River*, the court held that the province had fulfilled its obligation of meaningful consultation in approving the reopening of a mine. Although the province had not obtained the First Nation’s consent, it had discussed and been responsive to the First Nation’s concerns.

¹¹⁷ This language is taken almost verbatim from the judgment in *Haida Nation*, note 1 at para. 35.

¹¹⁸ *Haida Nation*, note 1 at paras. 76–77. The provincial Minister had refused to consult the Haida about the timber license on the basis that he thought he was not legally required to do so. The court ruled (at para. 78) that the province’s past discussions with the Haida about forestry management generally did not satisfy the duty to consult about the renewal of this particular licence.

¹¹⁹ *Haida Nation*, note 1 at para. 27.

THE FIDUCIARY DUTY OF THE CROWN TO ABORIGINAL PEOPLES

The Supreme Court of Canada has often said that section 35 of the Constitution requires federal and provincial governments to act toward Aboriginal peoples in a trust-like rather than adversarial manner.¹²⁰ This, the court has said, is required for section 35 to achieve its purpose: to achieve a just reconciliation of the prior occupation of Canada by Aboriginal societies with the assertion of sovereignty over Canada by the Crown.¹²¹ In this sense, governments' duty to act in a "trust-like manner" toward Aboriginal people is very closely entwined with the concept of "the honour of the Crown."

However, there is also another sense in which the court has used the concept of "fiduciary duty" in connection with Aboriginal groups. In trust law, a "fiduciary" relationship describes a relationship where one party owes a special duty of loyalty to protect the interests of the other. Such a "fiduciary relationship" typically arises where one person exercises legal powers in a discretionary way over the legal or practical interests of another.¹²² Trustees and lawyers are examples of persons in this kind of relationship with their clients. If a fiduciary relationship exists, the legal responsibilities of the party with the power extend considerably beyond the ordinary responsibilities of one person to another. For example, a "fiduciary" who causes harm by failing to act in the interests of the beneficiaries may be held liable for the ensuing losses.

The Supreme Court of Canada first applied this conception of fiduciary duty to Aboriginal interests in 1984, in a case called *Guerin*.¹²³ In that case the federal government was found liable for obtaining a surrender of reserve land and then ignoring the oral terms on which it had obtained the surrender. The court rejected the government's claim that it owed no legal obligations to the First Nation after the surrender. According to Chief Justice Dickson, a fiduciary duty arose because of the nature of Aboriginal interests in land and the fact that under Canadian law those interests can only be transferred to the Crown.¹²⁴ (In effect, under Canadian law First Nations are required to trust the Crown when they surrender reserve lands.) The Crown breached its fiduciary duty in the *Guerin* case when it failed to advise the First Nation and seek direction after it learned that it could not dispose of the surrendered lands in the manner agreed.

One implication of a finding that the Crown has a fiduciary duty to a First Nation is that it is required to exercise its discretion in the best interests of the First Nation.¹²⁵ Another is that statutes of limitation may not apply in the ordinary way. In fiduciary cases the courts will strive not to punish a party for not filing a claim if, because of its position, it was unaware of the

¹²⁰ See, e.g., *Sparrow*, note 84 at 1108.

¹²¹ This statement of the purpose of section 35 was first made in *Van der Peet*, note 100 at para. 43.

¹²² See, for example, *Lac Minerals, Limited v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 599. In the Aboriginal context, see *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 235 at para. 80 [*Wewaykum*].

¹²³ *Guerin*, note 50. In this case the Musqueam First Nation had surrendered some of its reserve for lease as a golf course. The federal government, which received the surrender, ultimately negotiated a lease that was much less favourable than the lease they had discussed, and did not advise the First Nation before entering the lease of the disadvantageous terms it would include.

¹²⁴ *Guerin*, *ibid.* at para. 65.

¹²⁵ See, for example, *Blueberry River Indian Band v. Canada*, [1995] S.C.R. 344 at para. 17 [*Blueberry River*]. Justice McLachlin noted in this case (at para. 104) that what is required is that the Crown act in the same way as "a man of ordinary prudence in managing his own affairs."

relevant facts or incapable of bringing the claim earlier.¹²⁶ In addition, if the fiduciary is in a position to remedy the situation, the court may find that it has a continuing duty to do so, unaffected by limitations periods.¹²⁷

A question that has been hotly debated is whether in appropriate circumstances the provincial government may owe a fiduciary obligation to a First Nation. In the broad sense of the word, as one level of the Crown, the province clearly has a duty to consult with Aboriginal groups when it proposes to interfere with section 35 rights, as described above. As for the “narrow” fiduciary duty to protect specific First Nation interests in land, thus far the cases that have held that the Crown is liable have tended to involve the federal government.¹²⁸

It is clear that a fiduciary duty does not attach to every dealing between the Crown and a First Nation.¹²⁹ However, it is significant that the Supreme Court of Canada has repeatedly used the term “Crown,” not “the federal government,” when it has described the fiduciary duty in Aboriginal cases. In *Haida Nation*, the reason given by the court for finding that the province owed an obligation to consult in that case, but not an enforceable fiduciary duty, was not because such a duty can be owed only by the federal government.¹³⁰ It seems likely then that the court will deal with each case on an individual basis to determine whether the hallmarks of an enforceable fiduciary duty are present. As the court stated in *Haida Nation*, “[t]he honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.”¹³¹

¹²⁶ This principle has been applied in several Aboriginal cases, including *Guerin*, note 50, *Blueberry River*, *ibid.*, and *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (F.C.A.).

¹²⁷ See *Blueberry River*, *ibid.* at para. 115.

¹²⁸ One apparent exception is *Bear Island*, note 112. In this case the Supreme Court of Canada noted (at para. 7) that “the Crown” owed a fiduciary duty to the Teme-Augama First Nation, and that this was “the subject of negotiations between the parties.” The province, not the federal government, was a party in the action.

¹²⁹ This derives from fiduciary law generally. The Supreme Court confirmed that this applies to Aboriginal cases in *Wewaykum*, note 122 at para. 81. Other than *Bear Island*, the cases to date have involved either a surrender of reserve lands, as in *Guerin*, note 50, or a unilateral taking of reserve lands for public purposes, as in *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746.

¹³⁰ The court made no reference to it being of any significance that it was the provincial Crown that was involved in the case. The court expressly rejected (at para. 57) the province’s argument that any duty to consult lay solely with the federal government. On the issue of whether the Crown owed a further enforceable fiduciary duty in the case, again the court made no reference to the fact that a provincial government was involved. This would have disposed of the argument if the court accepted the theory that a province cannot owe such a duty. Instead, the court indicated (at para. 18) that the Aboriginal interest at stake in the case was too uncertain (not having been proved in court) to give rise to a fiduciary duty.

A reasonable argument can be made that where a province directly interferes with existing Aboriginal or treaty rights or specific First Nation interests in land, it owes an enforceable fiduciary duty to the Aboriginal group involved. Prominent academics have argued that in appropriate cases the provinces will be found subject to the fiduciary duty. Brian Slattery, for example, has written as follows: “The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown’s overall fiduciary obligations to First Nations. Rather, these obligations tracked the various powers and rights to their destinations in Ottawa and the Provincial capitals.” See Brian Slattery, “First Nations and the Constitution: A Question of Trust” (1992) 71 *Canadian Bar Review* 261 at 274.

¹³¹ *Haida Nation*, note 1 at para. 18.

In circumstances where a province has assumed legal power over the implementation of a specific treaty right or a specific Aboriginal interest in land or other assets, it seems consistent with the courts' reasoning that the province may be held liable as a fiduciary for how it exercised that power.

OUTSTANDING LAND CLAIMS IN ONTARIO

THE NATURE OF OUTSTANDING LAND CLAIMS

Claims against Canada

According to the federal government, as of December 31, 2004, 242 land claims had been filed against the federal government in Ontario.¹³² Almost all of these claims have been filed under Canada's "Specific Claims Policy." (This policy will be described in detail later, but in essence it addresses claims alleging that the federal government owes an outstanding legal obligation in relation to First Nation lands or assets.) The great majority of these claims¹³³ allege that the federal government has failed to provide lands as required by treaty, has taken reserve lands without a proper surrender, has failed to live up to the terms of a reserve land surrender, has failed to protect reserve lands (from flooding, for example) in violation of its fiduciary duty, or has mismanaged First Nation trust funds.

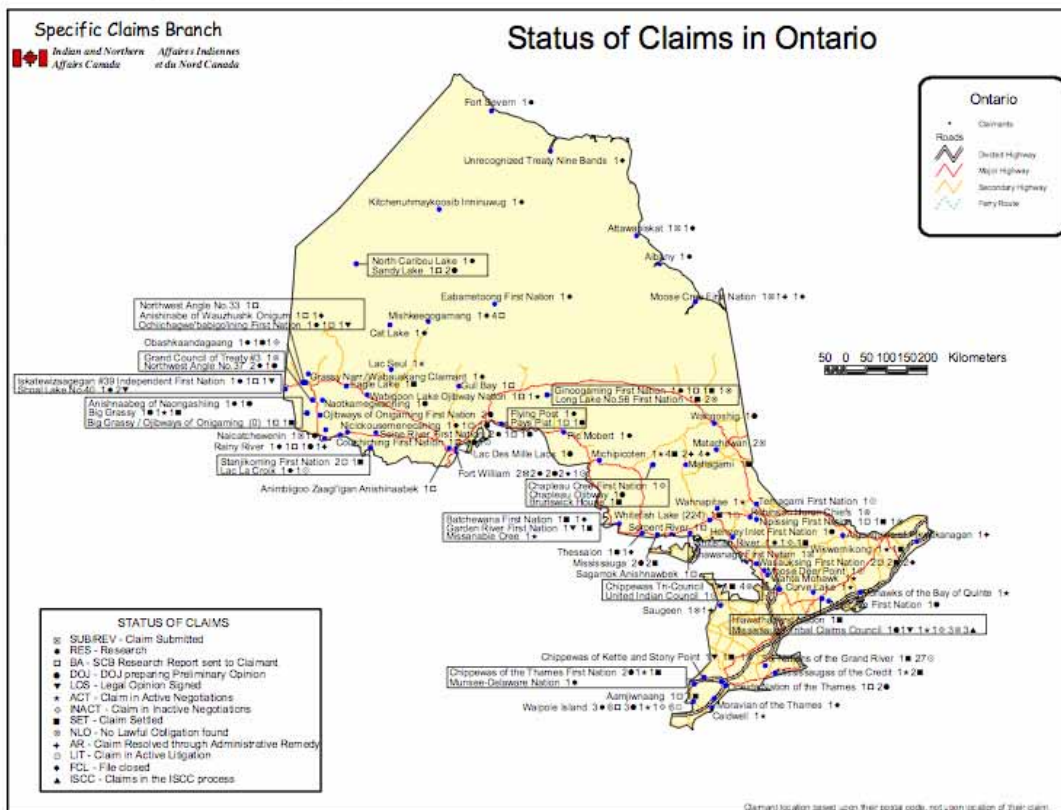
Each of these claims alleges that the federal government violated Canadian law, usually in its treaty or reserve land obligations, or in its dealings with First Nation moneys. Also included among the claims submitted to Canada are a number of claims alleging that certain lands were never given up by treaty—that the First Nation still has Aboriginal title to the lands. One of the best known of these Aboriginal title claims in Ontario is the claim by the Algonquins of Golden Lake. This claim, which was filed under the Specific Claims Policy in 1983, alleges that the First Nation has never surrendered its Aboriginal title to some 3.4 million hectares of land in the Ottawa valley.

Twenty-eight of the claims filed against Canada in Ontario, or more than 10 percent, relate to Six Nations of the Grand River. Six Nations is the most populous reserve in Canada and is now about one-sixteenth the size of its original allotment along the Grand River. As originally filed, Six Nations' claims range from allegations that lands were sold without surrenders, to failures to provide compensation for lands sold, to misappropriations of funds. Six Nations has since recast its individual claims into a demand for a fiduciary accounting by the Crown for all of its historic dealings with Six Nations' assets.

In the case of each of the claims filed under the Specific Claims Policy, the First Nation has provided Canada with detailed historical research intended to support the claim, as well as a statement of the legal grounds on which the claim against Canada is based.

¹³² Federal information about existing claims is available on the Internet. The summary of claims in Ontario is available online at: <http://www.ainc-inac.gc.ca/ps/clm/msp_e.html> (accessed March 30, 2005).

¹³³ For a brief description of each of these claims, prepared by the federal government, see Indian and Northern Affairs Canada, "Public Information Status Report—Specific Claims Branch," online: <http://www.ainc-inac.gc.ca/ps/clm/pis_e.html> (accessed March 30, 2005).



Source: Indian and Northern Affairs Canada¹³⁴

Claims against Ontario

About 118 land claims have been filed against the Ontario government.¹³⁵ More than 30 claims allege that a First Nation has not received its proper reserve entitlement under treaty (and thus that Ontario has wrongly received First Nation lands). More than a dozen claims allege that Ontario improperly permitted or caused the flooding and damage of reserve lands through provincially authorized water projects. At least 6 claims assert that Ontario built highways across reserves, either without proper legal authority or without paying adequate compensation. A similar number of claims allege that reserve lands that were surrendered for sale are now under Ontario's control and either have not been sold or the proceeds have not been paid to the First Nation.

¹³⁴ This map is available online at: <http://www.ainc-inac.gc.ca/ps/clm/csm_e.html>. A larger version of this map is attached as Appendix 1.

¹³⁵ These include some 30 claims currently before the courts and about 88 claims that have been filed for negotiation. The status of these claims is shown in Appendix 6. In addition to these formal claims, Ontario has received for negotiation some 13 requests from First Nations that the province assist them to enlarge their reserves. These include negotiations with the Lake Nipigon Ojibway, Michipicoten, Pays Plat, Pic Mobert, Rocky Bay, Sand Point, and Cat Lake First Nations, and six Nishnawbe-Aski First Nations. These negotiations are not focused on resolving assertions of legal rights, although in many cases Ontario's contributions to agreements in these negotiations may be taken into account in any future formal land claims by the First Nation. The status of these land-related requests are shown on the ONAS website: <<http://www.nativeaffairs.jus.gov.on.ca/english/negotiate/negotiate.htm>> (accessed March 30, 2005).

Ontario has also received several claims alleging unsurrendered Aboriginal title to traditional lands in the province. Included among these is the Algonquins of Golden Lake claim described above.

Many of the claims filed against Ontario have also been filed against the federal government.¹³⁶ Like the Algonquins of Golden Lake claim, they allege that both the federal and provincial governments bear a legal responsibility for resolving the claim. For example, both levels of government may have participated in the events leading to the alleged illegal taking of reserve lands. In other cases, it is alleged that the federal government breached one of its legal duties to protect First Nation lands, but that the province has unjustly benefited from this by obtaining resources it was not entitled to receive.

Finally, it should be noted that the list of claims described above does not include assertions by First Nations that current treaty harvesting rights have not been honoured. As will be discussed later, neither the federal nor the provincial government has a formal process for considering such claims.

Status of the Claims in Ontario

Of the 242 land claims in Ontario received by the federal government since 1973, 13 percent (31 claims) are listed as settled.¹³⁷ Another 24 have either been rejected on legal grounds, or the file has been closed. One hundred and sixteen claims are currently under review by the federal government to determine their historical and legal basis, while 21 are described as in negotiation. Lastly, 41 of the claims filed in Ontario against the federal government, or one-sixth of the total, are currently before the courts. Unresolved land claims represent a significant potential liability for the federal government: Canada's Public Accounts indicate that its contingent liability for claims across the country is more than \$6 billion.¹³⁸

The Ontario government established its first claims process in 1976. Since then, out of some 116 formal land claims filed with Ontario, about 11 percent (13 claims) have been settled.¹³⁹ Some 48 claims are currently being reviewed by Ontario to determine if Ontario will agree to negotiate

¹³⁶ It is impossible to state with certainty the number of the claims that overlap among the claims listed for the federal and provincial governments. Insufficient information is available about the names of the claims under review by Ontario or in litigation to compare them with the federal list of claims.

¹³⁷ Another six claims are listed as having been "resolved through an administrative remedy."

¹³⁸ As of March 31, 2004, the federal Public Accounts estimated Canada's contingent liability for Aboriginal title claims at more than \$3.7 billion. See Receiver General for Canada, *Public Accounts of Canada*, vol. 1 (Ottawa: Minister of Public Works and Government Services Canada, 2004), online: <<http://www.tpsgc.gc.ca/recgen/text/pub-acc-e.html>> (accessed March 30, 2005) at section 11.14. Canada's contingent liability for "Specific Claims" (see discussion below) was estimated at an additional \$2.6 billion as of March 31, 2001, the latest date for which this liability appears to have been publicly estimated. See: Indian and Northern Affairs Canada and Canadian Polar Commission, *Performance Report* (Ottawa: Minister of Public Works and Government Services Canada, 2001), online: <http://www.tbs-sct.gc.ca/rma/dpr/00-01/INAC00dpr/INAC0001dpr04_e.asp>, Section V—Financial Tables (accessed March 30, 2005). The backlog of unresolved Specific Claims has increased since then, as discussed below. (See <http://www.ainc-inac.gc.ca/ps/clm/msp_e.html>).

¹³⁹ The settlements of two of these 13 claims await ratification by one or both parties. For a brief description of all of the claims, see Appendix 6.

the claims. Ontario is currently negotiating 11 claims. About 30 land claims filed against Ontario are before the courts. Most of the remaining 14 claim files are described by Ontario as “inactive.”¹⁴⁰

Ontario Land Claims Received by the Federal Government since 1973	
Settled	31
Rejected	14
Under review	116
In negotiation	21
Before the courts/ISCC	41/3
Administrative remedy	6
Closed	10
Total	242

Land Claims Received by Ontario since 1976	
Settled	11
Settlement awaiting ratification	2
Inactive	12
Closed	2
Under review	48
In negotiation	11
Before the courts	30
Total	116

THE CURRENT APPROACH OF THE FEDERAL GOVERNMENT

CONSTITUTIONAL JURISDICTION AND THE FIDUCIARY DUTY

We have seen that the creation in 1867 of a federal system of government in Canada has created challenges for First Nations who have claims against the Crown.¹⁴¹ Since then, there have been two government actors in Ontario who could potentially interfere with First Nation lands or their treaty and Aboriginal rights. Indeed, First Nations allege that on some occasions both levels of government played a role in the wrongful taking of First Nation lands. One challenge, even if it is clear that the “Crown” is liable for some past wrong, is how to determine which government should be held liable for the wrong today. If both governments were involved in the wrongdoing, the challenge becomes how to decide which share of the liability each government should bear. These are issues of the legal responsibility of each government, and they must be addressed in the context of the facts and law relevant to each particular claim.

¹⁴⁰ Personal communication with Alan Kary, ONAS. The number of files that are inactive or closed were listed on the ONAS website until December 2004.

¹⁴¹ See the discussion of *St. Catherine's Milling* under “The Historical Approach of the Courts,” above.

A second source of difficulty that the division of powers has created is that in many cases neither level of government has the legal authority today to fully redress a land or treaty claim on its own. Thus, for example, if a federal wrongdoing in the past has led to a First Nation not having received all of the land it was promised by treaty, the federal government can offer money in compensation. But often the First Nation wishes to have its land base restored, and the federal government generally does not have Crown lands in Ontario that could be used in a settlement. To take another example, if Ontario has received First Nation lands to which it was not entitled, even if it still has most of the land it cannot now restore the lands to reserve status without the assistance of the federal government. These are issues of the current abilities of each government to correct the wrong. Often, for both practical and constitutional reasons, the participation of both levels of government is required to settle a claim.

Let us first consider the legal responsibility of the federal government for the events that gave rise to land and treaty claims, and then its legal capacity to provide adequate methods for resolving those claims today.

Canada's Legal Responsibility for Claims

The federal government's potential legal liability for the vast majority of historical land claims stems, indirectly, from the fact that since 1867 it has had legislative authority over "Indians, and Lands reserved for the Indians."¹⁴² Historically, because the federal government had exclusive authority to enact laws relating to Indian lands, it was the federal government that enacted the surrender requirements set out in the *Indian Act*, and federal employees were always directly involved in surrenders of reserve land. In such cases, as we have seen, the courts have been prepared to find that the federal government owed a fiduciary duty to protect the First Nation's interests in connection with the surrender. It was the *Indian Act* that provided for federal administration of First Nation moneys. Accordingly, claims alleging that First Nation moneys were misused are most likely to target the federal government.

The federal government's obligation to protect the current harvesting rights of Aboriginal peoples appears generally to be the same as Ontario's. Both governments have a legal responsibility to ensure that their actions do not interfere with treaty or Aboriginal rights unless their actions are justified by a valid objective and are consistent with the honour of the Crown.

Canada's Capacity to Resolve Claims

Canada draws legislative power from its jurisdiction over Indians and lands reserved for the Indians in its current capacity to provide for the just settlement of Aboriginal claims. Accordingly, Canada has the ability to enact laws that create mechanisms for the resolution of First Nation claims. The federal government has used this power recently to create a federal land claims tribunal, as discussed below.

