

SETTLING LAND CLAIMS

The evidence heard in the hearings, the policy papers submitted by the parties, the research carried out by the Commission, and the community consultations and round-tables discussions I attended make clear to me that the single biggest source of frustration, distrust, and ill-feeling among Aboriginal people in Ontario is our failure to deal in a just and expeditious way with breaches of treaty and other legal obligations to First Nations. If the governments of Ontario and Canada want to avoid future confrontations like Ipperwash or Caledonia, they will have to deal with land and treaty claims effectively and fairly.

The term “land claims” is the source of considerable public misunderstanding. It tends to suggest that First Nations are asking governments to give them more land, but the opposite is the case: these claims ask governments to fulfill the promises they made to First Nations about land and resources in the past and to compensate them for their failure to do so. The paper prepared for the Inquiry by the Ontario Secretariat for Aboriginal Affairs (OSAA, formerly known as the Ontario Native Affairs Secretariat (ONAS)) puts it succinctly: “Land claims assert a failure on the part of the Crown to live up to the promises made to Aboriginal people and the duties in law owing to them.”¹

Settling these claims is not only essential for establishing respectful and harmonious relations with First Nations, but also for ensuring that the rule of law is maintained in Aboriginal relations.

Because legal issues are at the heart of these claims, First Nations could litigate them in the courts. But formal litigation is expensive and adversarial. Moreover, the courts are usually not capable of fully settling the dispute. Court decisions tend to be winner-take-all verdicts on specific legal questions. Often, judges call upon the parties to continue negotiating matters that are beyond the jurisdiction of the court. Perhaps most importantly, judicial decisions cannot establish the positive ongoing relationship between First Nations, governments, and neighbouring communities that is needed for working out consensual approaches to practical matters that go beyond purely legal issues. It is for these reasons that alternatives to litigation were introduced which aim at reaching negotiated settlements.

Unfortunately, the land and treaty claims processes developed and applied by the federal and provincial governments since the mid-1970s have been largely ineffective, painfully slow, and unfair.

The ineffectiveness of these processes shows in the fact that only eleven of the 116 claims received by the Ontario government between 1973 and 2004 have been settled. This means only 9% of claims filed in Ontario have been settled in the last thirty years.² That is not an enviable track record.

The average time between filing a claim and reaching final settlement was fifteen years.³ Implementing the settlement often adds years to this total. Justice delayed is surely justice denied.

Finally, these processes are unfair. The government that receives a First Nation's claim determines whether it has legal validity, and there is no mechanism within the process for obtaining an independent review of the decision. A dispute-settling process in which one of the parties to it is the judge fails to meet the standard of justice that any fair-minded person would require. Every independent review of the current claims process in Ontario has identified as one of its major flaws the conflict of interest inherent in allowing the government to determine all legal issues.⁴

These are the most obvious and long-standing difficulties with the land and treaty claims process in Ontario. Experience has shown, however, that these processes would also benefit from improved accountability and transparency and better public education.

It is clear that the processes, institutions, and resources dedicated to resolving land and treaty claims in Ontario must be improved. The consequences of failing to address these issues constructively are predictable: more Aboriginal occupations and protests, more judicial intervention in the land and treaty claims process, slowed or stalled economic development, and more confrontations between the Aboriginal and non-Aboriginal communities.

Fixing the flaws in the claims settlement process is complicated by the federal/provincial nature of the problem. A few claims in Ontario may involve only the federal government, but most claims involve both levels of government. This means that any reforms introduced by Ontario will be incomplete and inadequate unless appropriate complementary reforms take place at the federal level. As commissioner of a provincial inquiry, my recommendations focus on what Ontario must do to overcome the shortcomings of the existing process, but I take into account the present state of the federal Specific Claims process and the reforms to that process which the federal government and parliament are now considering. The federal initiatives give the provincial government in Ontario an important opportunity to achieve compatible and effective reform of the claim settlement process in Ontario. Of course, the essential third partner in establishing an effective and legitimate process for resolving disputes concerning treaties with First Nations is the First Nations themselves and the organizations representing their

interests. Land claims processes are unlikely to work or to be credible if the dispute settlement process is imposed upon First Nations. I believe that reforms must be acceptable to First Nations as well as to the federal and provincial governments.

In order to play their part in reforming the claims process in Ontario, treaty nations have an obligation to build support for the effort in their own communities and with each other. How they do this is very much the responsibility of the people and leaders of the treaty nations and the organizations they have built to advance their common interests. I recognize the challenge of overcoming skepticism born of many years of frustration and unfulfilled promises, and the challenge of finding common ground within the diversity of experience and tradition among the First Nations in this province. I hope that the promise of a new beginning arising out of the work of this Inquiry will provide the incentive for First Nations and their leaders to take up this challenge effectively.

4.1 What Are Land Claims About?

According to the federal government, 273 claims had been filed in Ontario against the federal government as of September 30, 2006.⁵ Under federal policy, these are classified as specific claims. Most of these claims arise from alleged failures by the Crown to deal properly with lands reserved for First Nations by treaties.⁶

Twenty-eight of these claims against Canada in Ontario, over 10%, relate to the Six Nations of the Grand River, the most populous reserve in Canada. The protest which continues at Caledonia involves one of these claims. In addition to claims arising from historic treaties, there are a few claims alleging that certain lands were never “surrendered” by treaty, and that the First Nation therefore still has Aboriginal title to the lands.⁷

Ontario began receiving claims in 1973. The province received 116 land claims between 1973 and April 2005. Most of these claims concern mismanagement or mistreatment of reserve lands.⁸ Most of these claims also involve claims against the federal government. For instance, an allegation that the federal government has breached its fiduciary obligation to protect reserve lands may be accompanied by a claim against the province for unjustly benefiting from obtaining resources to which it was not entitled. It is often very difficult for First Nations to ascertain the appropriate level of government against which to file their claim. As a result, one of the reforms I suggest is that Canada and Ontario maintain a common registry for claims.

First Nations and Métis communities also have claims about harvesting rights on traditional lands. I discuss natural resource issues in chapter 5.

4.2 Successful Land Claims Settlements

The provincial government, through ONAS (as OSAA was then called), made a detailed submission to the Inquiry regarding Ontario's land claims process in April 2005.⁹ As of that date, OSAA reported that Ontario was party to eleven land claim settlements in which Ontario had turned over 175,000 acres and paid almost \$30,000,000 in financial compensation to First Nations. Ontario was also party to three agreements in principle which, if ratified by the parties, would increase the amount of land transferred to First Nations to about 275,000 acres and financial compensation payable by Ontario to approximately \$85,000,000. Ontario was also participating in nine additional land claim negotiations which, if successfully concluded, would add to those totals substantially.¹⁰

OSAA also advised the Inquiry that the provincial government was implementing three of the eleven settled claims. This last point raises an important issue: Even when an agreement is reached and a settlement is ratified, the settlement is not complete until it is fully implemented. The time it takes to implement a settlement must be added to the average fifteen-year period between filing a claim and negotiating a final settlement. This is obviously an unreasonable length of time for achieving a complete settlement of a land claim.

The most striking facts about the land claims process are the small number of settlements and the length of time taken to complete them. Nevertheless, for two reasons, it is important to recognize what has been accomplished through the process to date.

First, it is important to realize that claims can and do get settled. It would be incorrect to suggest that claims are so numerous or so substantial that it is impossible to settle them. Indeed, experience has shown that parties are able to negotiate creative, just, and effective settlements under the right conditions and with appropriate support.

Second, the land claims settled to date help us to appreciate the size of the remaining claims. This is important in helping us to understand the magnitude of what First Nations may be denied and the potential liability of governments. Professor Coyle obtained information from the *Public Accounts of Canada* to the effect that in 2001, Canada's contingent liability for specific claims across the country was estimated at more than \$2.6 billion.¹¹ The backlog of unsettled claims has grown since that estimate was made, and the figure would probably be greater today. I am not aware of any comparable estimate of contingent liability for Ontario, but it would be significant.

4.3 The Current Process

No reasonable person looking at land claims settlement in Ontario could avoid the conclusion that the process takes far too long. An average of fifteen years to settle a claim would be scandalous in any other part of the Canadian justice system.

In part, OSAA explained the delays in settling land claims as follows:

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

The OSAA paper also points out that the provincial (or federal) government is not always the source of delay. Sometimes, First Nations have difficulty consolidating their positions and identifying the potential beneficiaries of a claim.¹³

Finally, the OSAA paper stresses there have been “very significant improvements in the negotiation process that become evident by looking at milestones achieved longitudinally.”¹⁴ In other words, the process is getting faster.

I recognize that the legal and historical matters at issue in a claim are extremely complex. Land claims are complicated legal agreements that involve multiparty negotiation of complicated historical, property, legal, financial, and implementation issues. Land claims negotiations typically include negotiations over the basis of the claim, the valuation of loss, the nature and scope of compensation, the apportionment of federal and provincial contributions to the settlement, and questions about third-party interests. I also recognize that it is simplistic to blame the federal and provincial governments for every delay or frustration in the land claims process.

However, I believe that it is possible to improve the effectiveness and efficiency of the claims process significantly. According to Professor Coyle, “Presumably, the major reason for the length of time taken by Ontario to review claims is that insufficient resources are available to complete the task earlier.”¹⁵ Anyone familiar with the process will agree that Professor Coyle's comment is quite reasonable. Yet more than increased resources are needed. I propose procedural and institutional reforms to expedite the process of reviewing claims and to make it more fair and accountable.

The Ontario claims process proceeds in distinct steps.¹⁶ First, there is a two-step process before negotiations begin. The first step in this pre-negotiation phase

occurs immediately after Ontario receives a statement of claim from an Aboriginal group. OSAA performs two tasks at this stage. It gives the claimant group information about the process, including how funding can be obtained, and it examines the statement of claim and accompanying documentation to ensure their “clarity and completeness.” Clearly, the process of receiving the submission and informing the claimant group about the claims is necessary. We were given no information on how much time it typically takes to complete this first step, but I did not hear that this step was a major source of delay.