Finally, the federal government has the capacity to use its financial resources to transfer moneys in settlement of its liabilities. As we have seen, this in itself may not be sufficient to address the concerns of a First Nation that has seen its land base depleted and seeks Crown lands to add to its reserve.

¹⁴² This results from s. 91(24) of the *Constitution Act, 1867*, note 55.

In sum, Canada's past actions make it potentially liable in a significant number of land claims, and its obligations under section 35 make it legally responsible to ensure that its current actions do not violate Aboriginal or treaty rights.

CURRENT FEDERAL CLAIMS POLICIES

The Specific Claims Policy

Federal land claims policies are relevant to Ontario for two reasons. First, federal claims policies affect First Nations' grievances in the province. Second, they affect the province's efforts to resolve claims, because the province is often a participant with the federal government at the negotiation table. Canada's policies, which bind the federal negotiator, will either help or hinder all of the parties in their joint efforts to reach a settlement.

Canada reviews claims that it has mismanaged First Nations lands or assets, or that it has breached a treaty promise, through a policy called the "Specific Claims Policy." Dating back in its basic principles to 1973 when Canada first created a special office to address land claims, the policy provides for Canada to negotiate claims where it accepts that Canada has an outstanding "lawful obligation" to a First Nation.

The Specific Claims process requires a First Nation to file a clear statement of the allegations of Canada's unlawful action, together with a detailed binder containing all of the historical documents relied on in support of the claim with the Department of Indian and Northern Affairs. Canada reviews these documents for their accuracy and completeness in describing the events in question. The Department of Justice then analyzes the documentation to determine whether Canada owes a "lawful obligation" as defined in the policy.¹⁴³ If the Department of Justice finds that the claim has substance, Canada will negotiate with the First Nation in an effort to agree on compensation. The compensation criteria Canada uses are set out in detail in the policy. Finally, a separate unit within the Department of Indian Affairs determines the amount of loan funding that the First Nation will receive to support its participation in the negotiations. If the claim is settled, the amount of the loan will typically be added to the settlement amount. If the negotiations fail, the First Nation's debt will remain outstanding.

Generally, claim settlements to a maximum of \$7 million can be approved by the Minister of Indian Affairs. Settlements higher than this amount require the approval of central agencies, including the Department of Finance, Treasury Board, and the Privy Council Office, bringing higher levels of accountability to the proposed settlement. Relatively small claims (less than \$500,000) are dealt with through a "fast-track" process. Canada recently increased its national budget for specific claims settlements to \$100 million per year.¹⁴⁴

If Canada rejects a specific claim on the basis that it believes it has no outstanding obligation, the First Nation can either sue Canada or request that an independent body, the Indian Specific

¹⁴³ Canada does not rely on technical defences, such as statutes of limitation, in determining whether to negotiate. However, Canada will rely on such defences in court if the negotiations fail. For the criteria used by Canada in deciding whether to negotiate, and how much compensation to provide, see Appendix 2b.

¹⁴⁴ Personal communication with Sheila Parry, Specific Claims Branch, Department of Indian Affairs and Northern Development.

Claims Commission (the ISCC), hold an inquiry into the claim. The ISCC has the power to recommend negotiations to Canada if it concludes after an inquiry that the claim is valid.¹⁴⁵ The ISCC also has the power to act as a mediator during negotiations if both parties agree. To date, the ISCC has completed nine inquiries on Ontario claims: five have since been accepted for negotiation or settled.¹⁴⁶ The ISCC has acted as mediator between Canada and a First Nation on five Ontario claims.¹⁴⁷

Canada has made a number of adjustments to the Specific Claims Policy over the past 15 years. After the Oka Crisis of 1990, Canada received a number of critiques of the policy, which led to the creation of the ISCC in 1991 as an “interim” body to make recommendations on claims in accordance with the policy’s guidelines. Canada also began to accept pre-Confederation land claims that had formerly been barred by the policy. Finally, although Canada declined to make other changes to the policy, it has steadily increased its annual budget for Specific Claim settlements.¹⁴⁸ Thirteen years later, however, although a significant number of land claims have been resolved,¹⁴⁹ the overall proportion of unresolved claims is now higher than it was in 1982 or 1991.¹⁵⁰ In fact, the backlog of unresolved land claims against Canada has increased steadily since the Specific Claims Policy was created.¹⁵¹

Other Federal Claims Policies

There are two other federal claims policies that are relevant in Ontario. The first is its “Comprehensive Claims Policy,” established in 1981. This policy calls for the federal government to negotiate claims of Aboriginal title. It applies to First Nations who have not entered into a treaty to release their interest in their traditional lands. Negotiations under this policy are intended to provide certainty of title and to create economic opportunities for the First Nations involved. Because of the number of land treaties in Ontario, to date Canada has begun

¹⁴⁵ The ISCC also has the power to make recommendations on compensation criteria if Canada has accepted the claim but the First Nation and Canada cannot agree on the basic criteria by which compensation should be decided. The ISCC was created under the federal *Inquiries Act*, R.S. 1985, c. I-11. For more information on the mandate and track record of the ISCC, see Indian Claims Commission, Homepage, online: <<http://www.indianclaims.ca>> (accessed March 30, 2005).

¹⁴⁶ See Indian Claims Commission, “Status of Claims in Ontario as of May 2003: Completed Inquiries,” online: <<http://www.indianclaims.ca/english/claimsmap/on.html>> (accessed March 30, 2005).

¹⁴⁷ See Indian Claims Commission, “Status of Claims in Ontario as of May 2003: Claims in Mediation,” online: <http://www.indianclaims.ca/english/claimsmap/on_med.html> (accessed March 30, 2005).

¹⁴⁸ The national budget for settlements of specific claims was recently increased to \$100 million per year. (At the time of the events at Oka, the annual budget for claims settlements across the country was \$15 million).

¹⁴⁹ In the 10 years up to and including 2004, the federal government participated in 23 Specific Claim settlements in Ontario, involving a cumulative federal contribution of about \$141.5 million.

¹⁵⁰ This proportion of unresolved claims to the total received since 1970, as of December 31, 2004, was slightly more than 66 percent. (This figure for “resolved claims” includes those that were rejected by the federal government and those whose files were closed without settlement. (If one considers as “resolved” only those claims for which settlements were reached, the proportion of unresolved claims nationally is 76.8 percent). In Ontario the proportion of unresolved claims filed since 1970 against the federal government is worse: about 75 percent by the first measure, 84.7 percent by the second measure). See Indian and Northern Affairs Canada, “National Mini Summary—Specific Claims Branch,” online: <http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf> (accessed March 30, 2005). According to the Auditor General, in 1982 the proportion of unresolved claims was stated to be 61 percent and in 1990 it was 57 percent. See *Auditor General*, note 148 at 14.71.

¹⁵¹ As of December 31, 2004, there were 854 “specific claims” outstanding against the federal government. See online: <http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf> (accessed March 30, 2005).

negotiations on only one Ontario land claim under the Comprehensive Claims Policy. This is the claim of the Algonquins of Golden Lake, a claim in which the province is also at the negotiation table.

The final federal claims process that has been used in Ontario involves the negotiation of “Special Claims.” These are land claims for which Canada would not recognize an outstanding legal obligation under the other two policies, but for which Canada believes there is a strong legal risk of liability and a significant grievance to be addressed. Special Claims negotiations are not guided by a formal written policy.¹⁵² The research and review process is similar to that for Specific Claims. Negotiation mandates are established on a case-by-case basis. There is currently one land claim in Ontario being negotiated under this process: the Camp Ipperwash claim.

Canada has no process applicable in Ontario for the negotiation or determination of First Nation harvesting rights under treaties and section 35 of the Constitution.¹⁵³

RECENT FEDERAL LEGISLATIVE INITIATIVES

Canada has been negotiating with First Nation leaders since 1992 in an effort to address concerns that the Specific Claims process is too slow and that it puts Canada in a conflict of interest.¹⁵⁴ By the end of 1998 a joint task force of federal and First Nation representatives had agreed on recommendations that a permanent independent body should be created to resolve impasses in claims negotiations. In response, in November 2003, Parliament enacted the *Specific Claims Resolution Act* (the *SCRA*).¹⁵⁵ However, when the *SCRA* was considered by Parliament, its provisions came under intense opposition from prominent First Nation groups, including the Assembly of First Nations and Six Nations of the Grand River, because of the way it was drafted. For its part, the current federal claims commission, the ISCC, while advocating an independent claims tribunal, expressed concerns about the proposed limits to the jurisdiction of the proposed tribunal and its lack of complete independence from the Minister of Indian Affairs.¹⁵⁶ More than a year later the law has not yet been proclaimed into force, apparently to allow the federal government to consult further with First Nations and to consider their objections to the law.

¹⁵² Personal communication with Helen Lynn, Special Claims Branch, Department of Indian Affairs and Northern Development.

¹⁵³ By contrast, the federal government has an “Aboriginal Fishing Strategy” that applies to Canada’s coastal waters. This strategy, developed in 1992 as a response to *Sparrow*, note 84, aims at implementing Aboriginal fishing rights and enhancing economic opportunities for Aboriginal groups fishing in coastal waters. For more information, see Department of Fisheries and Oceans Canada, *Aboriginal Fisheries Strategy*, online: <http://www.dfo-mpo.gc.ca/communic/fish_man/afs_e.htm> (accessed March 30, 2005).

¹⁵⁴ As noted above, under the policy, Canada acts as judge and defendant on the claims against it.

¹⁵⁵ *Specific Claims Resolution Act*, S.C. 2003, c. 23 [SCRA]. The Act can be found on the Internet at <<http://laws.justice.gc.ca/en/tile/S.html>> (accessed March 30, 2005).

¹⁵⁶ Indian Claims Commission of Canada, “BILL C-6 An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims,” presented to the House of Commons Standing Committee on Aboriginal Affairs on June 11, 2003, at 18–25. The text is available online at: <<http://www.afn.ca/Programs/Treaties%20and%20Lands/Doc/Bill%20C6-SCAA%20Presentation-ICC-Nov.2002.pdf>> (accessed March 30, 2005).

The *SCRA* is a statute of considerable complexity—its definition of an eligible “claim” is more than 75 lines long.¹⁵⁷ With that caveat, the basic operation of the *SCRA* can be summarized as follows.

The *SCRA* would authorize the federal Cabinet to appoint the members of a new claims commission and a new claims tribunal.¹⁵⁸ The commission would foster the use of alternative dispute resolution in Specific Claims involving First Nations who wish to participate. If the parties are unable to reach agreement, and the First Nation waives any right to compensation over \$10 million, the commission could send the claim to a newly created tribunal, again appointed by the federal Cabinet.¹⁵⁹ After a public hearing where witnesses would be cross-examined under oath, the tribunal would have the power to determine if the claim is “valid” within the definition set out in the Act.¹⁶⁰

If the tribunal decides the claim is not valid, the Crown would be released from liability.¹⁶¹ If the tribunal decides the claim is valid, the parties would return to compensation discussions coordinated by the commission.¹⁶² If those discussions were not productive, then in the case of certain claims, the commission could refer the matter to the tribunal for a binding decision on compensation. The tribunal would not be authorized to hear compensation claims in which the First Nation seeks more than \$10 million in compensation, nor could it hear claims in which the First Nation seeks land as part of its settlement.¹⁶³ The tribunal would not be authorized to make any decisions about the subject matter of a valid claim other than to make a final cash award. Once a cash award is made, the *SCRA* would extinguish all rights and interests of the First Nation in the land subject to the claim.¹⁶⁴ Finally, the total of the permissible cash awards made in a year would be limited by an annual maximum amount published from time to time by the federal government.¹⁶⁵ The maximum proposed at the time the bill was debated was \$50 million.

The future of the *SCRA* is unclear. As noted above, First Nation leaders have objected vehemently to a number of its elements. These include:

- the fact that the federal government alone chooses the commission and tribunal, with no provision for First Nation consultation or appointment powers;
- the fact that the Act allows no claims for violation of Aboriginal rights, treaty harvesting rights, or Aboriginal title;
- the fact that the Minister is subject to no restrictions in the length of time he or she takes to decide whether to negotiate a claim; indeed he or she is not required to reach a decision about whether to negotiate the claim;
- the fact that claims of significant value (over \$10 million) are excluded from using the tribunal;

¹⁵⁷ *SCRA*, note 155, at s. 26.

¹⁵⁸ *Ibid.* at ss. 20 and 41.

¹⁵⁹ *Ibid.* at ss. 32(1)(c) and 26.

¹⁶⁰ The definition of “claim” is similar to the one used in the current Specific Claims Policy. See *ibid.* at ss. 26(1), 53, 54, and 55.

¹⁶¹ *Ibid.* at s. 72.

¹⁶² See *ibid.* s. 33.

¹⁶³ *Ibid.* at s. 35(1).

¹⁶⁴ *Ibid.* at s. 72.

¹⁶⁵ *Ibid.* at s. 35(1)(e).

- the fact that First Nations who seek lands as part of a settlement are not permitted access to the tribunal once their claim has been accepted for negotiation; and
- the fact that the tribunal will be subject to an annual limit prescribed by the federal government that will restrict the number of claims it can decide in a year.

It is also unclear how many provinces would decide to participate in the new process, given that these would be federal agencies applying federal claims criteria. Under the *SCRA*, provincial participation in its claims resolution processes is optional.

Because of its financial restrictions, and its exclusion of First Nations who have concerns about their land base,¹⁶⁶ it seems that the tribunal created by the *SCRA* in its present form would be unable to assist in most Ontario land claims.¹⁶⁷ On the other hand, the general thinking behind the *SCRA* does reflect a consensus that has now emerged in two important areas. First, the federal government has acknowledged First Nation concerns that the current Specific Claims Policy needs to be improved dramatically.¹⁶⁸ Second, there is a consensus among First Nations in Canada, one that seems to be shared by the federal government, that the appropriate process for Specific Claims involves assisted negotiation, with resort to an independent tribunal to resolve impasses that may arise.

THE CURRENT APPROACH OF THE ONTARIO GOVERNMENT

THE SCOPE OF PROVINCIAL JURISDICTION

The role of the province in dealing with land and Aboriginal rights claims, is determined, first, by its responsibility for historical actions of the province and, second, by its legislative capacity to address such claims today.

Ontario's Legal Responsibility for Claims

Since Confederation the provincial government has been an independent actor, capable of interfering through its actions with Aboriginal land interests and the exercise of treaty and Aboriginal rights. First Nation land claims against Ontario assert that the province has interfered illegally in some way with these rights.

For example, as discussed earlier, after the *St. Catherine's Milling*¹⁶⁹ decision in 1888, the province's consent was required for the establishment of reserves promised by treaty. For 36 years thereafter, until a federal–provincial agreement,¹⁷⁰ even reserve lands that were surrendered for sale or lease came under the immediate control of the provincial government. Both after the signing of a treaty and after the surrender of part of a reserve, it was possible for the province to

¹⁶⁶ As opposed to financial compensation.

¹⁶⁷ Of the 14 land claim settlements reached at the Indian Commission of Ontario between 1990 and 2000, only 2 would have satisfied the criteria for tribunal involvement.

¹⁶⁸ This is acknowledged by Canada's "Backgrounder" to the *SCRA*, which notes that the current policy is "unsustainable." See Indian and Northern Affairs Canada, "Backgrounder: Canadian Centre for the Independent Resolution of First Nations Specific Claims," online: <http://www.ainc-inac.gc.ca/nr/prs/s-d2003/02433bk_e.html> (accessed March 30, 2005).

¹⁶⁹ See *St. Catherine's Milling*, note 14.

¹⁷⁰ The agreement was reflected in federal and Ontario statutes. See *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48.

frustrate the agreements under which the land was surrendered if there were other public interests the province wished to advance. In some cases, through inaction or otherwise, reserve lands that were surrendered for sale were never sold and are to this day under the control of the province.

As we have seen, other claims against Ontario allege that the province illegally interfered with First Nation interests in reserve land, or failed to recognize First Nation interests in lands still subject to Aboriginal title. Still others allege that Ontario has violated treaty or Aboriginal harvesting rights.¹⁷¹ In all of these contexts, First Nations allege that Ontario is legally responsible for having violated the legal rights of an Aboriginal group in relation to land. In many claims against Ontario, Canada is also a defendant because of its own involvement in a historical violation of First Nation rights.¹⁷²

Ontario's Capacity to Resolve Claims

As we have seen, there are broad areas of provincial jurisdiction that permit the province to directly affect aboriginal interests—and to play a significant role in redressing First Nations' grievances. For example, Ontario has constitutional jurisdiction to enact laws regulating natural resources,¹⁷³ the environment,¹⁷⁴ the management and sale of Crown lands,¹⁷⁵ local works and undertakings,¹⁷⁶ the protection of heritage and cultural property,¹⁷⁷ the issuance of fishing licences,¹⁷⁸ and “all matters of a merely local or private nature”¹⁷⁹ in the province. In each of these areas, the province may pass a law of general application that affects Aboriginal people and their rights, provided that its main substance falls within provincial jurisdiction, that it is not inconsistent with the *Indian Act* or another valid federal law,¹⁸⁰ and that the law does not single out Indians for special treatment or interfere with the core of their Aboriginal identity.¹⁸¹ Further,

¹⁷¹ As we have seen, in all cases where the province continues to interfere with rights guaranteed under s. 35 of the Constitution, Ontario has a constitutional obligation to act in a manner consistent with the honour of the Crown.

¹⁷² Where both are defendants, their respective liabilities will depend on the legal and historical context of the claim. Because of Canada's historical role under the *Indian Act* in receiving land surrenders and managing First Nation trust accounts, the majority of land claims in the province name Canada as a defendant. The ONAS website indicates that the federal government is “primarily responsible” for the resolution of claims. This statement is probably accurate if it refers to the *number* of claims for which Canada may ultimately be held responsible. However, for claims alleging provincial involvement in the taking of First Nation lands (i.e., all of the claims filed against Ontario) the extent of Ontario's legal responsibility must be determined on the facts—as evidenced by the number of negotiated settlements where Ontario has paid either 50 percent or 100 percent of the total value of the settlement.

¹⁷³ Under ss. 92(5) and 92A of the *Constitution Act, 1867*, note 55.

¹⁷⁴ *Ibid.* at ss. 92(13) and (16). Both the federal and provincial governments may pass laws concerning “the environment.” See, e.g., *Friends of Oldman River Society v. Canada*, [1992] 1 S.C.R. 3.

¹⁷⁵ *Constitution Act, 1867*, *ibid.* at s. 92(5).

¹⁷⁶ *Ibid.* at s. 92(10).

¹⁷⁷ *Ibid.* at s. 92(13).

¹⁷⁸ Ontario's authority to regulate fishing is due partly to a federal decision to delegate some of its constitutional powers in this area to the province.

¹⁷⁹ *Ibid.* at s. 92(16).

¹⁸⁰ This limit results from the fact that Canada has primary jurisdiction over Indians and lands reserved for Indians. The province may enact laws within their jurisdiction that incidentally affect Indians or lands reserved for Indians, but specific provisions of federal laws on this subject are paramount over inconsistent provincial laws.

¹⁸¹ The application of these principles is complex. For two recent examples of the Supreme Court of Canada's approach, see *Kitkatla Band v. B.C.*, [2002] 2 S.C.R. 146 [*Kitkatla*] and *Paul v. B.C.*, [2003] 2 S.C.R. 585 [*Paul*]. In both of these cases the court held that provincial laws of general application that specifically addressed Aboriginal

as discussed earlier, if a provincial law interferes with the section 35 rights of an Aboriginal group, it will be valid only if it passes the test for constitutional justification.¹⁸²

It must be stressed that within an area of provincial jurisdiction nothing prevents Ontario from passing general laws that include provisions designed to respect or protect Aboriginal interests or the rights of Aboriginal people. British Columbia, for example, has enacted legislation protecting heritage objects that specifically include Aboriginal artifacts.¹⁸³ British Columbia has also enacted forestry legislation that provides for a provincial tribunal to hear claims of Aboriginal rights.¹⁸⁴ In the past Ontario has enacted at least three statutes designed to assist in the resolution or clarification of First Nation rights.¹⁸⁵

Finally, in addition to Ontario's ability, as described above, to enact laws that protect the interests and rights of Aboriginal people, Ontario's ownership of Crown lands and its financial resources place it in a unique position to contribute to the settlement of land claims.

HISTORY OF LAND CLAIMS POLICIES IN ONTARIO

The Origins of Ontario's Land Claims Policy and the Role of the ICO

Until 1976 the Ontario government had no general process for addressing First Nation claims.¹⁸⁶ In February of that year, the province created an Office of Indian Claims within the Ministry of Natural Resources. Although this office had no formal policy to guide it, the Office of Indian Claims received and began to review a small number of land claims.¹⁸⁷

Shortly thereafter, in July 1977, the Ontario government established a Royal Commission to examine the impact of resource exploitation in Northern Ontario. Its Commissioner, Justice E.P. Hartt, examined among other things the tragic effect of mercury poisoning within two First Nations caused by the forestry operations of Reed Ltd. Justice Hartt noted that two-thirds of the people living in the northern half of Ontario were Aboriginal people who depended on the land for their survival.¹⁸⁸ Writing about the erosion of First Nation resource bases, Justice Hartt stressed the importance of treaty rights and land claims. Thus, he concluded:

A major focus of Indian demands involves the use of Crown land, specific land claims and accessibility to resources, all of which are related to the interpretation

interests did not affect the "core of Indianness" or fall afoul of the rule against "singling out Indians" for special treatment.

¹⁸² See the discussion of s. 35 rights under "Current Law" above.

¹⁸³ This law was upheld by the Supreme Court of Canada in *Kitkatla*, note 181.

¹⁸⁴ This law was upheld by the Supreme Court of Canada in *Paul*, note 181.

¹⁸⁵ These were *An Act to Confirm the Title of the Government of Canada to Certain Lands and Indian Lands*, S.O. 1915, c. 12; *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, note 170; and the *Indian Lands Agreement (1986) Act*, S.O. 1988, c. 39. All three Ontario statutes were enacted to reflect agreements with the federal government.

¹⁸⁶ Some claims were dealt with on an ad hoc basis in the late nineteenth and early twentieth centuries, as described under "Historical Claims and Treaty Rights Policies."

¹⁸⁷ These included the Brunswick House claim and the Assabaska Shoreline Claim, both of which were eventually resolved in the 1990s within the Indian Commission of Ontario process. Also filed with the Office of Indian Claims was the Wauzhushk Onigum claim, described below.

¹⁸⁸ *Hartt*, note 76 at 19.

of the original treaties. To date, Government seems to have left these matters to be resolved by the courts. I do not believe that this is the most productive course of action to follow.¹⁸⁹

Noting that “conventional governmental processes have failed to resolve these conflicts,” Justice Hartt concluded that “[i]t is time to explore an approach based on negotiation and the acceptance of mutual responsibilities.”¹⁹⁰ He recommended the creation of a tripartite committee, composed of ministerial-level representatives of the federal and Ontario governments and representatives of First Nations, to oversee the negotiations. Finally, he recommended that a small secretariat, acceptable to all parties, should assist the work of the committee.¹⁹¹

The result of Justice Hartt’s recommendation was the creation in 1978 of the Indian Commission of Ontario (the ICO). Its mandate was established by a resolution of the Chiefs of Ontario and parallel orders-in-council of the federal and provincial governments. Justice Hartt was chosen by all parties as its first commissioner, a position he held until 1983. Following Justice Hartt, Roberta Jamieson (later Ombudsman of Ontario), Harry S. LaForme (now a judge on the Ontario Court of Appeal) and Chief Philip Goulais of the Nipissing First Nation each served terms as the ICO Commissioner.¹⁹²

The ICO was mandated to perform three functions:

- To provide a forum for the negotiation of self-government issues;
- To facilitate the examination and resolution of any issue of mutual concern to the federal and provincial governments, or to either of them, and to some or all of the First Nations in Ontario, which a committee of Ministers and Chiefs (the “Tripartite Council”) referred to the ICO; and
- To acquaint the residents of Ontario with the nature of the matters before the ICO.¹⁹³

The duties of the ICO included providing a chairperson for all discussions in the ICO process, assisting the parties to resolve the issues before them, and convening meetings of the Tripartite Council at least once a year to discuss the ICO’s agenda. The ICO’s formal powers appeared extensive: to request the production of documents, impose deadlines, suspend negotiations, and (with the consent of the parties on an issue) to arrange for fact-finders, mediators, or arbitrators, or even (with the consent of the Tripartite Council) to facilitate the reference of any issue to a court. However, the ICO’s powers did not include the ability to sanction a party that ignored one of its requests, or to enforce any order that it might make.¹⁹⁴

The ICO’s formal mandate required renewal by the parties every five years and its budget was negotiated annually. The ICO began with a staff of three people in addition to the commissioner,

¹⁸⁹ Ibid. at 34.

¹⁹⁰ Ibid. at 35.

¹⁹¹ Ibid. at 36.

¹⁹² I should note that I worked as a facilitator for the ICO from 1989 to 2000.

¹⁹³ See Appendix 3 for a copy of the full orders-in-council of the ICO.

¹⁹⁴ Ibid.

with an annual operating budget of some \$545,000. By the first half of the 1990s, its annual budget had reached about \$1,160,000, before the province reduced its contribution by about 25 percent in 1996.¹⁹⁵ At its peak in the mid-1990s, in addition to the commissioner, the ICO had three full-time facilitators and a support person dedicated to land claims issues alone. The remainder of its staff worked primarily on self-government negotiations.

The work of the ICO on land claims and related issues was diverse. In the 1980s the ICO had facilitated negotiations between Ontario and Canada to establish parallel and federal legislation to permit unique jurisdictional solutions to First Nation claims.¹⁹⁶ In 1990, after convening a Tripartite Council meeting of Ministers and Chiefs to discuss the effects of the Oka crisis in Ontario, the ICO was asked by all parties to analyze the federal Specific Claims Policy. The resulting Discussion Paper¹⁹⁷ included 38 recommendations for change.¹⁹⁸ Again, through the ICO process, the Ontario First Nations and the federal and Ontario governments were able to agree to resolve immediately the situation of six northern First Nations who had been left on their traditional lands without a reserve or essential services. The resulting agreement, facilitated and drafted by the ICO with all parties' input, provided for each First Nation to obtain reserve land. The cost of implementing the land and service arrangements exceeded \$60 million, shared by Ontario and Canada.

The majority of land claims negotiations facilitated by the ICO involved both the federal and provincial governments and one or more First Nations.¹⁹⁹ Canada generally participated under its Specific Claims Policy. In 1988, Ontario transferred the responsibility for negotiating land claims to the new Ontario Native Affairs Directorate, now known as the Ontario Native Affairs Secretariat (ONAS). The Ontario Cabinet adopted a formal land claims policy shortly after the Directorate was created.²⁰⁰ Essentially, Ontario continued to review land claims formally filed with the province from a historical, legal, and policy perspective. If, after this review, the Minister Responsible for Native Affairs²⁰¹ approved, the Directorate would commence negotiations in an effort to resolve the issues.

¹⁹⁵ See Smith et al., *Review of the Indian Commission of Ontario and the Tripartite Process*, Draft Report (unpublished, 1999) at 93 [Smith].

¹⁹⁶ This was the *Indian Lands Agreement (1986) Act*, S.O. 1988, c. 39 and its federal counterpart, later used in the settlement of the Mississauga No. 8 land claims, discussed below.

¹⁹⁷ The result was Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: Indian Commission of Ontario, 1990) [*Discussion Paper Regarding First Nation Land Claims*], cited in Indian Claims Commission, *Indian Claims Commission Proceedings*, vol. 2 (Ottawa: Ministry of Supply and Services, 1995) at 157 [*Indian Claims Commission Proceedings* (vol. 2)].

¹⁹⁸ As noted earlier, some of the ICO's recommendations were adopted by the federal government, including the negotiation of pre-Confederation claims, increased federal funding for claims settlements, and the creation of an independent body to review the federal government's decisions on claims.

¹⁹⁹ The province did not participate in six of the claims settled within the ICO; three claim negotiations did not include Canada.

²⁰⁰ Personal communication with David McNab. This policy does not appear to have been made public.

²⁰¹ Initially this was the Attorney General. For a period under the NDP government in the 1990s the responsible Minister was the Minister of Natural Resources. With election of the Conservative government, the Minister Responsible for Native Affairs was once again the Attorney General, a situation that continues under the present government.

It appears that Ontario had no pre-established policy criteria for determining the precise components of acceptable settlements. Objective criteria were often used in the negotiation for measuring the First Nation's loss, through land appraisals and loss-of-use studies. The strength of the First Nation's legal case and political factors²⁰² also appear to have played a continuing role in Ontario's approach to the negotiations.

A snapshot of the ICO process at the end of 1999 gives an indication of its record on land claims. Since 1990, the parties had settled some 16 claims²⁰³ through the ICO process, including the first treaty settlement involving Ontario since 1923, another settlement providing for First Nation ownership and management of the Lake of the Woods Provincial Park,²⁰⁴ and a detailed agreement in principle signed in 1998 for the return of Camp Ipperwash to First Nation ownership. The ICO had also, in the face of rising tensions and an occupation in the City of Brantford over Six Nations land claims, facilitated an agreement among two First Nations, nine municipalities, a conservation authority, and the federal and provincial governments. The agreement, providing for reciprocal sharing of information concerning proposed land uses, will be described later in this report.

In reaching these land claim settlements the parties had requested more than mere facilitation from the ICO. At the request of all parties involved in a claim, the ICO had engaged historical fact-finders to address disputed issues, as well as neutral appraisers and loss of use experts to avoid "wars of experts" hired by each party. In all cases, these outside experts were selected by the parties and worked according to jointly agreed terms of reference. When requested by the parties, the ICO prepared neutral drafts of potential terms of settlement based on all parties' input. Finally, at the parties' request, the ICO frequently coordinated and facilitated public consultations on proposed land settlements.

The ICO process, however, was far from capable of resolving all the issues brought before it. First, an issue could not enter the ICO process for facilitation unless all parties agreed. In practice, this meant that issues such as the situation at Ipperwash Provincial Park after 1995 and the Temagami land claim could not enter the ICO process. Second, several files lingered for years without significant progress, and the ICO's lack of enforcement powers meant that it had no capacity to require the parties to reconsider their positions on specific issues.²⁰⁵ Finally, while First Nation representatives frequently expressed concern that the ICO needed more effective powers to advance negotiations, some government negotiators expressed concern about perceived bias in the approach of ICO facilitators. In the end, after an independent review involving all parties in 1999 had recommended certain improvements to the ICO process,²⁰⁶ and its all-party steering committee had recommended renewing the ICO's mandate for another five

²⁰² For example, Ontario's negotiation position might be affected by concerns raised by the public and third-party stakeholders as to the possible effects on them of a land settlement in the area.

²⁰³ These include final settlements and agreements in principle on the terms of settlement for 15 claims, and the agreement to provide reserves and services for the six First Nations described above.

²⁰⁴ The park is now called the Assabaska Ojibway Heritage Park. The Assabaska claim had been in negotiations outside the ICO process for 13 years. Ontario, Canada, and the First Nations were able to reach an agreement in principle to settle the claim after three years of ICO-facilitated negotiations.

²⁰⁵ At the time of its closure in 2000, four land claims that had reached the negotiation stage remained without an Agreement in Principle.

²⁰⁶ See the independent consultants' report described in *Smith*, note 195.

years, the federal Minister of Indian Affairs and Northern Development declined to renew the ICO's orders-in-council. On March 31, 2000, the ICO ceased operations.

Ontario's Land Claims Framework since Closure of the ICO

Even during the existence of the ICO, Ontario had negotiated certain land claims outside the ICO process.²⁰⁷ Since the closure of the ICO, Ontario has continued to negotiate land claims under its previous policy. Now, however, the negotiations generally do not involve a neutral facilitator. Of the 18 land-related negotiations in which Ontario is currently involved, 11 are formal land claims based on allegations of past illegal acts by the province, while 7 involve requests by Robinson Treaty First Nations for an increased reserve land base.

Generally, the province will review a land claim only if it receives a formal statement from a First Nation (together with supporting historical documents) alleging that Ontario has not fulfilled its obligations "with respect to Aboriginal or treaty rights pertaining to land."²⁰⁸ Ontario does not have a formal policy that dictates whether it will negotiate a land claim that alleges a past illegal act on the part of the province.²⁰⁹ Unlike the federal government, which will negotiate a land claim wherever it concludes that it has an outstanding "lawful obligation," Ontario considers several factors in reviewing a land claim. The factors are as follows:

1. a historical review of the claim;
2. a legal review to determine whether or not the province may have any legal obligations with respect to the claim;
3. a review of what other parties might be affected by a claim, and what their interests might be;
4. an assessment of the possibility of negotiations reaching a settlement acceptable to those affected in a timely and efficient manner, and one that fosters good relations among communities;
5. an assessment of the potential for a settlement to meet the government's policy directions, which support Aboriginal self-reliance through economic development; and
6. an assessment of risks, if any, involved in not negotiating the claim.²¹⁰

Note that the above factors do not commit Ontario to negotiate a formal land claim wherever its review indicates that Ontario has an outstanding legal obligation to the First Nation. Nor do they appear to prevent Ontario from entering negotiations where no legal obligation has been found. The final decision—after its historical, legal, and policy reviews—is made by the Minister Responsible for Native Affairs.

²⁰⁷ In February 1995, for example, Ontario was involved in four active claims negotiations outside the ICO process: the Algonquins of Golden Lake claim and requests by the Garden River, Nipissing, and Whitefish River First Nations for the return of unsold surrendered lands.

²⁰⁸ Ibid. There appears to be no publicly available policy that guides Ontario's negotiation of requests for a larger land base. The seven current negotiations for a larger land base arise from a framework agreement signed in 1991 by Ontario and Canada; its focus is addressing the socio-economic needs of the First Nations involved.

²⁰⁹ The ONAS website indicates, however, that "Ontario's approach to Aboriginal affairs commits the government to developing policy direction on land claim negotiations." See Ontario Native Affairs Secretariat, "Ontario's Approach to Aboriginal Land Claims: The Highlights," online:

<http://www.nativeaffairs.jus.gov.on.ca/english/landclaims_fs/high.htm> (accessed March 30, 2005).

²¹⁰ Ibid. The wording of the criteria is taken directly from the ONAS website.

If Ontario decides to negotiate a land claim, unlike Canada, it does not provide the First Nation with a letter indicating the basis on which it has accepted the claim for negotiation. In fact, it appears that in general the province does not formally confirm to the First Nation that it accepts that there is a valid grievance to be negotiated. Instead, it simply advises that it is prepared to enter negotiations in an effort to resolve the issues. If, on the other hand, Ontario decides not to negotiate, the process is over.

The land claim negotiations themselves are generally led by ONAS, although other ministries contribute their expertise and advice.²¹¹ In claims that may involve Crown land as part of a settlement, the province will seek to ensure that any settlement will minimize any impacts on existing users of the land. The province will never expropriate private landowners as part of a settlement. Throughout the negotiations, ONAS will liaise with the public and with land users who may be affected by a possible settlement in an effort to identify and address their concerns.²¹²

It should be noted that Ontario has a “fast-track process” for reviewing claims where Ontario’s contribution to settlement would be less than \$1 million, and where the First Nation does not seek land as part of the settlement. Although the ONAS website indicates that the fast-track process “promotes efficiency in reaching settlements on small claims,” thus far no claim has been filed with the province that qualifies for the process.²¹³

The Results Achieved by Ontario’s Current Land Claims Process

As we have seen, Ontario has settled 13 of the 116 land claims²¹⁴ filed with the province since 1976. Some 30 of those claims are now before the courts, while some 59 files remain within the claims process, and 14 are described as “inactive” or “closed.” The 11 settlements in which Ontario has participated have been significant and often creative in their approach to righting historical wrongs. Still, one of the most significant concerns about Ontario’s current land claims process is the length of time claims take to be resolved. We have already seen that the federal government has recognized that its own process for resolving land claims in the province is “unsustainable,” because it has not proved capable of settling most claims in a timely way.²¹⁵

Like Canada’s Specific Claims process, the current Ontario process appears to have difficulty resolving the majority of claims in a timely way. We will review the sources of the delays later in this paper. In considering the timeliness of Ontario’s current claims process, however, two statistics appears particularly significant. First, the unresolved claims now in negotiations have spent an average of 19.6 years in the Ontario process. Second, over the past five years, Ontario

²¹¹ Depending on Ontario’s possible contribution of land or resources to a settlement, such ministries might include the Ministry of Natural Resources (if Crown lands may be involved), the Ministry of Transportation (if roads may be affected), the Ministry of Municipal Affairs and Housing (if local municipalities will be affected), the Ministry of the Environment (if lands need to be confirmed as uncontaminated), and so on.

²¹² Techniques used include: newsletters, advisory committees, public meetings, and, in some cases, the appointment of representatives of the public or local municipalities to the Ontario negotiating team. See the ONAS website, note 210.

²¹³ Personal communication with Alan Kary, December 2004, of the Ontario Native Affairs Secretariat [Kary].

²¹⁴ See the discussion under “Current Federal Claims Policies,” above.

²¹⁵ See the general discussion under “The Specific Claims Policy,” above.

has settled 4 land claims, while 22 new land claims were filed against the province.²¹⁶ Thus, under Ontario's existing process, the backlog of outstanding land claims against the province is rising, not falling.²¹⁷

A major concern about the effectiveness of Ontario's current claims process is that it includes no mechanisms, other than discussion, for resolving disagreements among the parties. If Ontario decides not to negotiate a claim that the First Nation believes is valid, court is the only alternative. Ontario has no equivalent of the federal ISCC, an independent body that will review the government's decision and issue recommendations. Nor is there an administrative tribunal to review the decision.

If, in the course of the negotiations, the parties have a disagreement about an issue of law (for example, about the amount of compensation²¹⁸ Ontario should provide, or the allocation of responsibility between Canada and Ontario), the province will not accept a First Nation's request to arbitrate the issue. Nor, historically, has Ontario ever agreed to a First Nation's request for a non-binding independent view on any legal issue. Since the closure of the ICO in 2000, even neutral facilitation has been used only rarely.²¹⁹ Thus, if the parties reach an impasse in their efforts to agree on the value of a reasonable settlement, the negotiations will either continue without significant progress, or, if the First Nation has sufficient resources, it may initiate court proceedings. In the latter case, the general policies of both the province and the federal government call for them to suspend their involvement in negotiations.

IMPLEMENTING AN EFFECTIVE PROCESS: HOW SHOULD LAND CLAIMS BE RESOLVED IN ONTARIO?

GENERAL PRINCIPLES

It is suggested that an effective process for resolving land claims in Ontario should satisfy six main criteria:

- It should be timely;
- It should be fair and perceived by all parties as fair;
- It should strengthen the relationship between First Nations and the Crown;
- It should take into account the division of responsibilities between the federal and provincial governments, without allowing that division to cause delays in the settlement of claims; and
- It should protect the interests of the general public.

²¹⁶ *Kary*, note 213.

²¹⁷ We have already seen that the same situation applies to the federal Specific Claims process in Ontario.

²¹⁸ "Compensation" here refers to the value of the redress (money, land, or other) that Ontario will contribute to the settlement.

²¹⁹ Since the closure of the ICO, apparently First Nations have requested facilitation only rarely; *Kary*, note 213.

Although the federal ISCC has a mandate that permits it to act a mediator on land claims, it appears that Ontario has never participated in an ISCC mediation. (The ISCC has mediated tripartite claims negotiations involving Saskatchewan (seven files) and British Columbia (one file).

First, the claims process should be designed to resolve outstanding claims in a timely manner. Land claims are assertions that governments owe an outstanding legal obligation to First Nations. It is a maxim of Canadian law that justice must be provided in a timely way. Although governments do not agree that all land claims are valid, both Ontario and Canada recognize that a significant number of land claims are based on legal wrongs that they have not yet redressed. We have seen that historically First Nations land grievances were generally ignored by government policy and by the law. However, for more than a decade the courts have made it clear that this must not continue. Although the federal and provincial governments have both established formal processes to address land claims, we have seen that the current processes appear incapable of resolving the majority of claims expeditiously.

In light of the record of existing claims policies in Ontario, it will be suggested that the amount of resources dedicated by Ontario and Canada to resolving claims needs to be re-examined, as does the current practice of all parties duplicating work in the claims process. Further, the claims process should include binding time frames for the review of claims and for the conclusion of negotiations on compensation for valid claims.

Second, the results of claims processes should address the underlying grievance, and the processes themselves should be designed to strengthen the relationship between the parties. Addressing the sense of grievance that has arisen from historical actions by the Crown is essential to improving the relationship between the parties.

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

Third, because land claims involve legal rights, the process for resolving them must be fair, and it should be perceived as fair by a reasonable observer viewing the process from the perspective of each of the parties. As we shall see, independent reviews of the current processes since 1978 have repeatedly concluded that the processes create an unacceptable conflict of interest for the governments because they call for governments to adjudicate claims in which the government is a defendant. Consistent with past independent critiques, it is suggested that the claims process should ensure that the parties have access to independent views where this is required to assist them in resolving their disagreements.

Fourth, the claims policies of Ontario and Canada must be consistent with their respective constitutional responsibilities. Each has distinct legal responsibilities in relation to particular claims, and each has a different capacity to contribute to the lasting resolution of claims. This division of responsibilities continues to pose a challenge where federal and provincial governments disagree about their respective obligations to contribute to claims settlements. Further, the fact that each government has a different claims policy creates complications for the settlement of claims.

In general, differences in the present federal and provincial claims processes do not appear to have created significant obstacles in negotiations. The present policies permit both governments

to develop workable solutions in accordance with their legal responsibilities. However, significant problems have arisen over disagreements between Canada and Ontario about their own legal obligations in a land claim they both recognize as valid. Resolving internal disagreements about the sharing of the Crown's responsibilities should not occur at the expense of a First Nation with a valid claim against the Crown. There are several methods by which the federal and provincial governments might resolve such disagreements, including negotiation and arbitration. It is suggested that the federal and provincial governments have a responsibility to ensure that they establish a timely process for resolving such disagreements in a particular claim.

Fifth, federal and provincial claims processes must be designed to protect the interests of the public and of individuals who may be affected by a claim settlement. We have seen that both governments have adopted a relatively comprehensive range of practices for consulting with the public about possible claim settlements. Concerns that have been raised about these practices appear in general to relate to the adequacy of their implementation. Here, we will consider the particular situation of municipalities in a claim area, their need to stay informed about the progress of claims negotiations, and to be consulted fully about the possible financial effects on the municipality of a proposed claim settlement. We will also briefly consider the deleterious effects on municipalities of the failure to resolve claims in a timely way.

The remainder of this section will expand upon each of the above general principles, identifying past critiques of the current claims processes, "best practices" that have been used in past claims, and the challenges that must be addressed if they are to be implemented. In each case specific recommendations will be offered that could be adopted to implement the general principle.

THE PROCESS SHOULD BE TIMELY

First Nations who have presented land claims believe that their interests in land have not, historically, been treated with the respect shown to the property of other Canadians. Failure by government to address these claims in a timely way exacerbates First Nations' sense of grievance, for it appears to them that governments still do not take their rights seriously. Willard Estey, a former Justice of the Supreme Court, once noted that, "unlike fine wines, conflicts rarely improve with ageing." Unless First Nations claims are resolved with some degree of urgency, it seems inevitable that the relationship between Aboriginal peoples and other Canadians will be marred by frustration and increased tension in the future.

Timeliness of the Current Ontario Process

Forty-eight land claims are currently under review by Ontario. The average length of time that these First Nations have been waiting to hear whether Ontario will negotiate their claim is six years and 10 months.²²⁰ The four oldest claims that await a decision to negotiate were filed with Ontario in 1985. ONAS has indicated to the writer that its estimated review time for claims received today is in the range of from three to five years.²²¹

²²⁰ For the dates that Ontario received the formal allegations and supporting research for each of these claims, see Appendix 6. The writer did not have access to the months in which the claims were filed. The averages quoted assume that the claims' filing dates were evenly distributed between the first and second half of the calendar year.

²²¹ Kary, note 213.

For the 11 formal claims in negotiation that have not yet reached a settlement, the average length of time they have been in the Ontario claims process is 19.6 years.²²² Four were filed after 1991, five have been in the process since the 1980s, and another two have been in the process since the 1970s.

For the land claims involving Ontario that have reached a negotiated settlement, the average time between filing the claim with Ontario and reaching final settlement was 15 years.²²³ The quickest settlement was achieved in 3 years. The longest took 23 years, while the majority took 15 years or longer to reach settlement.²²⁴

It is worth pausing to consider the effect of these time lapses from the viewpoint of First Nations with unresolved grievances. Consider the Wauzhushk Onigum First Nation, whose claim alleges that reserve lands were taken without compensation for the erection of a gold mine in the late 1800s. The First Nation filed its claim with Ontario and Canada in 1980. Although it was received into the ICO process that year, it was not accepted by both governments for negotiation until 14 years of discussion later.²²⁵ The First Nation requested non-binding arbitration to assist the parties in the mid-1990s, a request that was declined by the federal and provincial governments. Discussions to resolve the Wauzhushk Onigum claim continue today, some 24 years after the claim was filed. It would not be surprising to learn that the members of the First Nation consider the land claims process extremely frustrating, and that from their perspective the length of the process constitutes a denial of justice.

Past Critiques of the Timeliness of Existing Processes

The delays involved in the land claim processes applicable in Ontario have been a major focus of criticism in past critiques of these processes. The 1990 ICO *Discussion Paper* recommended that all parties in the process be required to submit to binding time frames, subject to the supervision of an independent body.²²⁶ The ICO also proposed that an independent body be created to help resolve impasses that arise in the negotiation of claims.²²⁷ In addition, the ICO recommended a “dramatic increase” in the resources allocated to the resolution of claims.²²⁸

The absence of all-party accountability for meeting established time frames was also a focus of the federal Auditor General’s review of the Specific Claims Policy in 1991. That report concluded bluntly that “[t]here is no planning and control framework for claims” and predicted that without major change the backlog of claims against Canada would not fall over the next 20

²²² For the filing dates of claims within the Ontario claims process, see Appendix 6.

²²³ See Appendix 6. Included in this calculation were all the final settlements for which filing times were provided by Ontario.

²²⁴ It should be noted that where these settlements involved land to be added to a reserve, the time period to final resolution has actually been considerably longer than the above figures would suggest. The Mississauga No. 8 and Wikwemikong claims reached final settlement agreements in 1994. However, it appears that the land component of the settlements has yet to be added to their reserves. It is beyond the scope of this paper to examine the reasons for such delays in implementation: it appears that in both cases the lands are now under the administration and control of Canada, awaiting transfer to reserve status.

²²⁵ Ontario agreed to negotiate the claim in 1992, Canada in 1994. See Indian Commission of Ontario, *Indian Negotiations in Ontario: Making the Process Work* (Toronto: Indian Commission of Ontario, 1994) at 91.

²²⁶ *Discussion Paper Regarding First Nation Land Claims*, note 198 at 224–225, 238–239, 241–242.

²²⁷ *Ibid.* at 238 and 242–243.

²²⁸ *Ibid.* at 239.

years.²²⁹ The need for effective time deadlines was also emphasized by Ontario and by First Nations in their submissions for the *ICO Discussion Paper*.²³⁰

Since 1978, almost every independent review of the land claim processes applicable in Ontario has recommended the creation of an independent tribunal to assist the parties to resolve negotiation impasses. Empowering a tribunal to help the parties resolve enduring disagreements would speed up the process, and it would also increase the appearance of fairness in the process. For this reason, the possible role of an independent body in Ontario claims processes is discussed in more detail under “Fairness” below.

Lack of resources dedicated to claims resolution also appears to be an important factor in the delays encountered by current claims processes in Ontario. Recall that the average time taken to date by Ontario to assess the claims still under review is six years and 10 months, and that ONAS estimates it can review new claims in three to five years. Presumably, the major reason for the length of time taken by Ontario to review land claims is that insufficient resources are available to complete the task earlier.

The level of resources committed to the payment of government contributions to settlements also appears to be a contributing factor in the failure of current claims processes to reduce the number of outstanding claims. The federal government has recognized this on several occasions since 1990, increasing its annual Specific Claims settlement budget from \$15 million to \$100 million. Five years ago the federal government estimated its contingent liability for Specific Claims at about \$2.6 billion.²³¹ Even disregarding the rate at which new claims are entering the process, this suggests that under its current annual budget the federal government’s outstanding obligations under existing claims cannot be met in less than 26 years.

A final obstacle to the timely settlement of claims through unassisted negotiation arises from the parties’ perceived alternatives to reaching a negotiated settlement. Intelligent negotiators will compare the cost of settlement to the cost of the alternative—litigation through the courts. The federal and provincial governments have permanent staffs of litigation lawyers and public resources available to defend claims. This inevitably makes litigation and deferring resolution a less unpalatable alternative for government than it does for First Nations, who must rely on limited resources to commence a costly process of litigation to the Supreme Court of Canada.²³² In fact, if a First Nation actively pursues litigation on a claim against the Crown, it is Canada’s policy to immediately cut off all claims research funding it provides to the First Nation. Thus, to

²²⁹ See Office of the Auditor General of Canada, “1991 Report of the Auditor General of Canada,” online: <<http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9114ce.html>> (accessed March 30, 2005) at ss. 14.72, 14.74, and 14.82 [*Auditor General*].

²³⁰ See *Discussion Paper Regarding First Nation Land Claims*, note 197 at 229–230.

²³¹ See <http://www.tbs-sct.gc.ca/rma/dpr/00-01/INAC00dpr/INAC0001dpr04_e.asp#SectionV-FinancialTables>, note 138 (accessed March 30, 2005).

²³² Neither Canada nor Ontario keep public records of the legal costs of land claims litigation. Consequently, it is impossible to provide an estimate of the total expenses involved. Nevertheless, it is reasonable to assume that the costs are substantial. For example, on one claim alone the Ontario courts ordered the federal government to pay the First Nation some \$329,000 in legal costs for a series of pretrial motions that Canada lost between 2000 and 2001. This figure does not reflect Canada’s own legal costs for these motions. See the court files for action number 406/95 (Superior Court), 690/99 (Divisional Court), and M25814 (Court of Appeal).

the extent that the main alternative to negotiated settlement is litigation, in most cases there will be a significant power imbalance that disadvantages the First Nation.

In a situation where one party is a defendant, has access to much greater financial and legal resources than the other party, and views the costs of not settling as largely intangible, there will be a reduced motivation to settle the claim quickly. (There will also be little incentive for that party to submit to third-party views on disputes over the law.) This will be true at the institutional level regardless of the goodwill and dedication of the individuals involved. Indeed, in its submission on land claims to the Indian Commission of Ontario, the province acknowledged that the prospect of deferring settlement payments creates a disincentive for governments to settle land claims in a timely manner.²³³

Of course, there are significant costs, and foregone benefits, involved in the failure to settle claims. Some of the costs are significant but not amenable to accounting methods: the failure of government to ascertain and fulfill its obligations to First Nations in accordance with the rule of law, for example. Others, such as the costs of litigation, the cost to local communities of continuing uncertainty over rights to land, and the increase in settlement entitlements due to the passage of time, could be calculated, but do not appear to be systematically estimated and taken into account by the province in claim negotiations.²³⁴ Nor has the province undertaken a study of the financial and social benefits of claims settlements to First Nations and their neighbours.

While the fairness of individual settlements must be carefully reviewed by all parties, it is submitted that because of Ontario's commitment to the rule of law and because of the financial, legal, and social costs to the province of delaying the settlement of land claims, an effective claims process will be one that builds in accountability for all party's positions so that no party has an incentive to delay or avoid reasonable settlements.

Recommendations to Address the Need for Timeliness

- This review has suggested that to increase timeliness of their processes and to address the backlog of land claims in Ontario effectively, the province and Canada need to re-examine the adequacy of the resources they dedicate to the resolution of claims. The adequacy of resources appears to be a critical issue both for the support and review of claims, and for the payment of the government's obligations through settlements.
- The parties should consider the use of binding deadlines in both the review process and the various stages of the negotiation process. The record suggests that the mere setting of time frames for the negotiation process, without accountability, does not ensure that negotiations progress in a timely manner. One effective way of achieving this would be for the parties to assign a respected independent body to supervise the completion of tasks within agreed time limits, unless all parties agree to waive a particular time limit.
- As discussed under "Relationship" below, all parties should consider adopting a process whereby they work jointly to complete important tasks that are currently repeated separately by each party.

²³³ See *Discussion Paper Regarding First Nation Land Claims*, note 197 at 239.

²³⁴ By way of example, unlike Canada, Ontario has not tried to estimate its contingent liability for land claims in the province: personal communication with Kim Twohig, March 2005, Crown Law Office, Ontario.

- As discussed below, under a revitalized process each party should be entitled to refer legal issues to neutral experts when the parties are unable to resolve disagreements on those issues through discussion in a timely way.

THE PROCESS SHOULD BE FAIR AND BE SEEN TO BE FAIR BY ALL PARTIES

Ontario's Current Approach

If Ontario determines that it will address a land claim, negotiation is its preferred approach to resolving any differences in the parties' views. A negotiated resolution will command the confidence of all parties and is capable of meeting all parties' interests. Further, negotiation, unlike litigation or arbitration, allows the parties to fashion creative and complex solutions that can rectify a historic wrong without creating new injustices for non-Aboriginal Canadians who live in the area of the claim. As this report has indicated, through the negotiation process²³⁵ the province has been able to achieve several significant and creative settlements with individual First Nations and Canada over the past 15 years.

It should be noted that since the early 1990s, all parties in Ontario have regularly agreed to use the same experts for measuring the economic losses that resulted from a loss of First Nation lands. Thus, independent real estate appraisers and loss-of-use consultants are hired by the parties collectively, according to jointly developed terms of reference. Their reports are non-binding, but the use of only one appraiser avoids the possibility of lengthy disputes about which of three conflicting appraisers' reports should be relied on by the parties.

However, as noted, Ontario's current land claims process includes no mechanisms, other than discussion, for resolving disagreements on questions of law. This is critical to the resolution of land claims, where disagreements over the legal basis of the claim or the compensation that is payable in accordance with legal principles can prevent settlement of the claim. As discussed, it also creates an appearance of unfairness, because it gives Ontario the unilateral power to trump the First Nation's view wherever there is a disagreement over the legal obligations of the province. This appearance of unfairness exacerbates the existing disparity in resources, and therefore power, that usually exists at the negotiation table.²³⁶ Finally, even assuming that the province is always correct in its legal opinions, the fact that they are produced by a defendant to the claim means that the province's determinations will not cause the First Nations' sense of grievance to disappear.

As noted above, Ontario has always rejected requests for neutral independent opinions on legal disputes in claims, including requests for non-binding opinions that would be confidential to the parties. If, as the defendant in the claim, its own views of the law are always correct, the province presumably has no reason to be concerned about referring a disputed legal issue to a respected neutral expert or panel of experts. The neutral opinion would bring legitimacy to the province's position and force the First Nation to reconsider its own views. On the other hand, if

²³⁵ As discussed earlier, from 1978 to 2000, most claim negotiations in Ontario were assisted by the facilitation process of the ICO.

²³⁶ On this point, see the report of the Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 79 [Task Force].

on a particular claim a neutral, independent expert or panel of experts were to conclude that the law does not support Ontario's view, then following the neutral determination would be consistent with Ontario's stated commitment to fulfill its legal obligations to First Nations.

It should be noted that the idea of creating a tribunal to adjudicate legal disputes between government and citizens is far from novel. The provincial and federal governments have created dozens of statutory tribunals to perform just this function where government agencies make determinations about their legal obligations to citizens. Such tribunals determine pay equity obligations, pension and social assistance entitlements, the environmental obligations of government departments, land development rights, human rights entitlements, Canada's international trade obligations, and so on. The use of tribunals brings specialized expertise, efficiency, flexibility, and the possibility of cost savings in dispute resolution through the avoidance of unnecessarily rigid procedural rules.

Past Critiques of the Fairness of Existing Processes

Every independent review of the current claims process in Ontario has identified the governments' conflict of interest in determining all legal issues in claims as a major flaw in the process. These include a detailed analysis of the Specific Claims process in 1978 by Mr. Justice Gerard LaForest, later appointed to the Supreme Court of Canada;²³⁷ the 1988 report of the Canadian Bar Association Special Committee on Aboriginal Rights;²³⁸ the 1990 *ICO Discussion Paper* on claims;²³⁹ and the 1996 *Report of the Royal Commission on Aboriginal Peoples*.²⁴⁰ Each of these reviews calls for the creation of an independent tribunal to assist the negotiation process.²⁴¹

The federal government currently makes neutral mediation available in all of its Specific Claims. Canada has also recognized the need for an independent claims tribunal in the recently enacted *Specific Claims Resolution Act*.²⁴² We have seen that the particular form of this statute is problematic for First Nations, because of (among other things) the appointment process for the tribunal, the limited role of the tribunal, and the exclusion of claims for land from the tribunal process. However, the development of the *SCRA* suggests that the federal government

²³⁷ Gerard V. LaForest, *Report on Administrative Processes for the Resolution of Specific Indian Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1978) at 18 [*LaForest Report*].

²³⁸ Canadian Bar Association, *Special Committee Report, Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988) at 84 [*Special Committee Report*].

²³⁹ See *Discussion Paper Regarding First Nation Land Claims*, note 197.

²⁴⁰ *RCAP vol.2*, note 26 at 591–612.

²⁴¹ See *ibid.* at 596; *LaForest Report*, note 237 at 33; *Discussion Paper Regarding First Nation Land Claims*, note 193 at 238; *Special Committee Report*, note 238 at 83. See also the 1991 report of the federal Auditor General, note 229 at 14.92, which recommended that the federal government reassess its fundamental practices for settling claims, including "the objectivity and independence of Specific Claims Branch." See also *Task Force*, note 236 at 79–80. The report identified the conflict of interest as a major flaw in the federal Comprehensive Claims process, and identified the need for a neutral, independent supervisory body as "essential" for the negotiation of Comprehensive Claims. As long ago as 1948 a special joint committee of the Senate and House of Commons recommended that an independent administrative tribunal be created "to assess and settle finally and in a just and equitable manner all claims and grievances which have arisen" under Indian treaties. See Special Joint Committee of the Senate and the House of Commons Appointed to Continue and Complete the Examination and Consideration of the Indian Act, *Fourth Report*, June 22, 1948, 187.

²⁴² See the discussion of this statute under "Recent Federal Legislative Initiatives," above.

acknowledges the need for an independent claims tribunal, a concept that First Nations leadership has supported since at least the early 1990s.

The value of a claims tribunal would arise not only from the decisions that it is called upon to make. Much of its value would come from the mere fact that there exists the possibility of recourse to a tribunal if a party refuses to reconsider its position after reasonable efforts at negotiated resolution. The potential consequences of being forced to go before a binding tribunal would encourage all parties to resolve legal disagreements reasonably.

Detailed descriptions of how a claims tribunal might operate have been set out by Justice LaForest,²⁴³ by the Joint First Nations–Crown Task Force on Claims Policy Reform,²⁴⁴ by the Royal Commission on Aboriginal Peoples,²⁴⁵ and by the Indian Commission of Ontario.²⁴⁶ A tribunal for Ontario land claims would, for constitutional reasons,²⁴⁷ require that Ontario, Canada, and Ontario First Nations collaborate on the creation of appropriate legislation. In the end, as each of these reports has indicated, the effectiveness of any claims tribunal would depend on its structure being perceived by all parties as fair, impartial, and not unduly technical in its process. This would require independence from the governments defending a claim, and an appointment process that ensures that its members are highly qualified and generally acceptable to both government and First Nation parties. For the reasons discussed in the next section, while the tribunal would focus on Canadian legal principles, the process should be one that is not overly technical in its treatment of evidence and is adapted to First Nations’ cultures.

Finally, resolving land claims in Ontario today involves more than determining outstanding legal obligations. Settlements must be fashioned that meet all parties’ current needs and that protect the interests of third parties and the public. Thus, an effective claims tribunal should be designed to assist the negotiation process, rather than replace it. It would intervene at the request of one party only when the parties have been unable to agree within established time frames on the validity of a claim,²⁴⁸ or on the application of legal principles in determining the overall level of compensation owed. The parties should be able to return to negotiations after tribunal decisions on the validity of a claim, or on particular legal questions relating to compensation. This would allow them to continue to find creative and appropriate settlements of claims, in accordance with the legal decisions of the tribunal.

²⁴³ *LaForest Report*, note 237.

²⁴⁴ Joint First Nations–Crown Task Force on Claims Policy Reform, *Final Draft Report* (unpublished, November, 1998).

²⁴⁵ *RCAP vol.2*, note 26 at 591–599.

²⁴⁶ *Discussion Paper Regarding First Nation Land Claims*, note 197 at 232–246.

²⁴⁷ For more on the constitutional issues arising from land claims, see the discussion under “The Division of Constitutional Responsibilities,” below.

²⁴⁸ The Royal Commission on Aboriginal Peoples recommended that the independent claims tribunal be responsible for supervising good faith negotiations and adherence to time frames, much like Labour Relations Boards supervise the collective bargaining process. See *RCAP*, vol. 2, note 26 at 596–597. In the interest of ensuring tribunal independence and impartiality when it comes to resolving disputes of substance, the parties might prefer to task this to a separate body responsible for facilitating and monitoring claims negotiations.

Recommendations for Resolving Disagreements over the Law Relating to a Claim

- The Ontario process should offer mediation on all claims. This would assist the parties in developing non-adversarial approaches to claims negotiation. In the interest of cost-effectiveness and subject matter expertise, all parties should consider recreating a permanent facilitation body in Ontario, based on the lessons of the ICO experience.
- Where disagreements over a question of law on a claim are not resolved within a reasonable time, the parties should make it their policy to permit one party to require that the parties obtain the non-binding legal view of a jointly selected expert.
- Ontario should make access to an independent tribunal's binding opinion available in all claims. Such an opinion would be able to be requested by a party on questions of the validity of a claim and the application of legal principles to the compensation owing on a claim, if such questions are not resolved by negotiation after a reasonable period of time. The relationship of such a process to any federal tribunal process will be discussed under "Division of Constitutional Responsibilities," below.
- To permit the flexibility needed to develop settlements that meet the current needs of the parties and the public, an independent tribunal should be designed to assist the negotiation process, not to replace it.
- The above options should not be considered mutually exclusive. An effective process would include progressive access to more interventionist approaches to resolving disagreements if less interventionist approaches are unsuccessful.

THE PROCESS SHOULD BE DESIGNED TO STRENGTHEN THE RELATIONSHIP OF THE PARTIES

The long absence of government policies to address land claims, and the historic inability of First Nations to advance claims, has had the effect of damaging the relationship between the parties. In that context, the failure of current government policies to address First Nations' land rights in a timely way to settle claims has caused heightened tensions, frustration, and, at times, physical confrontations. The Supreme Court of Canada has stated that the legal relationship between the Crown and First Nations should be non-adversarial and trust-like. This suggests that litigation, a costly and time-consuming process that heightens distrust between the parties, is not an appropriate forum for the resolution of most claims.

Subject to what has been said about the need for mechanisms to resolve impasses and enforce deadlines, negotiation, through a process agreed to by all parties and according to rules that treat all parties as equals, offers the hope that grievances will be addressed in a way that respects all parties' points of view. To address the underlying grievances fairly, the parties' general approach to claims negotiations should not be overly technical.²⁴⁹ Further, as will be discussed below, joint processes of fact finding can be a particularly effective way of advancing negotiations in a non-adversarial way.

Two other challenges arise at the end of the claims resolution process. First, it is Canada's policy to require a legal "surrender" by the First Nation of all interests in the claimed lands, as a term of the final settlement. Further, to ratify the settlement the First Nation is required to hold a separate

²⁴⁹ The risks of creating land claims processes that are not effective in resolving underlying grievances is significant. A federally commissioned study of 17 Specific Claim settlements in 1994 revealed that only two of the First Nations were satisfied with the result. See *RCAP vol.2*, note 26 at 547.

“surrender” vote in addition to the community vote to approve the terms of settlement. The word “surrender” comes from the provision in the *Indian Act* that provides for First Nation transfers of their interest in reserve land. The idea behind the settlement including a final and binding release in relation to the historic claim is understandable. However, the current surrender requirement creates at least three problems. First, notwithstanding any continuing interest over the lands that the First Nation may wish to retain (hunting and fishing rights, for example, as well as the right to use and protect any sacred sites on the land), the surrender process requires First Nation members to consent to the extinguishment of all rights on the lands that were wrongly taken from them. Further, the surrender requirement flies in the face of Aboriginal understandings of their continuing relationship with the land. Finally, the word “surrender” itself has colonial connotations that suggest the First Nation is yielding to a dominant force. For these reasons, a number of independent commentators have recommended that Canada abandon its policy of requiring that all First Nation interests in the claimed land be surrendered as a condition of settlement.²⁵⁰

The second challenge involves the current federal and provincial policies on apologies. First Nation members have often carried a sense of injustice about a taking of lands for most of their lives. In settlement negotiations it is often important for them to hear that the government regrets what occurred and intends to act differently toward the First Nation in the future. In such cases, receiving a sincere apology from the government may be more important than many other aspects of the settlement. Further, such an apology sends a message to their non-Aboriginal neighbours that the First Nation’s grievance was in fact a legitimate one. The current federal and provincial approaches to claim settlements permit a public statement of the agreed history of the claim, but do not authorize a formal apology to the community. It is suggested that where government is prepared to provide compensation for a past wrong in a land claim, it should also be prepared to offer a sincere apology to the community at the time of settlement.²⁵¹

The Relevance of Past Critiques

To ensure that claims processes are effective in promoting settlements, the report of the Special Committee of the Canadian Bar Association²⁵² and the *ICO Discussion Paper*²⁵³ both spoke of the need for First Nations to be involved in shaping the process which will apply to their claims. For the same reason, these reports and the report of Justice LaForest also urged that claims resolution policies should not be overly technical and should not permit the use of technical legal defences in considering the validity of or compensation owing on a claim.²⁵⁴

Canada adopted a process of consultation on its claims processes in the early 1990s, with the creation of the Joint First Nations/Canada Working Group on Claims. Canada also expressly excludes the use of technical defences in its Specific Claims Policy. In contrast, Ontario’s stated

²⁵⁰ This question has been examined most frequently in the context of Canada’s “Comprehensive Claims” policy. See A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership* (Ottawa: Department of Indian Affairs and Northern Development, 1995) at 27–31; *Task Force*, note 236 at iii–iv; and *RCAP vol.2*, note 26 at 542–544.

²⁵¹ If the government is concerned about the liability implications of an apology, it can be offered at the signing ceremony, when the legal releases have been executed.

²⁵² See *Special Committee Report*, note 238 at 83.

²⁵³ *Discussion Paper Regarding First Nation Land Claims*, note 197 at 242.

²⁵⁴ See *Special Committee Report*, note 238 at 28; *Discussion Paper Regarding First Nation Land Claims*, note 197 at 234; *LaForest Report*, note 237 at 11.

approach to claims does not offer assurance that technical defences will be ignored in the review and negotiation of claims.

As for the final settlements of claims, governments understandably wish to see these settlements provide a final resolution of the historical issues under dispute. As noted above, First Nation commentators and independent reviewers have long urged that Canada achieve this without relying on its current policy of requiring that claim settlements involve a new “surrender” of the First Nation’s rights.²⁵⁵

Best Practices

Two examples of government-supported facilitation of land claims negotiations are provided by the Indian Commission of Ontario and the federal Indian Specific Claims Commission (the ISCC).²⁵⁶ The mandates and records of the Indian Commission of Ontario and the ISCC have been discussed already.²⁵⁷ Both were created after consultation with First Nations. As noted above, both have successfully facilitated a large number of claims settlements. Both bodies, however, reported that they lacked the powers to ensure that difficult claims were resolved in a timely manner.²⁵⁸ Both recommended that effective facilitation work in tandem with an independent claims tribunal.²⁵⁹

A good example of a respectful approach to investigating the validity of a First Nation land claim is provided by the inquiry process of the Indian Specific Claims Commission.²⁶⁰ When the Commission is tasked with reviewing a decision by the federal government to reject a claim, it holds an inquiry into the claim at the First Nation community. Elders are encouraged to give testimony, which is taken into consideration and transcribed for the permanent records of the community. The Commission and its counsel are the only parties who question the elders, based on consultations with the government and the First Nation prior to the inquiry.

²⁵⁵ See note 250.

²⁵⁶ In British Columbia a treaty commission has been overseeing First Nation negotiations since 1992. However, the commission does not generally facilitate individual negotiations. Instead, its role includes overseeing the commencement of negotiations, monitoring their progress, and recommending solutions where problems arise in the negotiations. Since 1992, 55 First Nations have participated in treaty negotiations through the commission process. Five Agreements in Principle have been reached, although none has yet been finalized. The parties to the process do not view it as an unalloyed success. In 2002 a tripartite review of the process concluded that it has been expensive and slow to achieve results. See: Tripartite Working Group, “Improving the Treaty Process,” February 25, 2002, online: <<http://www.bctreaty.net/dcd/Reports>> at 4. Among other things, the parties are now reviewing the possibility of expanding the commission’s role in directly facilitating negotiations. For the commission’s mandate, record, and recent reports, see <<http://www.bctreaty.net>>. For a recent reviews of the B.C Treaty process, see Deloitte & Touche, “B.C. Treaty Commission: An Independent Effectiveness Review,” November 18, 2003, http://www.gov.bc.ca/tno/down/bc_treaty_commission_review_final_dec_2_03.pdf (accessed March 30, 2005).

²⁵⁷ See the discussion at pp. 38 and 43–46 above.

²⁵⁸ See the Indian Commission of Ontario, *Discussion Paper Regarding Land Claims*, note 197, at 238–244, and the Indian Commission of Ontario, *Indian Negotiations in Ontario: Making the Process Work* (Toronto: Indian Commission of Ontario, 1994) at 47. The ISCC has repeatedly expressed concern that it lacks the power to negotiate that reach an impasse. See, e.g., [1995] 2 *Indian Claims Commission Proceedings* at 23; and Indian Claims Commission, *Annual Report 2002–2003* at 11–12. Both are available at the Commission’s website: <<http://www.indianclaims.ca/english/pub/pub.html>> (accessed March 30, 2005).

²⁵⁹ *Ibid.*

²⁶⁰ The Commission’s inquiry process is described on its website. See: Indian Claims Commission, “The Claims Process,” online: <<http://indianclaims.ca/english/about/claimsprocess.html>> (accessed March 30, 2005).

Another example of innovative approaches to addressing First Nation grievances jointly is a recent pilot project involving the Michipicoten First Nation in Northern Ontario. The First Nation was concerned about several takings of the reserve set aside for it under the Robinson-Superior Treaty of 1850. The First Nation lacked the resources to research each of the transactions independently. In 1997, Canada and the First Nation entered a protocol agreement to commission the research jointly in a process facilitated by the ISCC. The parties and their lawyers worked together on drafting the questions that should be answered by the researcher. They also worked together to define and narrow the legal issues involved.

Because of this work, the federal Department of Justice was able to provide legal opinions on each of the 13 transactions in an average of six months. Five of the transactions have led to the acceptance of Specific Claims for negotiation, three have been referred for administrative action, and on four transactions the joint research has led the First Nation to conclude that they do not form the basis of claims against Canada. Following the joint research and submission of the claims the Chief wrote the following to the federal government:

What I really want to convey to you is the sense of well-being that this Pilot Project has brought to our community. First off, we were treated like equals and given the necessary funding and resources to come to the table as equals. The funding also allowed us to meet with our members, both on and off the reserve, and explain our history and our claims to them. This in turn made our members feel much more involved and we also see that attaining positive results on claim settlements has been greatly enhanced. This Pilot Project has done more to bring all the members of this First Nation, both on and off reserve, together than you could imagine.

The Pilot Project has also allowed us to reach out to our non-native neighbours and forge new relationships and partnerships. The town of Wawa is now a big supporter of what we are doing and our Council and their Council meet regularly to ensure open and effective communication. There will be no surprises.

We now have a sense that our historic grievances will be rectified and that our First Nation will be able to successfully move into the future. This would not have been possible without the wonderful support that we have received from Specific Claims Branch, Research Funding Division and the Department of Justice. Thank you for your support.²⁶¹

Recommendations to Ensure the Process Strengthens the Parties' Relationship

- To ensure that the claims process resolves grievances in an enduring way, all parties should participate in designing the process. For the reasons given above, the process should not permit reliance on technical defences, should permit the participation of elders in claims discussions, and should discourage the resort to the courts.

²⁶¹ The Michipicoten Pilot Project is described in detail in a paper presented by its legal counsel. See K. Fullerton, "The Michipicoten Pilot Project on Specific Claims," paper presented at the Pacific Law Conference, September, 19, 2002 [Fullerton]. The letter by Chief John Peterson is quoted at 14–15.

- Because the court process is costly, adversarial, and damaging to the parties' relationship, and because it rarely results in the final resolution of claims, Ontario, Canada, and the First Nations involved should review each of the dozens of claims that are currently in active litigation in the province, with a view to considering whether they can agree on a fair and timely negotiated alternative to the court process.
- To avoid the cost and time required for independent historical and preliminary legal research, Ontario and Canada should consider making available to all First Nations the joint approach to research adopted in the Michipicoten Pilot Project.
- Canada should reconsider whether settlement agreements can be drafted without use of the word "surrender," and Canada should consider amending sections 37 to 41 of the *Indian Act*²⁶² to replace the word "surrender" with less offensive language.
- To demonstrate their commitment to honouring First Nations' rights, at the final settlement of a claim, Canada and Ontario should offer a public apology to the First Nation in relation to the events giving rise to claim.

THE DIVISION OF CONSTITUTIONAL RESPONSIBILITIES SHOULD NOT DELAY SETTLEMENTS OF VALID CLAIMS AGAINST THE CROWN

The division of constitutional powers between Canada and Ontario does not need to hinder the settlement of land claims in the province. Each government has its own separate legal obligations in relation to historic claims and each has distinct resources and constitutional powers to contribute to settlements of claims. Many of the outstanding claims in Ontario have been filed against the province alone (typically in cases where the province still controls lands surrendered for sale), many have been asserted against Canada alone, and several involve both Canada and Ontario.

What is required, where both governments are negotiating the same claim, is that their policies and processes be compatible. At present, insofar as both are generally prepared to negotiate compensation on the basis of Canadian legal principles, it is possible to take a consistent approach in tripartite settlement negotiations. However, a major concern arises for First Nations when the governments disagree as to their respective legal responsibilities based on the facts of the claim. Not infrequently each take conflicting positions about the share of settlement that should be contributed by the other. In such cases, the result is that negotiations do not progress, although all parties agree that the Crown owes an outstanding obligation to the First Nation.

It is suggested that arguments between Canada and Ontario about their respective shares of legal responsibility for the events giving rise to a claim should not be permitted to hinder the settlement of valid claims against the Crown. Fairness dictates that Canada and Ontario should find methods of resolving such conflicts in a timely way.

Another concern that arises in claims where both Canada and Ontario are involved is that duplication of tasks by the governments typically adds expense and time to the settlement of the claim. Thus, both governments independently review the historical research submitted by the First Nation. Here there is an opportunity to simplify and speed up the process if all parties can agree to work on the research jointly, following the example of the Michipicoten claims. In

²⁶² *Indian Act*, R.S.1985, c. I-5.

addition to accelerating the review process dramatically, it is estimated that using this process saved the federal government some \$30,000 per claim.²⁶³ Presumably, similar cost savings could be expected for Ontario.

Finally, the proposal that Ontario provide resort to a claims tribunal raises issues of constitutional jurisdiction. If Ontario agrees to the use of third-party arbitration as a matter of policy where First Nations consent to such a process, no constitutional issues appear to arise. If Ontario created the tribunal unilaterally through provincial legislation, the law would stand on dubious constitutional ground, as it would risk violating the exclusive authority of the federal government over “Indians, and lands reserved for the Indians.”²⁶⁴

The safest approach to creating such a tribunal through legislation would be to negotiate its mandate with First Nations in the province and ask the federal government to enact authorizing legislation.²⁶⁵ Alternatively, the province could consult with Canada to ensure that any legislated federal claims tribunal has a mandate and appointment process acceptable to the province.²⁶⁶

Past Critiques

Several independent reviews have focused on the challenge of federal–provincial co-operation to permit the just settlement of claims.²⁶⁷ However, the position of the Province of Ontario presented to the Commission on the Northern Environment in 1977, puts the matter succinctly: “Claims by native people based on aboriginal rights for unfulfilled treaty entitlements should be pursued jointly with the government of Canada and the province of Ontario. This shared responsibility for dealing with such claims arises from the division of responsibilities in the *British North America Act*...”²⁶⁸

Recommendations to Address the Division of Responsibilities

- To avoid delays in the settlement of claims, Ontario and Canada should develop a process, whether of negotiation or arbitration, whereby they can efficiently resolve disagreements between them about their share of responsibility for past actions of the Crown in relation to a claim.
- To avoid duplication in the research and review of claims, all parties should consider adopting as a general policy the joint approach used in the Michipicoten Pilot Project.
- All parties should use their jurisdictions in parallel to meet the constitutional requirements of establishing a permanent claims tribunal.

²⁶³ Fullerton, note 261 at 3.

²⁶⁴ See the discussion in Paul, note 181.

²⁶⁵ Note that Ontario has used this approach in the past, adopting parallel legislation with Canada to address First Nation land issues. See the discussion of the *1986 Indian Lands Agreement Act* above.

²⁶⁶ The federal *Specific Claims Resolution Act*, discussed above, does not betray signs of extensive consultation with the provinces to ensure that they will be prepared to use the tribunal. As noted earlier, the future of this Act is uncertain.

²⁶⁷ See, e.g., *RCAP vol.2*, note 26 at 547–548 and 590; Hartt, note 76 at 36–37; *Discussion Paper Regarding First Nation Land Claims*, note 197 at 201–202, 236, 240–242.

²⁶⁸ Royal Commission on the Northern Environment, *Issues Report* (Toronto: Commission, 1978) at 148.

CLAIMS PROCESSES SHOULD ADDRESS THE INTERESTS OF THE PUBLIC

The manner in which current provincial and federal claims policies protect the interests of private land owners and users of Crown lands in settlement areas has been discussed above. The provincial government in particular has much experience now in implementing public consultations about land claims and in liaising with local municipalities and interest groups. This is a difficult and delicate task, which ONAS, the Ministry of Natural Resources, the Ministry of Municipal Affairs, and other involved provincial ministries appear to execute well. Canada has participated with Ontario in public consultations on proposed settlement lands. Where Canada has negotiated without Ontario and a settlement involves an addition to reserve lands, the federal government has engaged in public consultations on its own.

The Ontario public has a legitimate interest in being informed about the nature and status of land claims in the province, as well as the steps being taken to resolve disputes about First Nation land and treaty rights. Public resources are used in dealing with these disputes, whether in the courts or through negotiation. Public resources and human lives are also affected by the failure to resolve the disputes. Nevertheless, outside the context of local consultations about a particular land claim settlement proposal, the Ontario government provides very little information to the public about land and treaty claims through the ONAS website or otherwise. Unlike the federal government, Ontario does not publish on its website a description of the land claims filed against Ontario, the length of time they have spent in various government processes, or even, for settled claims, the nature of Ontario's contribution to the settlement.

At present, it is extremely difficult for a member of the public to learn about the history of outstanding land claims in Ontario, the efforts being made to resolve them, or the province's investments to date in settling claims. The Indian Commission of Ontario, while it existed, published regular reports detailing such information. Providing detailed, concrete information on these issues to the public would increase public understanding and public accountability for the government's actions in this area. Finally, it appears that increasing public access to information about land claims may have the effect of enhancing public support for efforts to resolve such claims.²⁶⁹

The interests of municipalities in claim areas also raise important issues. Municipalities generally have no interest in participating directly in the negotiation of claims. Where lands may form part of a settlement, the province is a party and the province is responsible for ensuring settlements meet the interests of Ontarians. Municipal governments are, however, significantly affected by land claim negotiations in several ways. First, the failure to resolve a claim in a timely and harmonious way can create tensions between Aboriginal and non-Aboriginal people in the area. Second, the settlement of a claim and the payment of settlement proceeds tend to bring investment and spending into the area, and it can contribute to the renewal of ties between the First Nation and its neighbours. Third, a failure by the provincial or federal government to keep the municipality informed about progress in claims negotiations can leave municipal leaders unable to address speculation in their community about the possible outcome of the claim.

²⁶⁹ See, e.g., ARA Consulting Group, "Summary Report: Social and Economic Impacts of Aboriginal Land Claims Settlements: A Case Analysis" (Vancouver, 1995), online: <<http://www.gov.bc.ca/tno/rpts>>.

In addition, the provision of lands for reserve in a claim settlement may have the effect of taking land out of the municipality's tax base. Although the municipality will no longer be obliged to provide services to the settlement lands unless the First Nation makes arrangements to pay for them, the net result will usually be that the municipality's budget will be reduced by a settlement that involves land within its assessment area. In its *Additions to Reserve Policy*, the federal government requires First Nations to negotiate in good faith with municipalities in areas such as joint land use planning, tax considerations, and the delivery of services by the municipality. However, neither the federal nor the provincial governments are directly involved in the negotiations, and the municipality does not have the ability to veto the transfer of the land to reserve status. The negotiations themselves can be sensitive, particularly where a First Nation considers that lands being returned should never have been subject to municipal taxation in the first place.

Best Practices

There is not another jurisdiction in Canada that manages public consultations about specific proposed claims settlements better than Ontario. While Ontario provides very little public information about the nature and status of unresolved land claims, Indian and Northern Affairs Canada offers a brief description of each of the claims filed against Canada and their progress through the federal claims process. Their website also provides useful summaries of the total number of claims filed by province, the number that have been rejected or dealt with outside the process, and the number of settlements reached. All of this information is regularly updated, offering interested members of the public an opportunity to assess the general level of progress by the federal government in resolving land claims.

The involvement of municipalities in discussions about the settlement of the Mississauga No. 8 claim near Blind River and the Wikwemikong (Point Grondine) claim near Killarney provide examples of effective municipal consultation. In both cases, the First Nation, Canada, and Ontario worked together on the overall consultations with the public, and met together with local municipalities to discuss the basis of the claim and the implications of settlement. In both cases, the municipal governments actively supported the settlement of the claim.

The Grand River Notification Agreement offers an example of municipalities, First Nations, and the federal and provincial governments working together to address the tensions created by the failure to resolve claims. The agreement arose because tensions over Six Nations land rights had led to the occupation of municipal lands, and because provincial planning and environmental legislation did not provide for First Nations in the area to be consulted about land use changes and environmental decisions that affected them. In negotiations facilitated by the Indian Commission of Ontario, the parties reached agreement in 1998 on a wide-ranging protocol for mutual notification of actions and proposals that would affect land uses in the area. The agreement has since been renewed twice by the 14 parties involved.²⁷⁰

²⁷⁰ The Grand River Notification Agreement can be found at the Department of Indian Affairs and Northern Development website. See Indian Affairs and Northern Development, "Grand River Notification Agreement Renewal," online: <http://www.ainc-inac.gc.ca/on/grndrvr_e.html> (accessed March 30, 2005). The federal government's "Backgrounder" on the Agreement is available at Indian Affairs and Northern Development, "Background to the Grand River Notification Agreement," online: <http://www.ainc-inac.gc.ca/on/grndbkr_e.html> (accessed March 30, 2005).

Another example of innovative municipal negotiation, in this case to address tensions arising from a dispute over treaty rights, is the Hamilton/Six Nations/Haudenosaunee negotiation regarding the building of an expressway in the Red Hill Valley. Again, tensions over First Nation rights had led to an occupation of municipal lands. The City of Hamilton negotiated a series of agreements with the Haudenosaunee, including: the protection of burial sites, co-operation and monitoring of archaeological activities, the protection of medicine plants, and joint consultation on future land uses in the valley. At the time of writing, the draft Agreements have not yet been ratified by both parties, but they are available for review on the city's website.²⁷¹

Recommendations to Address the Public Interest

- In the interest of informing the public and to increase accountability for the manner in which Ontario addresses land claims, Ontario should provide specific information on the ONAS website about the nature of the outstanding land claims in Ontario, and about the status of the efforts to resolve each of those claims. In addition to a general summary of the number of claims received, the number of claims at each level of the settlement process, and the number and value of settlements reached to date, the website should provide a brief description of the allegations made in each claim. The format could be similar to the reports provided to the public by Canada regarding its Specific Claims (see note 4). The ONAS website should also offer a summary of the progress made over the past year toward resolving each claim.
- To increase public accountability, Canada and Ontario should also publish a brief description of the land claims in which they are currently parties to litigation, and estimate the amount of funds spent by the government on such litigation on an annual basis.
- To enhance information sharing with municipalities, Ontario and Canada should consider involving the province in all municipal consultations where a settlement contemplates the addition of land to reserve and the province has not been a party to the negotiations.
- To improve communications between municipalities, the Crown, and First Nations about proposed changes to land uses while claims are negotiated, all parties should consider establishing interim consultation agreements with respect to lands claimed by First Nations.

TREATY RIGHTS

CURRENT TREATY POLICIES IN ONTARIO

Apart from their formal land claims, First Nations' access to resources on their traditional lands has long been a source of grievance in Ontario. We have seen that access to resources off-reserve has been recognized as a *constitutional* right of Aboriginal peoples in a variety of contexts since 1990. The right may arise from the traditions of Aboriginal peoples at the time of contact,²⁷² or from guarantees in treaties that First Nations could continue to use resources on their traditional

²⁷¹ See City of Hamilton, "Project Updates," online: <<http://city.hamilton.on.ca/public-works/capital-planning/red-hill-valley-program/Red-Hill-Valley-Project/direct-links.asp#Project%20Updates>> (accessed March 30, 2005).

²⁷² The relevant time for the Métis people is the time when European exerted effective control in a particular area. See the discussion of Aboriginal rights under "Current State of the Law," above.

lands.²⁷³ If the Crown interferes with such a right today, and unless it can prove the right was clearly extinguished by the federal government prior to 1982, it must show that its action has a valid objective (such as conservation or public safety) and that its action is consistent with the “special trust relationship” between the government and Aboriginal people. Finally, we have seen that even reasonable *claims* to a section 35 right must be addressed by the province through discussion and consultation if it proposes to take a decision that would interfere with the right.²⁷⁴

In this section of the report we will examine Ontario’s current approach to treaty right claims. Ontario’s land claims policy (like the federal claims policy) does not address claims of existing treaty rights. It clearly does not address the grievances focused on by Justice Hartt in 1977: First Nations’ access to economic opportunities on traditional lands and the effects of environmental damage on those lands. Ontario is the subject of dozens of treaties, yet, as we shall see, the province currently has no general framework designed to clarify and protect the rights contained in those treaties. Since 1991 the province has had an interim enforcement policy designed to protect Aboriginal food harvesting from prosecution. Yet it has no general policy for clarifying and protecting other treaty rights, even though the courts have confirmed that such rights exist. Instead, certain Aboriginal interests in the use of their traditional lands have been the subject of sporadic protection by a variety of provincial ministries.

With the exception of the Interim Enforcement Policy, it does not appear that any provincial ministry has adopted a detailed proactive approach, through legislation or otherwise, to guide its managers and personnel through their constitutional obligations where their decisions might affect existing Aboriginal or treaty rights. In several cases, as we shall see, such decisions have the potential to interfere with treaty or Aboriginal rights.

The Role of ONAS and Other Provincial Ministries

In general, ONAS is mandated to coordinate the province’s development of Aboriginal policy. Its responsibilities include providing policy advice to line ministries and advising those ministries regarding relations with Aboriginal groups.²⁷⁵ Because there is no central policy for ascertaining and accommodating treaty rights, it is not clear what role, if any, ONAS has played in the development of the line ministries’ current approaches to treaty rights.²⁷⁶

Hunting and Fishing Rights Off-Reserve

Following the decision in *Sparrow*, the Ministry of Natural Resources (MNR) issued an Interim Enforcement Policy on Aboriginal hunting and fishing.²⁷⁷ The terms of this policy were finalized in 1991 after discussions between the MNR and First Nations representatives within the ICO

²⁷³ See the discussion of treaty rights “Current State of the Law,” above.

²⁷⁴ The decision in *Haida Nation* is discussed under “The Duty of the Provincial and Federal Governments,” above.

²⁷⁵ For the overall mandate of ONAS, see Ontario Native Affairs Secretariat, “Corporate Coordination of Aboriginal Affairs,” online: <<http://www.nativeaffairs.jus.gov.on.ca/english/about/about.htm#corporate>> (accessed March 30, 2005).

²⁷⁶ The ONAS website indicates that it is currently involved in developing a general policy on “Aboriginal issues” and that such a policy would seek, among other things, to ensure greater involvement by Aboriginal people “in the decisions that affect their lives.” The website does not refer to treaty rights. See Ontario Native Affairs Secretariat, “Policy Approach,” <<http://www.nativeaffairs.jus.gov.on.ca/english/apf/apf.htm>> (accessed March 30, 2005).

²⁷⁷ Ministry of Natural Resources, *Interim Enforcement Policy* (Toronto: MNR, 1991) [*Interim Enforcement Policy*].

process. The policy provides that Aboriginal²⁷⁸ persons harvesting game or fish for personal consumption and/or social or ceremonial purposes in their treaty areas or traditional lands will generally not be prosecuted. Exceptions are provided for hunting in an unsafe manner, hunting or fishing in a way that puts conservation or habitat at risk, and hunting or fishing on private land without the consent of the owner.²⁷⁹ The policy also provides for the MNR Deputy Minister to screen all proposed MNR enforcement activities against Aboriginal people who appear to be harvesting game or fish for commercial purposes.²⁸⁰

By its terms, the Interim Enforcement Policy was clearly intended to be an interim measure for recognizing Aboriginal and treaty rights. The policy expressly provided for immediate negotiations with Aboriginal people across the province about the MNR's enforcement procedures. It also committed the province to enact appropriate legislation regarding Aboriginal harvesting of wildlife and fish.²⁸¹ However, when the province enacted a new *Fish and Game Conservation Act*,²⁸² neither it nor the detailed regulations under it made any reference to treaty or Aboriginal harvesting rights. Nor does the legislation make any special arrangements to protect Aboriginal harvesting.

The current situation, then, is that Ontario's fish and game laws do not generally recognize Aboriginal harvesting rights and the province's enforcement guidelines guarantee protection only for harvesting for food and/or social or ceremonial purposes. The guidelines do not protect harvesting intended to provide a moderate subsistence to Aboriginal people, a right that has been recognized in various specific contexts by a series of court decisions beginning in the early 1990s.²⁸³ Unfortunately for the relationship of the parties, it appears that since 1990 the province has frequently resorted to prosecutions of Aboriginal people rather than consultation in seeking to clarify the existence and extent of treaty rights. On at least three occasions since the Interim Enforcement Policy was adopted, Ontario courts have criticized the province's limitation of Aboriginal harvesting opportunities and its reliance on prosecution in relation to Aboriginal constitutional rights.²⁸⁴

²⁷⁸ The Policy was amended in 1996, after a court decision against the province, to include Aboriginal people other than status Indians.

²⁷⁹ *Interim Enforcement Policy*, note 258 at ss.1 and 2.

²⁸⁰ *Ibid.*, at s. 3 (a).

²⁸¹ See the preamble to the Policy and s. 6.

²⁸² The *Fish and Wildlife Conservation Act*, 1997, S.O. 1997, c. 41, amended in 2002, replaced the earlier *Game and Fish Act*.

²⁸³ See, for example, *R. v. Marshall*, note 89 (decided in the context of a Maritime treaty); *R. v. Jones* 14 O.R. (3d) 421 (Prov. Ct) [*Jones*] (Aboriginal right of the Saugeen Ojibway to fish commercially); and *R. v. Jackson*, [1992] 4 C.N.L.R. 121 (Prov. Div.) [*Jackson*] (fishing rights of the Kettle & Stony Point First Nation).

²⁸⁴ In *Jones*, *ibid.*, Judge Fairgrieve concluded (at para. 74):

I am ... satisfied that the evidence relating to the allocation of the quotas under the existing regulatory scheme has made no attempt to extend priority to the defendants' band. Scrutiny of the government's conservation plan discloses that anglers and non-native commercial fishermen have in fact been favoured, and that the allocation of quotas to the Chippewas of Nawash, much less the Saugeen Ojibway as a whole, did not reflect any recognition of their constitutional entitlement to priority over other competing user groups.

Judge Fairgrieve then continued at para. 84:

... It has also not been proved that there was appropriate consultation with the Saugeen Ojibway at the time the conservation measures were adopted. Instead, the evidence suggests inadequate efforts to enlist the

It should be noted that since the 1990s the MNR has implemented a number of specific initiatives in various parts of the province to allocate commercial fishing opportunities to First Nations. For example, following the court decision in *R. v. Jones*,²⁸⁵ MNR acquired 100 percent of the commercial fishing quota around the Bruce Peninsula and allocated it to the Saugeen First Nation. In addition, the MNR has allocated 50 percent of the commercial fishing quota in the north channel of Lake Huron to local First Nations. Finally, First Nations now have virtually all of the commercial fishing quotas on Northern Ontario lakes, including lakes Nipissing, Nipigon, and Lake of the Woods.²⁸⁶

Forestry Rights

Lack of access to commercial forestry opportunities has long been a source of grievance to First Nations in Ontario. At the time they first met Europeans and when most of the treaties in Ontario were signed, Aboriginal people lived off the resources of the forest. Medicinal plants, berries, wood for fuel, shelter, hunting tools, canoes, and trade were all taken from the forest. The Ojibwe of Northern Ontario, for example, were actively involved in selling lumber to non-Aboriginal enterprises prior to the signing of Treaty 3.²⁸⁷ Although Aboriginal people argue that the signing of treaties was intended only to permit European settlement and a sharing of the

participation of the aboriginal peoples in the planning process, and certainly a failure to respond to the protests and objections made when the band considered its rights to have been disregarded.

Commenting on Ontario's enforcement tactics in *R. v. Jackson*, *ibid.*, Judge Eddy stated (at para. 57):

... the time has long since passed when the Crown should seek to determine its relationship by way of regulation of Indian fishing and hunting rights through the use of the courts particularly in the manner utilized in this case. Surely, the matter of receiving a complaint from the Bluewater Angler's Association, entering upon an investigation of such complaint to the extent of conscripting members of the Ontario Provincial Police, officers of the Department of Natural Resources of the State of Michigan, together with officers of the Ministry of Natural Resources, organizing a predawn raid with boats pursuing and intercepting persons engaged in fishing activities, approaching with guns drawn and boarding and seizing the nets and gear, scarcely can be construed as an activity in which the government's relationship is trust-like rather than adversarial.

In *R. v. Powley* (2000) 47 O.R. (3d) 30 (Ont. Sup. Ct) Justice O'Neill concluded (at para 87):

I consider that meaningful content cannot be given to s. 35(1), nor can the rule of law flourish, in an environment where, given the trust-like relationship between aboriginal peoples and the government, and given the many other complex and competing interests at stake, both public and private, the aboriginal peoples are required ... to defend themselves against the blunt instrument of the criminal or quasi-criminal process, or to litigate against the Crown through every level of court, in a multitude of cases involving a multitude of issues. If the search for justice and settlements in Ontario has led us to court-connected mediation, surely by the same measure, and for the additional reasons herein given, the search for a just settlement of the s. 35 rights of the aboriginal peoples of this province, must lead us to a process of good faith negotiations, and in applicable circumstances, mediation.

²⁸⁵ *Jones*, note 283.

²⁸⁶ Personal communication with Dave Loftus, MNR Peterborough.

²⁸⁷ Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario* EA-87-02 (Toronto: Ministry of Environment, 1994) at 348–349 [*Class Environmental Assessment*]. After four years of hearings, the Board's order approved MNR's undertaking of timber management in Ontario, subject to 115 conditions. These conditions are legally binding on the government. The Approval, which lasted for nine years, was revised and renewed in 2003. Condition 77 remains (now renamed Condition 34).

For a general description of the history of Aboriginal use of the forests and their subsequent exclusion from Ontario timber opportunities, see chapter 10 of the *Reasons*.

resources on their traditional lands,²⁸⁸ it appears that Aboriginal people have been largely excluded from the Ontario forestry industry since the treaties were signed. This was the conclusion of the Environmental Assessment Board in its 1994 environmental assessment of forest management on Crown lands in Ontario: “We are convinced by the evidence we have discussed ... that Aboriginal communities have historically been and are today excluded from sharing in the social and economic benefits accruing to non-native communities from the planning and conduct of timber operations on Crown land.”²⁸⁹

The Board noted that the province had not even identified Aboriginal communities as stakeholders with an interest in forest management in its early drafts of the environmental assessment.²⁹⁰ In the end, the Environmental Assessment Board ordered, as a condition of its assessment approval, that MNR District Managers negotiate with Aboriginal peoples to “implement ways of achieving a more equal participation by Aboriginal peoples in the benefits” of forest management planning.²⁹¹ The Board’s concerns extended beyond the lack of proportional participation by Aboriginal people in the forest industry: “We are convinced that the desperate situation of our First Nations and Aboriginal communities cannot improve unless the Ontario and federal governments engage in serious negotiations to resolve treaty and Aboriginal rights and land claims by Aboriginal peoples in the Area of the Undertaking.”²⁹²

Although the Board found that individuals within the MNR had made “tremendous efforts” to assist First Nations to develop economic opportunities,²⁹³ it noted that negotiations with Aboriginal people regarding their constitutional rights “have been dragging on for years.” The Board recommended that Ontario and Canada do “whatever is necessary to conclude various processes under way to define treaty and Aboriginal rights.”²⁹⁴ The Board also recommended that Ontario review its timber licensing policy as it relates to Aboriginal peoples, investigate any barriers to their obtaining timber licenses, and consider what remedies may be required.²⁹⁵

Since the Board’s order, it appears that Ontario has established no negotiations, either locally or provincially, to determine the treaty rights of Aboriginal communities in relation to the forestry industry.²⁹⁶ During the same period, two provincial courts of appeal have given support to the

²⁸⁸ See, for example, the testimony of Chief George Kakeway before the Environmental Assessment Board, note 287 at 347, and the Board’s findings at 351–352.

²⁸⁹ Ibid., at 372. The Board also concluded that Canada’s historic policies had unduly restricted First Nations’ access to timber on their own reserves (see 353–355). For more information on Canada’s historic practices in relation to timber cutting on reserve lands, see M. Kuhlberg, “Nothing it seems can be done about it: Charlie Cox, Indian Affairs Timber Policy, and the Long Lac Reserve, 1924-1940,” (March 2003) 84(1) *Canadian Historical Review*.

²⁹⁰ Ibid. at 360.

²⁹¹ Ibid. at 374.

²⁹² Ibid. at 375.

²⁹³ Ibid. at 360.

²⁹⁴ Ibid. at 375.

²⁹⁵ Ibid. at 375–376.

²⁹⁶ Ontario’s *Crown Forest Sustainability Act, 1994, SO 1994, c. 25* does at least provide that the Act does not derogate from Aboriginal or treaty rights recognized by the Constitution, and it permits agreements with First Nations in the area of forestry planning. See ss. 6 and 23. The MNR has developed a consultation program for Aboriginal communities early in the timber management process to better protect Aboriginal cultural values in the course of timber harvesting, and the MNR now includes Aboriginal representatives on forest management planning teams. Aimed at protecting medicine plants and unique Aboriginal values during timber harvesting, the program

argument that historic treaties can create rights to harvest timber on Crown lands.²⁹⁷ Further, as we have seen, the decision of the Supreme Court of Canada in *Haida Nation*²⁹⁸ has confirmed that the province is constitutionally required to consult First Nations where forestry management decisions may affect their treaty or Aboriginal rights.

Other Provincial Decisions That May Affect Traditional Uses of Treaty Lands

There are a large number of other areas in which provincial decisions about the management of lands in Ontario can affect the ability of Aboriginal peoples to carry on traditional activities, including activities that may be protected by treaty rights. These include decisions by the MNR to set aside provincial parks and to regulate the use of Crown lands. The creation of a provincial park, for example, will normally limit or prohibit traditional harvesting activities. Decisions under legislation under the authority of the Ministry of the Environment may approve land developments or industrial projects that will alter the habitat.²⁹⁹ So too may land use approvals issued under provincial planning legislation. Decisions by provincial Conservation Authorities may affect watersheds in areas used by Aboriginal people. In none of these cases do the applicable legislation or ministry policies currently take into account as a matter of course a need to assess possible impacts on the enjoyment of constitutional rights to harvest plants, fish, or wildlife.³⁰⁰

It should be noted that some provincial ministries, particularly the MNR, have nevertheless engaged in a number of initiatives to recognize specific interests of individual First Nations in the use of their traditional lands. Thus, MNR officials have negotiated co-management or “co-existence” agreements with certain First Nations, as at Quetico Provincial Park. Recently, MNR officials have also, when deer culls are deemed necessary, organized First Nation participation in such culls at certain provincial parks (including the Rondeau, Pinery, and Algonquin Parks). In another initiative the MNR has recognized the Curve Lake First Nation as the custodian of historic Aboriginal petroglyphs, or “Teaching Rocks,” at the nearby Petroglyphs Provincial

does not address the issue of treaty rights. The main elements of this consultation program were approved by the Board in its *Reasons for Decision*. See *Class Environmental Assessment*, note 287 at 370–371.

²⁹⁷ See *R. v. Marshall*, [2004] 1 C.N.L.R. 211 (Nova Scotia Court of Appeal), which ruled that a lower court had been wrong to reject a treaty defence to charges of cutting timber on Crown lands; and *R. v. Bernard*, note 98, which held that a 1761 treaty confirmed the right to harvest and sell logs from Crown land. Both of these cases focus on the context and wording of the treaty in question, and both have been appealed to the Supreme Court of Canada.

²⁹⁸ *Haida Nation*, note 1.

²⁹⁹ The Ministry of the Environment is responsible for conducting environmental assessments where significant undertakings are proposed in the province. The relevant legislation, *The Environmental Assessment Act*, RSO 1990, c. E.18, appears to make no special provision for notice to Aboriginal groups where a proposed undertaking might interfere with treaty rights. Nor does the Act refer to the existence of treaty rights as a factor to be considered in decisions under the Act. Indeed, during the 1994 Forest Management Assessment described above, the province argued that the Environmental Assessment Board had no jurisdiction to consider Aboriginal or treaty rights. See *Class Environmental Assessment*, note 287 at 372.

³⁰⁰ One apparent exception is a new general strategy announced by Ontario in 1999 to guide the management of Crown lands covering 45 percent of the province. The document outlining the strategy indicates that Ontario is committed to consulting with Aboriginal peoples where land use decisions may affect existing Aboriginal and treaty rights. It states that Ontario intends, among other things, to consult with local communities before new land areas come under protection. The document, called *Ontario's Living Legacy Land Use Strategy*, is available on the MNR website. See Ministry of Natural Resources, “Approved Land Use Strategy,” online: <<http://crownlanduseatlas.mnr.gov.on.ca/supportingdocs/alus/contents.htm>> (accessed March 30, 2005).

Park.³⁰¹ All of these initiatives demonstrate sensitivity to particular First Nations' relationship with their traditional lands. They were not, however, the product of a centralized Ontario government policy to protect First Nations' activities on their traditional lands or to protect treaty rights across the province.

IMPLEMENTING AN EFFECTIVE TREATY FRAMEWORK IN ONTARIO

We have seen that the Constitution of Canada requires that both the federal and provincial governments take treaty promises into account when they make decisions or enact legislation that may affect the fulfillment of those promises. The government is legally obliged to consult with Aboriginal peoples wherever it appears that a proposed decision may adversely affect the exercise of the constitutionally protected rights that arise from treaties. In Ontario, the extent of protection offered by treaty promises to Aboriginal people has never been systematically investigated. However, the province's duty to consult arises even where the precise extent of a treaty right has not yet been proved in court if there is a reasonable basis for concluding that the right may exist.

We have seen that Ontario has not developed a policy to guide provincial officials where they are faced with assertions that their decisions will interfere with treaty rights. This appears to stand in defiance of admonitions by the Supreme Court of Canada that the accommodation of section 35 rights cannot be left to the unstructured discretion of government officials.³⁰²

Past Critiques of the Failure to Address Treaty Right Claims

This report has already noted the concerns raised by the Royal Commission on the Northern Environment³⁰³ and by the Environmental Assessment Board³⁰⁴ about the federal and provincial governments' failure to deal with treaty rights claims. The Special Committee of the Canadian Bar Association³⁰⁵ and the Royal Commission on Aboriginal Peoples³⁰⁶ have echoed these criticisms, in both cases recommending that the federal government create a Royal Commission tasked with supervising a process to implement the spirit and intent of the treaties.

Best Practices

In marked contrast to the province of Ontario, since 2002 the province of British Columbia has had a general policy to assist provincial decision-makers in assessing the existence of section 35 rights and ensuring that their decisions comply with the constitutional framework of "honourable accommodation" set out by the Supreme Court of Canada.³⁰⁷ The policy sets out in plain English the rules established for government decisions that may affect section 35 rights in British Columbia, as established by the Supreme Court of Canada. As in Ontario, most section 35 rights have not yet been adjudicated by the courts. Accordingly, the policy focuses on addressing Aboriginal rights that have not yet been proved in court. It sets out detailed guidelines for

³⁰¹ For more information on the roles of the MNR and the Curve Lake First Nation in this park, see: <www.mnr.gov.on.ca/MNR/csb/news/sep27nr02.html> (accessed March 30, 2005).

³⁰² See *Adams*, note 89 at para. 54, and *Haida Nation*, note 1 at para. 51.

³⁰³ See *Hartt*, note 76.

³⁰⁴ See *Class Environmental Assessment*, note 287.

³⁰⁵ *Special Committee Report*, note 238 at 58–59.

³⁰⁶ *RCAP vol.2*, note 26.

³⁰⁷ British Columbia's "Provincial Policy for Consultation with First Nations," October 2002, is available online at: <<http://srmwww.gov.bc.ca/clrg/alrb/cabinet/ConsultationPolicyFN.pdf>> (accessed March 30, 2005).

ascertaining First Nation interests in land and resources and consulting with First Nations to ensure those interests are properly taken into account in government decision-making processes about land and resource development. The policy is supplemented by a 64-page list of Aboriginal consultation guidelines for government managers involved in the management of sustainable resources.³⁰⁸

As we have seen, in *Haida Nation*, the Supreme Court of Canada ruled that provinces have an obligation to assess and take into consideration section 35 rights without waiting for court rulings. The court noted that British Columbia had not enacted laws to ensure appropriate government consultation with Aboriginal groups. While the court did not analyze the content of British Columbia's consultation policy, it observed that "[s]uch a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision makers."³⁰⁹ For its part, Ontario has neither a general policy nor a regulatory scheme to ensure that treaty rights are properly considered and accommodated by government decision-makers.

Recommendations

- Ontario should develop as soon as possible a detailed policy to guide provincial decision-makers in assessing and accommodating treaty rights in the province.
- Ontario should enter negotiations with First Nations in the province for the purpose of reaching agreements on the nature of the activities protected by treaty promises in the province.
- Ontario should review its existing legislation and regulations in relation to permitted activities and uses of Crown lands to ensure that where treaty rights are asserted, such legislation and regulations include mechanisms for ascertaining the existence of existing treaty rights and accommodating the continued exercise of those rights.

CONCLUSION

The federal Specific Claims Policy, which applies to most land claims in Ontario, is entitled "Outstanding Business." The title is perhaps indicative of the governments' current approach to First Nation land claims and treaty rights. It suggests that ascertaining the legal obligations owed by governments to First Nations is an issue to be addressed by discretionary "claims" policies. It is true that for individual claims, at the time that a claim is filed, the extent of the governments' outstanding obligations may be unclear. Yet the findings of this report suggest that current land claims processes in Ontario do not offer the appearance of fairness to Aboriginal claimants. Nor do they offer hope that the governments' obligations will regularly be determined and acted upon in a timely way. Most of the claims that have been accepted for negotiation have been in the provincial claims process without resolution for well over 10 years. And the situation is not improving: the current processes have proved unable to stem the tide of a growing backlog of outstanding claims.

³⁰⁸ British Columbia Ministry of Sustainable Resource Management, "First Nation Consultation Guidelines: Sustainable Resource Management Planning," July 2004, available online at: <<http://srmwww.gov.bc.ca/rmd/srmp/doc/FNConsultation%20Guidelines-Final-web.pdf>> (accessed March 30, 2005).

³⁰⁹ *Haida Nation*, note 1 at para. 51.

While there have been significant success stories in individual cases, it seems clear that the provincial and federal governments need to include mechanisms for resolving enduring disagreements and ensuring that the claims are dealt with expeditiously. Further, although in recent years the federal government has increased its budget for claim settlements, it appears that the level of resources currently committed by both governments needs to be increased significantly to permit the settlement of more than a small proportion of the outstanding claims in the next 20 years. Lastly, the law requires Ontario to take steps to ensure that the existing constitutional rights of Aboriginal people are respected when provincial decisions might interfere with those rights.

Ontario and Canada both took significant steps in the 1980s when they developed policies for addressing their outstanding obligations in land claims. The question now appears to be whether they are prepared to increase their commitment to a level where it is possible to fulfill their outstanding obligations. To do so will require a significant investment of energy and resources. However, Canadians have been prepared to make such investments on important priorities in the past, in determining to reduce government deficits, for example. And Canadians have not questioned the value of such investments when rights are involved, such as the right of women and minorities to receive equal pay for equal work.

At the same time, the cost of deferring the settlement of Aboriginal claims appears high, both in financial and human terms. Failing to deal with land claims and treaty rights in a timely way will continue to leave Aboriginal people with the sense that their rights have once again been marginalized. Relationships between Aboriginal people and non-Aboriginal Ontarians will not be made whole overnight. In many cases, claims negotiations will continue to be difficult, and all parties will need to be reasonable. The federal government will need to play its part. But a systematic effort by Ontario to address First Nation land rights within this generation, in a manner consistent with fairness and the rule of law, would be an effort in which Ontarians could justly take pride.

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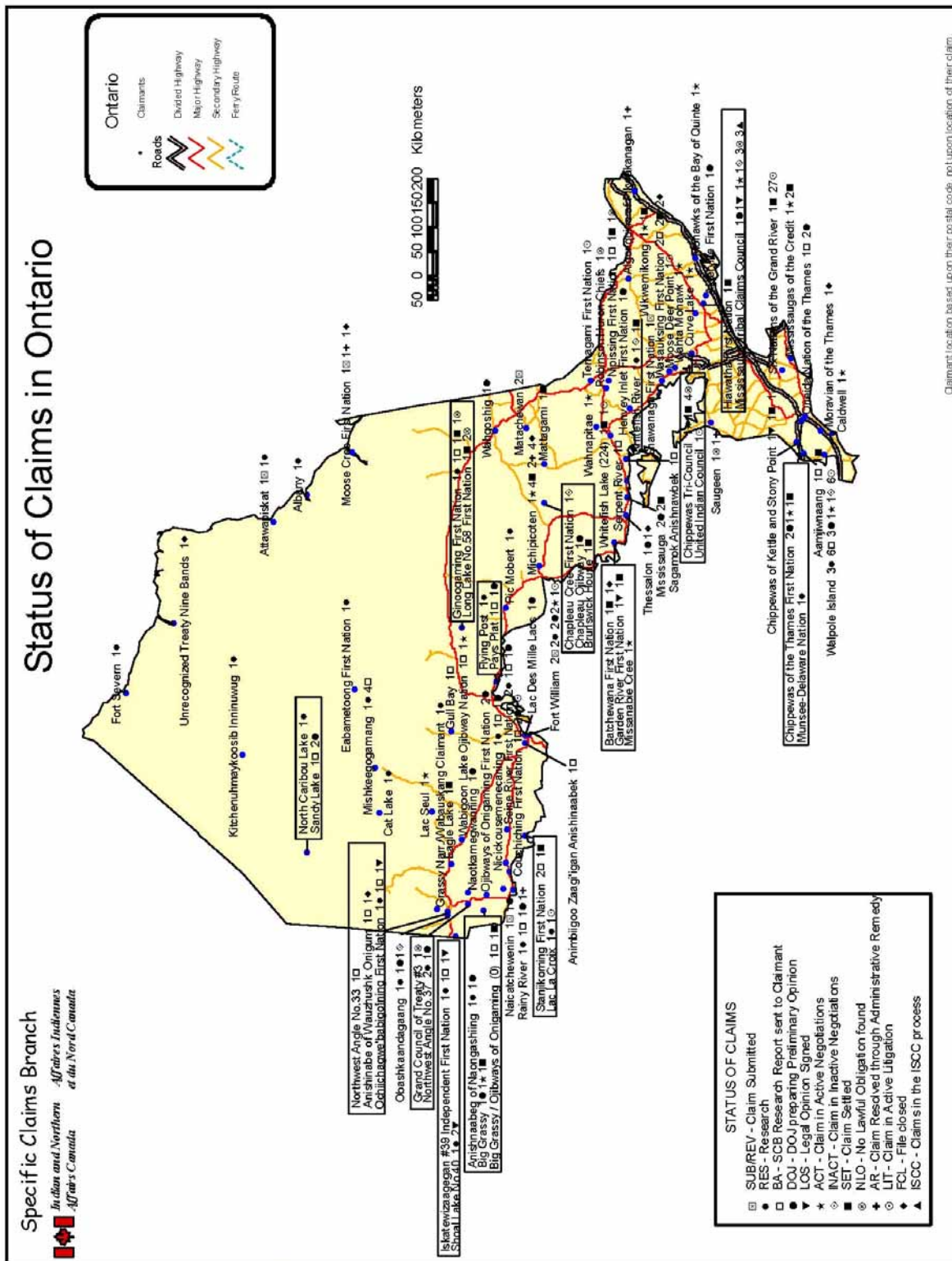
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APPENDICES



1) Lawful Obligation

The 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 the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

2) Beyond Lawful Obligation

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

3) Statutes of Limitation and the Doctrine of Laches

Statutes of Limitation are federal or provincial statutes which state that if one has a legitimate grievance, yet fails to take action in the courts within a prescribed length of time, the right to take legal action is lost. The right to take action on a valid civil claim, therefore, will expire after a certain length of time unless legal proceedings have been started.

The doctrine of laches is a practice which has come into observance over the years. It is, therefore, a common law rule as opposed to a specific piece of legislation passed in Parliament. The doctrine is based on actual cases whereby people lose certain rights and privileges if they fail to assert or exercise them over an unreasonable period of time.

With respect to Canadian Indians, however, the government has decided to negotiate each claim on the basis of the issues involved. Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with Native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case.

<div data-bbox="217 1226 298 1854" data-label="Section-Header"> <h2>Submission and Assessment of Specific Claims</h2> </div> <div data-bbox="342 1173 391 1854" data-label="Text"> <p>Guidelines for the submission and assessment of specific claims may be summarized as follows:</p> </div> <div data-bbox="412 1152 761 1820" data-label="List-Group"> <ol style="list-style-type: none"> 1) Specific claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development. 2) The claimant bringing the claim shall be the band suffering the alleged grievance, or a group of bands, if all are bringing the same claim. 3) There shall be a statement of claim which sets out the particulars of the claim, including the facts upon which the claim is based. 4) Each claim shall be judged on its own facts and merits. 5) The government will not refuse to negotiate claims on the grounds that they are submitted too late (statutes of limitation) or because the claimants have waited too long to present their claims (doctrine of laches). 6) All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law. 7) Claims based on unextinguished native title shall not be dealt with under the specific claims policy. </div> <div data-bbox="761 1134 818 1820" data-label="Text"> <p>9) Treaties are not open to renegotiation.</p> </div> <div data-bbox="818 1152 959 1829" data-label="List-Group"> <ol style="list-style-type: none"> 10) The acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event that no settlement is reached and litigation ensues, the government reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence. </div> <div data-bbox="1005 1617 1045 1850" data-label="Section-Header"> <h2>Compensation</h2> </div> <div data-bbox="1081 1173 1133 1848" data-label="Text"> <p>The following criteria shall govern the determination of specific claims compensation:</p> </div> <div data-bbox="1151 1148 1378 1812" data-label="List-Group"> <ol style="list-style-type: none"> 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles. 2) Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case. </div> <div data-bbox="1435 1493 1463 1518" data-label="Page-Footer"> <p>30</p> </div>	<div data-bbox="237 321 358 970" data-label="List-Group"> <ol style="list-style-type: none"> 3) (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands. </div> <div data-bbox="358 321 456 945" data-label="List-Group"> <ol style="list-style-type: none"> (ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss. </div> <div data-bbox="456 321 553 976" data-label="List-Group"> <ol style="list-style-type: none"> 4) Compensation shall not include any additional amount based on "special value to owner", unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value. </div> <div data-bbox="553 321 602 976" data-label="List-Group"> <ol style="list-style-type: none"> 5) Compensation shall not include any additional amount for the forcible taking of land. </div> <div data-bbox="602 321 699 976" data-label="List-Group"> <ol style="list-style-type: none"> 6) Where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisition costs, but these must not exceed 10% of the appraised value of the lands to be acquired. </div> <div data-bbox="699 321 773 976" data-label="List-Group"> <ol style="list-style-type: none"> 7) Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice. </div> <div data-bbox="773 321 870 976" data-label="List-Group"> <ol style="list-style-type: none"> 8) In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed. </div> <div data-bbox="870 321 943 976" data-label="List-Group"> <ol style="list-style-type: none"> 9) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim. </div> <div data-bbox="943 321 1097 984" data-label="List-Group"> <ol style="list-style-type: none"> 10) The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered. </div> <div data-bbox="1427 644 1455 669" data-label="Page-Footer"> <p>31</p> </div>
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APPENDIX C



P.C. 1995-548 +567
March 31, 1995

(T.B. Rec. 822672)

WHEREAS a Tripartite Council consisting of representatives of the Government of Canada, the Government of Ontario and the Indian Chiefs of Ontario, herein referred to as the Chiefs of Ontario, was established on March 16, 1978, for the purpose of identifying, clarifying, negotiating and resolving matters of mutual concern to the Government of Canada, the Government of Ontario and the Status Indians residing in Ontario;

WHEREAS on September 28, 1978, Mr. Justice E. Patrick Hartt was appointed to a commission, named the Indian Commission of Ontario, by the Governments of Canada and Ontario by Order in Council P.C. 1978-3044 of September 28, 1978 and Provincial Order in Council 2838/78 and a resolution by the Executive Council of the Chiefs of Ontario in August 1978; which appointment was extended to December 1985 by Orders in Council P.C. 1980-3/2996 of October 30, 1980, P.C. 1981-4/255 of January 29, 1981, P.C. 1982-1/3156 of October 14, 1982 and P.C. 1983-3069 of September 30, 1983;

WHEREAS the Government of Canada, by Order in Council P.C. 1985-3117 of October 10, 1985, and the Government of Ontario and the Chiefs of Ontario agreed to appoint Roberta Louise Jamieson, of the Six Nations Indian Reserve, as Commissioner of the Indian Commission of Ontario for a period of six months commencing October 1, 1985 and terminating March 31, 1986; and which appointment was extended to March 31, 1989 by Order in Council P.C. 1986-4/767 of March 26, 1986 with certain terms of reference;

WHEREAS the Government of Canada, by Order in Council P.C. 1989-1/625 of April 13, 1989, the Government of Ontario and the Chiefs of Ontario agreed to extend the Indian Commission of Ontario for a period of twelve months commencing April 1, 1989 and terminating March 31, 1990, and to extend the appointment of Roberta Louise Jamieson for a period of two months commencing April 1, 1989 and terminating May 31, 1989;

.../2

- 2 -

WHEREAS the Government of Canada, by Order in Council P.C. 1989-1248 of June 23, 1989, and the Government of Ontario, by Order in Council OC 1584/89, and the Chiefs of Ontario agreed to appoint Harry S. LaForme of Toronto, Ontario, as Commissioner of the Indian Commission of Ontario for a period of ten months commencing June 1, 1989 and terminating March 31, 1990;

WHEREAS the Government of Canada, by Order in Council P.C. 1990-883 of May 15, 1990, and the Government of Ontario, by Order in Council OC 780/90, and the Chiefs of Ontario agreed to extend the appointment of Harry S. LaForme for a period of five years commencing April 1, 1990 and terminating March 31, 1995;


AND WHEREAS the Government of Canada, by Order in Council P.C. 1992-248 of February 10, 1992, and the Government of Ontario, by Order in Council OC 277/92, and the Chiefs of Ontario agreed to appoint Philip Goulais of Sturgeon Falls, Ontario, as Commissioner of the Indian Commission of Ontario for a period terminating March 31, 1995;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development and the Treasury Board, is pleased hereby

(a) to extend the functions and duties of the Indian Commission of Ontario, as outlined in Schedule 1 hereto, for a period commencing on April 1, 1995 and terminating on March 31, 2000 on condition that a review of the Commission's mandate be completed by March 31, 1999; and

(b) to approve that the Governor in Council appoint a commissioner of the Indian Commission of Ontario, effective April 1, 1995.

CERTIFIED TO BE A TRUE COPY - COPIE CERTIFIÉE CONFORM


CLERK OF THE PRIVY COUNCIL - LE GREFFIER DU CONSEIL PR



P.C. 1995-564
April 4, 1995

(T.B. Rec. 822672)

WHEREAS by Order in Council
P.C. 1995-548 of March 31, 1995, the Indian
Commission of Ontario was extended for a period
commencing on April 1, 1995 and terminating on
March 31, 2000;

THEREFORE, HIS EXCELLENCY THE GOVERNOR
GENERAL IN COUNCIL, on the recommendation of the
Minister of Indian Affairs and Northern
Development and the Treasury Board, pursuant to
Order in Council P.C. 1995-548 of March 31, 1995,
is pleased hereby to reappoint, effective April 1,
1995, Philip Goulais of Sturgeon Falls, Ontario,
as Commissioner of the Indian Commission of
Ontario, for a period terminating March 31, 2000.

CERTIFIED TO BE A TRUE COPY - COPIE CERTIFIÉE

CLERK OF THE PRIVY COUNCIL - LE GREFFIER DU CONSEIL

SCHEDULE 1

Functions and Duties **of the Indian Commission of Ontario**

1. MISSION STATEMENT

The objective and responsibility of the Indian Commission of Ontario is to facilitate negotiations and discussions to establish First Nation self-government and negotiations and discussions relating to matters and arrangements with respect to the exercise of jurisdiction and powers by First Nations' governments in Ontario, and to resolve land claims. All discussions and negotiations conducted under the auspices of the Indian Commission of Ontario are to be on a privileged and without prejudice basis. (In these Orders in Council "First Nation" has the same meaning as "band", as defined by the Indian Act, R.S.C. 1985, c.1-5)

2. FUNCTIONS

- 2.1 To provide a forum for the negotiation of self-government issues;
- 2.2 To facilitate the examination and bring about resolution of any issue of mutual concern to the federal government and provincial government, or either of them, and to all or some of the First Nations in Ontario, which the Tripartite Council refers to the Commission by formal direction or as otherwise requested by the parties as hereinafter described; and
- 2.3 Under the general direction of the Tripartite Council, to acquaint the residents of Ontario with the activities of the Commission and with the nature and progress of the matters before it.

3. DUTIES

- 3.1 To perform in accordance with this Order, all functions, duties and activities assigned by way of a formal direction of the Tripartite Council referring a matter for examination and resolution to the Commission and which direction shall confirm the agreement of the parties as to:
 - a) the nature of the matter;
 - b) the objective of the matter being referred to the Commission;
 - c) the process to be implemented;

- d) the resources to be allocated to the First Nations by the Government of Canada and the Government of Ontario;
 - e) a schedule for completion;
- 3.2 To facilitate the resolution of any matter of concern to one or more First Nations or communities and one or both of the Government of Canada and Ontario, at the request of all the parties involved in that matter, where the Commissioner believes assistance would be appropriate, and subject to the following conditions:
- a) The Commissioner shall forthwith notify the members of a Senior Steering Committee consisting of Senior Officials appointed by each of the Parties (hereafter called the "Senior Steering Committee"), of the involvement of the Commission for consideration at a meeting of the Steering Committee;
 - b) If it is the consensus of the Senior Steering Committee that the Commission should not be involved in the matter, the Commission shall cease its involvement in the matter forthwith, subject always to further review of the matter by the Tripartite Council;
 - c) Upon review and consensus of the Tripartite Council, the involvement of the Commission in a matter may be confirmed or otherwise regulated;
- 3.3 To convene a mutually agreed-upon number of meetings of the Tripartite Council during each calendar year;
- 3.4 To act as Secretariat to the Tripartite Council with respect to any process or mechanism, including the process of mediation, in which the Commission is involved as in accordance with this Order;
- 3.5 To provide a chairperson for all Tripartite activities in which the Commission is involved who shall be the Commissioner or such other person agreed upon by the parties involved;
- 3.6 To provide progress reports to the Tripartite Council on a semi-annual basis, the reports to include a summary description of outstanding issues or concerns and a summary of the Commission's on-going and proposed activities, and which may include suggestions or recommendations for the

parties concerning the matters referred to the Commission. Any recommendations made by the Commission must be discussed by the Tripartite Council at the next scheduled meeting following receipt of the Commission's report;

- 3.7 To assist the Tripartite Council in the identification, examination and resolution of matters of mutual concern to the Tripartite Council, including land claims;
- 3.8 To bring formally to the parties' attention any concerns the Commission may have regarding the parties' commitment to resolve any issue that has been formally adopted by the Tripartite Council for negotiation and resolution;
- 3.9 To foster respectful conduct in negotiations and discussions facilitated by the Commission;
- 3.10 To assist the parties to any particular matter, where requested by the parties, to inform Ontarians about the parties' objectives with respect to the resolution of the matter.

4. POWERS AND AUTHORITIES

- 4.1 To grant to the Commission the powers and authorities listed below which are required to enable it to deal effectively with the matters, including land claims, referred to it;
- 4.2 To convene and adjourn meetings in consultation with representatives of the Government of Canada, the Government of Ontario, and the First Nations in Ontario and upon reasonable notice;
- 4.3 Should the Tripartite Council be required to consider a matter on an urgent basis, to convene a meeting at its sole discretion upon 30 days notice at which alternate representation of the parties would be acceptable;
- 4.4 To convene and adjourn meetings to consider the financial requirements of one or more of the parties;
- 4.5 To meet separately or jointly with representatives of the Government of Canada, the Government of Ontario or the First Nations in Ontario;

- 4.6 To request any representatives to the Tripartite Council, upon reasonable notice:
- a) to deliver to the Commission any document or information available to that party. However, nothing in this Order shall be construed as a requirement of any party to make available information that is privileged or would in court proceedings give rise to a right to receive from the court an order providing exemption from disclosure or is, in the case of information in the possession of Canada, a record for which an exemption is provided in the Access to Information Act, R.S.C. 1985, c.A1, as amended and as it may be amended from time to time, or is, in the case of information in the possession of Ontario, a record for which an exemption is provided in the Freedom of Information and Protection of Privacy Act, S.O., 1987 c.25, as it may be amended from time to time;
 - b) to make available any person in the employ of any of the parties for the purpose of assisting the Commission in its efforts to facilitate the resolution of an issue, provided, however, that should the Government of Canada, the Government of Ontario, the First Nations in Ontario, or any one or more of them be unable to comply with any such request, the reasons for being unable to comply with that request shall be provided in writing to the Commission, and to representatives of the Government of Canada, the Government of Ontario and the First Nations in Ontario, as the case may be;
- 4.7 After due consultation with the parties, to impose deadlines for the completion of any process, or any stage of any process, being facilitated, examined or otherwise by or before the Commission;
- 4.8 To set questions and to request responses from the parties, and in consultation with the party concerned, set a reasonable time period for receipt of the response;
- 4.9 To present verbally or in writing, at its discretion or at the request of the Tripartite Council, to any or all of the parties, suggestions for their consideration and response with a view to alleviating adverse effects and with a view to arriving at a mutually acceptable resolution of any matter which is the subject of negotiation;
- 4.10 After consultation with the representatives of the Government of Canada,

the Government of Ontario and the First Nations in Ontario to the Tripartite Council, to suspend any of the Tripartite processes created by the Tripartite Council, on the condition that the suspension and the Commission's reasons in writing for such suspension shall be discussed and either confirmed or rejected at the next scheduled meeting of the Tripartite Council. Failure by the Tripartite Council to achieve agreement on the issue shall be treated as confirmation of the suspension;

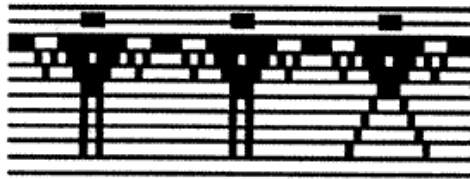
- 4.11 With the consent of the Tripartite Council, to facilitate the reference of any issue, or any element of any matter, to a court of competent jurisdiction or to any tribunal, body or person;
- 4.12 With the agreement of the parties to a matter which has been referred to the Commission for examination and resolution, to act as or arrange for a mediator, factfinder or arbitrator on any issue or any element of any matter;
- 4.13 On the application of a party in a matter which is before the Commission, to determine whether an impasse in the negotiations has occurred. If in the opinion of the Commission an impasse has occurred, the Commission may suggest alternative dispute resolution mechanisms to resolve the impasse, and require the parties to attend one mediation, or other meeting to attempt to resolve the impasse;
- 4.14 To recommend to the Tripartite Council the appointment of a commission under The Inquiries Act, R.S.C. 1985, c.I-11, the Public Inquiries Act, R.S.O. 1980, c.411, or any other appropriate legislation, to inquire into such matters as the Commission considers necessary. Subject to section 4.5 herein, where a party decides not to follow the recommendation of the Commission to establish a commission of inquiry that party shall state its reasons for doing so in writing to all other parties and the Commission within thirty days of the date of the refusal;
- 4.15 To engage the services of such counsel, clerks and advisors as may be required to carry out the functions and duties of the Commission within its budgetary limits;
- 4.16 The authority, to be exercised by the Commissioner, to disburse the funds provided to meet the expenses of the Commission, subject to such terms and conditions as are approved by the federal Treasury Board and by the Ontario Management Board of Cabinet and subject to audit in accordance

with the provisions of the Audit Act, R.S.O. 1980, c.35; and

- 4.17 To agree that all the expenses of the Commission be shared equally among the Government of Canada, the Government of Ontario and the First Nations in Ontario, with Canada's share being subject to approval of the federal Treasury Board and Ontario's share being subject to approval by the Ontario Management Board of Cabinet on the recommendation of the Minister Responsible for Native Affairs.

Appendix 4 – Source: Indian Commission of Ontario, Proposed Action Plan to Revitalize the ICO Negotiation Process (1995) [unpublished].

INDIAN COMMISSION of ONTARIO



DRAFT
JUNE 2, 1995

"PROPOSED ACTION PLAN TO REVITALIZE THE ICO NEGOTIATION PROCESS"

Whereas all participants in the Indian Commission of Ontario tripartite process (federal, provincial, and First Nations representatives) have agreed that there is a need to revitalize the ICO process to make it more efficient and productive; and

Whereas the Indian Commission of Ontario issued a draft report to the parties in November 1994 listing twenty one recommendations to improve the ICO process; and

Whereas the Department of Indian Affairs also issued a report on behalf of the parties identifying concerns related to the ICO process; and

Whereas at a Tripartite Council Meeting held January 24, 1995 the federal and provincial ministers present and the Chiefs and Grand Chiefs directed that an action plan be developed for their consideration in light of the recommendations made in the above two reports; and

Whereas additional suggestions to enhance the tripartite negotiation process were tabled by participants in a workshop hosted by the ICO on April 11, 1995 at the Ontario Institute for Studies in Education;

Resolved, that the parties adopt the following changes to the ICO process:

PART "A"

That parties who enter negotiations facilitated by the ICO do so on the basis of the following shared commitments.

1. The parties to the negotiation will address the issues identified for resolution within specific timeframes which will be identified by the parties prior to the beginning of the negotiations.

2. All parties to the negotiation shall confirm prior to the beginning of the negotiations that they have secured the mandate necessary for them to resolve the issues identified for resolution.
3. All parties shall undertake that their negotiation team shall include persons with the expertise necessary to develop specific solutions to the issues identified for resolution.
4. All parties shall ensure that their negotiation team either has the authority to make decisions or to consult as necessary to obtain decisions within a timeframe to be specified at the outset of the negotiations regarding the issues identified.
5. As all parties have confirmed that their goal is an objectively fair resolution of the issues, their negotiator shall be prepared to seek neutral standards and criteria in developing options for agreement. In land claim negotiations it is agreed that the parties shall be prepared to consider the First Nation's minimum legal rights without regard to technical defences.
6. To ensure that an atmosphere of respect is maintained at the table, conducive to the parties' focusing on the issues under negotiation, the negotiator shall:
 - i) behave in a courteous manner toward each other;
 - ii) remain in each meeting until the chair has determined that the agenda has been completed;
 - iii) cancel or postpone meetings only by advising the chair in writing at least seven days in advance, unless all parties to the negotiation agree to shorter notice;
 - iv) OTHER?
7. To assure the integrity of the ICO process and continuity in the chairing of the negotiations, all meetings of the parties (including informal meetings) which address issues of substance shall be chaired by the ICO.
8. At the end of each negotiation meeting, the ICO chair shall summarize the agreements and undertakings made at the meeting. At the outset of each meeting the chair shall review the status of undertakings previously made. Where undertakings have not been completed within the timeframe anticipated, the party that made the undertaking shall explain the reason for the failure to complete the undertaking.
9. Where both federal and provincial governments are parties to a negotiation, the Crown negotiators shall use their best efforts to ensure that disputes over their respective shares of responsibility shall not prevent or unduly delay resolution of the issues. To this end:

- i) in self-government and treaty negotiations both Crown governments will participate in the negotiations and submit for ratification any negotiated agreement;
 - ii) in land claim negotiations in which both Crown governments are parties they shall seek a resolution that will implement fully between them any outstanding Crown obligation.
10. Where the parties to a negotiation fail to resolve a specific issue within ninety days after the timeframe agreed pursuant to article 1 above, unless they have agreed in writing to an extension of time an impasse shall be deemed to have arisen. In this case the parties agree to the following procedure:
- i) Within fifteen days thereafter a meeting of all parties shall be convened by the ICO, to be attended by senior officials or representatives with decision-making authority, to attempt in good faith to negotiate a resolution.
 - ii) If the parties fail to resolve the issue at this meeting, they shall jointly select a neutral advisor within thirty days after the meeting, to assist them in settling their dispute, if the parties are unable to agree on the advisor within this time frame, the ICO shall appoint one.
 - iii) If the parties are unable to resolve the issue within forty five days with the assistance of the neutral advisor, the parties agree to submit the issue to non-binding arbitration pursuant to **[procedures to be identified]** or any other procedures agreed at the outset of the negotiations.
 - iv) The parties will jointly select the arbitrator. If after thirty days the parties are unable to agree upon the choice of arbitrator, then one will be chosen by the Indian Commission of Ontario.

PART "B"

In order to streamline the administration of the ICO process, the parties agree to revise the Terms of Reference of the Senior Steering Committee to include the following:

1. The Senior Steering Committee will meet approximately every six weeks. Proposed meeting dates shall be identified at the beginning of the fiscal year.
2. After seeking input from the parties, the ICO will prepare and distribute a draft agenda for the upcoming Senior Steering meeting two weeks prior to the meeting.
3. Prior to the close of each Senior Steering meeting, the parties will identify and agree upon policy issues for discussion at the next scheduled meeting of the Committee.
4. Where a specific issue under negotiation cannot be resolved by the Senior Steering Committee due to a policy issue, or otherwise, this issue will be placed on the agenda of the next scheduled Tripartite Council Meeting for discussion and resolution.
5. In determining other Tripartite Agenda items, the Senior Steering Committee shall consider the following factors, among others:
 - i) whether the issue involves an addition or deletion to the tripartite workplan;
 - ii) whether the issue is of concern to more than one First Nation (higher priority) than an issue specific to one First Nation;
 - iii) whether the negotiators have not been able to make progress on a key issue after an undue length of time;
 - iv) whether the Tripartite Council is being asked for direction with respect to the exercise of powers under the Orders-in-Council; and
 - v) whether there is a specific decision or result expected from the discussions.
6. The representatives of the Senior Steering Committee will determine issues of priority for inclusion in the ICO workplan for the upcoming fiscal year. Inclusion on the ICO workplan will be determined by criteria established by the Committee.
7. In accordance with the ICO Orders-in-Council, before finalizing the draft workplan the Senior Steering Committee will thoroughly discuss and recommend to the Tripartite Council by no later than December of each year, the financial resources necessary to accommodate the workplan.
8. By December of each year, the Senior Steering Committee will draft a proposed

workplan for the upcoming fiscal year. By the end of March, the Committee will forward to the Tripartite Council a mutually acceptable final draft workplan for review and approval.

9. The ICO will, within one week following each Senior Steering Committee or Tripartite Council meeting, circulate to the parties a memorandum outlining the commitments made and agreements reached by the parties.

Appendix 5 - Source: Ontario Native Affairs Secretariat Website

Ontario's Approach to Aboriginal Land Claims

Ontario recognizes that the successful resolution of land claims can meet its legal obligations and create a positive environment for economic development for Aboriginal and non-Aboriginal people alike.

A land claim as defined by Ontario is a formal statement submitted to the federal and/or provincial government in which an Aboriginal community most often asserts that the Crown has not lived up to its commitments or obligations with respect to Aboriginal or treaty rights pertaining to land.

Most Aboriginal land claim negotiations involve the federal government, which has primary responsibility for the resolution of Aboriginal land claims. Provinces may become involved in Aboriginal land claims because of provincial involvement in the historical events giving rise to the claim and because many claims involve the assertion of rights with respect to Crown lands, natural resources and private property.

The issues in Ontario land claims usually concern the meaning of original treaty agreements, the extent to which treaty commitments have been honoured and how to provide redress in cases where treaty commitments were breached.

Ontario believes that negotiations provide an effective process for addressing the legal, constitutional and practical issues raised by Aboriginal land claims. Ontario is committed to ensuring that land claim negotiations address the interests and concerns of people who live or who use the lands within the claim area. Meaningful public involvement helps lead to more enduring settlements that are broadly acceptable to those who live and work in the claim area.

Criteria

The province determines whether negotiation offers the best route for resolving the issues raised by a land claim based on the following considerations:

- a historical review of the claim
- a legal review to determine whether or not the province may have any legal obligations with respect to the claim
- a review of what other parties might be affected by a claim, and what their interests might be
- an assessment of the possibility of negotiations reaching a settlement acceptable to those affected in a timely and efficient manner, and one that fosters good relations among communities
- an assessment of the potential for a settlement to meet the government's policy directions which support Aboriginal self-reliance through economic development
- an assessment of risks, if any, involved in not negotiating the claim.

The province may begin formal negotiations with the First Nation and Canada after the reviews have taken place, and once a mandate to enter negotiations is provided by the Minister Responsible for Native Affairs.

Public Involvement

Members of the public may become involved if and when their land-based interests become affected by an Aboriginal land claim. Affected interests might include municipalities and agencies responsible for highways and hydro corridors and private property owners. Users of Crown land may be affected because

they are holders of leases, licences or permits to use Crown land for commercial or non-commercial purposes, or because they use Crown land under claim for recreation. The process of negotiating a land claim allows Ontario to consult and address the many public and private interests affected by a claim.

Negotiated settlement agreements containing appropriate legal assurances (releases and indemnities) that achieve greater certainty for people potentially affected by a land claim. Settlements bring closure to the issues under negotiation, including matters regarding access to and title to Crown land, natural resources and private property.

The various means of involving the public in the negotiating process are tailored to meet the circumstances of each particular land claim negotiation. Ontario currently uses a range of approaches for public consultation and involvement such as:

- newsletters and fact sheets which are sent to local municipal officials and affected parties and the media
- public meetings, open houses and workshops
- advisory committees to the negotiations, consisting of representatives of the affected public
- with the agreement of the negotiating parties, a formal side table to the main negotiation table may be created for affected parties to discuss specific matters with the First Nation, Ontario and Canada
- on complex claims with many affected interests, Ontario may invite a local representative (e.g. from municipal government) to participate as a member of the Ontario negotiating team.

The Negotiation Framework Agreement

At the start of negotiations, Ontario prefers that the negotiating parties conclude a negotiation framework agreement. This agreement addresses process matters such as cost-sharing arrangements, negotiation timeframes, funding to the claimant during negotiations, the process to involve the public and the parties' approval procedures needed for the final agreement.

During discussions leading to a negotiation framework agreement, the negotiating parties may prepare a work plan and budget to support the Aboriginal claimant's participation in the negotiation process and to address how the funding will be recovered as part of the final settlement. The parties may agree to undertake and share costs of studies to determine the scope and magnitude of the claim. The kinds of studies that may be done by the parties include land appraisals, hydrological studies and loss of use studies. Land appraisals may be done to determine the financial value of the lands under claim. Hydrological studies may be done in flooding claims to help assess the extent of the flooding and its effects. Loss of use studies may be done to help the negotiating parties assess the impact on the First Nation of the loss of use of the claimed land and its resources. The parties may also address the disposition of lands and resources in the claim area pending the settlement of the claim.

Private Property & Crown Land Uses

Ontario will not expropriate private property to reach a land claim settlement. However, the province may agree to buy land from an owner on a willing seller/willing buyer basis where it will help achieve a satisfactory settlement of the land claim. Access to private property is assured.

Existing Crown land uses are taken into consideration during the negotiations. Potential impacts on existing uses are minimized as much as possible. For example, Crown land leases, easements, mining claims, timber allocations, and other licenses and permits will not be revoked during their term. Public involvement in land claim negotiations helps Ontario to determine the best way to address local interests.

"Fast-track" Process

The Ontario Native Affairs Secretariat has a "fast-track" process that applies only to claims where: Ontario's share of any compensation is less than \$1 million, no land is claimed as compensation, and the documentation provided by the claimant to support the claim is adequate to demonstrate that the issues raised are clear and relatively uncomplicated.

The process promotes efficiency in reaching settlements on small claims. The federal government has a similar type of expedited process.

More Efficient & Effective Settlements

Ontario strives for settlements that are cost and time effective to negotiate and implement. It strives for negotiated settlements that result in more constructive and enduring solutions than other alternatives, such as litigation.

Land claim settlements will provide Aboriginal communities with opportunities for economic development, while removing barriers to investment and fostering a stable climate for local businesses and other interests.

Settlements aim to promote self-reliance of Aboriginal communities through economic and community development. Settlements should fall within the government's overall approach to public sector financial management, which stresses efficiency, effectiveness, and greater accountability.

Ontario has developed guidelines for the provision of negotiating funding to Aboriginal communities. These guidelines set out accountability and performance measures toward achieving settlements. Such funding will be repayable from any final settlement.

For more information contact:

Chris Maher, Director
Negotiations Branch
Ontario Native Affairs Secretariat
Email: chris.maher@jus.gov.on.ca
Phone: 416-326-9567
Fax: 416-326-0542

Appendix 6 - Ontario Claim Filing Dates

Ontario: Claim Filing Dates

PRE-NEGOTIATION: 48 filed claims are in the pre-negotiations stage, under historical, legal and policy reviews by Ontario.

Year received	# of claims
1985	4
1991	1
1994	3
1995	3
1996	4
1997	5
1998	4
1999	2
2000	4
2001	5
2002	4
2003	7
2004	1
2005	1
	48

Aggregate age of claims being reviewed, as of March 31, 2005: 328 yrs / 48 claims
= avg. 6.8 yrs

NEGOTIATION: 11 land claim negotiations are ongoing.
The following chart lists the dates they were filed with Ontario.

Algonquins	1983	Chapleau Cree	1992
Couchiching (exploratory)	1986	Fort William	1986
Missanabie Cree	1997	<i>Wasauksing</i>	
		<i>1981</i>	
Temagami	1973	Wikwemikong Islands**	
		<i>1975</i>	
Wabigoon	1992		
Wauzhushk Onigum	1980		
Williams Treaty**	1991		

* = Negotiation for larger land base, not legal claim

** = Listed as “ongoing” negotiation in December 2004, no longer listed on ONAS website in March 2005

Aggregate age of claims, as of March 31, 2005: 216.25
yrs / 11 claims = avg. 19.66 yrs per claim, assuming
filings evenly distributed between first and second half of
calendar year.

Appendix 6 - Ontario Claim Filing Dates (cont'd)

2 of the above Negotiations have reached the Agreement-in-Principle stage:

(first date is filling date, second is Agreement)

Temagami 1973 (2000) Wasauksing 1981 (1998)

FINAL AGREEMENTS AWAITING RATIFICATION (Agreement dates): 2

(first date is filing date, second is Agreement date)

Tyendinaga (Turton Penn) 1995 (2004)
Rainy River 1982 (2004)

INACTIVE FILES: 12

CLOSED FILES: 2

IN LITIGATION: 30

SETTLED CLAIMS: 11

(Bold date indicates date of settlement)

3 Final Settlement Agreements (being implemented):

(first date is filing date, second is Agreement date)

Wahta 1981	(2004)
Assabaska 1977	(2000)
Manitoulin Settlement Agreement 1987	(1990)

8 Final Settlement Agreements (completely implemented):

(first date is filing date, second is Agreement date)

Big Grassy 1985	(2000)
Nipissing Specific Agreement 1973	(1995)
Thessalon Settlement Agreement 1983	(2000)
Whitefish River, Phase I 1980	(1998)
Brunswick House Settlement Agreement 1976	(1995)
Wikwemikong Settlement Agreement (Point Grondine) 1986	(1995)
Garden River Settlement Agreement (Phases I & II) 1979	(1994)
Mississauga #8 Northern Boundary Settlement Agreement 1983	(1994)

(Filing dates not shown where information unavailable to writer.) Source for claims status:

<http://www.nativeaffairs.jus.gov.on.ca/english/negotiate/negotiate.htm> and Personal communication:

Alan Kary, ONAS.