The second step in the pre-negotiation phase is the crucial stage at which the provincial government decides whether it will accept the claim for negotiation. This is the complex, time-consuming, process to determine if the claim is even eligible for negotiations.

There are three parts of this stage of the process: historical review, legal review, and the Minister’s decision to accept or reject the claim for negotiation. OSAA supplied the following table which sets out the steps and milestones in the process.

Land Claims Milestones Achieved by Period (April 2005)¹⁷

Period	Active Claims	Historical Review	Legal Review	Minister’s Decision	Agreement		
					Not Accepted	In Principle	Final Agreement
'73-'85	26	13	7	2	—	—	—
'86-'95	45	15	14	19	—	6	6
'96-'04	86	39	36	26	2	9	5

OSAA subsequently updated some these figures for the Inquiry. As of January 2007, OSAA reported that fifty-seven claims were in pre-negotiation, twelve claims were in negotiations, six settlement agreements were being implemented, and nine agreements had been implemented.¹⁸

According to OSAA, the table demonstrates that Ontario is making progress in reducing the backlog of land claims awaiting internal review and is speeding up the process generally, particularly for claims received between 1996 and 2004:

Ontario has learned a great deal about the process and practice of settling land claims.... [The] practice of land claims negotiations in the province is maturing with a consequent quickening in the pace of settlements.¹⁹

The province should be commended for improving the provincial land claims process. However, the record also shows that the process is not yet keeping up with

the caseload. As of April 2005, almost fifty claims had not yet passed the historical review phase. Sixty claims had not passed ministerial review of eligibility for the negotiations process. It takes Ontario an average of almost seven years simply to decide whether to accept a claim for negotiation. On more than two-thirds of the active claims in the system, the long, arduous process of actually negotiating the claim has not even begun.

OSAA advised the Inquiry that it should be able to reduce the pre-negotiation assessment period. This would be commendable, but I believe that the period must be reduced significantly. The keys are adequate resources, improved institutional supports, and a more strategic approach to addressing land claims.

Two other aspects of the pre-negotiation stage are concerning. First, the Ontario process assesses the eligibility of a claim based not only on the historical or legal merits, but also on a “policy review” that appears to include an assessment of interests in the area affected by the claim, land values, and local Aboriginal/non-Aboriginal relations.²⁰ This raises the possibility that Ontario may refuse to negotiate a claim even if it has been shown to be valid in an historical and legal sense. The “policy review” is one of the key objections to the Ontario claims process raised by the Chiefs of Ontario.²¹

Second, the minister alone decides whether the claim should be accepted for negotiation. Although I fully understand that the minister, and eventually the Cabinet, must concur in any agreement reached through negotiations, it does not seem in keeping with the purpose of the claims process for the minister to decide, unilaterally, whether a claim merits access to the negotiating process.

I accept that a First Nation must meet a clear legal threshold before a claim will be accepted for negotiations. But given that the aim of the claims process is to provide a less adversarial, less expensive, and more interest-based alternative to litigation, the decision to accept a claim into the process should not be controlled by the provincial government unilaterally.

By way of contrast, access to the federal process depends on an assessment of the legal merit of the claim, performed by the Department of Justice. If Canada refuses to negotiate a specific claim because it believes it has no outstanding legal obligation, the First Nation can ask that the decision be reviewed by an independent body, the Indian Specific Claims Commission (ISCC). However, it is important to note that, under the present system, if the ISCC finds that the claim is valid, it can only recommend to the federal government that it negotiate the claim. The federal government recently announced its intention to reform the Specific Claims process.²² A key part of the reform is establishing an independent tribunal to resolve disputes. This proposal is now under discussion in the federal parliament. The land claims process in Ontario would be much fairer if

access to the provincial negotiating process matched its federal counterpart.

The frustration created by decades of delay cannot be underestimated. The submission by the Grand Council of Treaty 3 gave an account of a claim which was settled through the Ontario process, but took decades to complete. In the claim by the Assabaska First Nation in the Lake of the Woods area, there was a *prima facie* case of illegally taken lands. They filed the statement of claim in 1977. An agreement was reached in 1999, twenty-two years later. According to the First Nation, this delay exposed its people to “mistrust and hatred by their neighbouring non-native communities for over 20 years.”²³ The First Nation also wrote that “The longer such an issue remains unresolved, the more anger and resentment is allowed to brew—a recipe for another Ipperwash-type incident.”²⁴

The lack of transparency and accountability in the land claims process in Ontario is a further area for improvement. OSAA maintains a website which provides general information and statistics about the land claims process in Ontario. It cooperated with the Inquiry by providing information upon request and by participating in the Inquiry roundtables. These efforts improve transparency and accountability, but they do not achieve it. I believe that a continuous independent public accounting of the land claims process in Ontario is imperative.

4.4 Improving Land Claims Processes in Ontario

My recommendations for improving the land claims process in Ontario are directed at establishing an independent Treaty Commission of Ontario to facilitate and oversee the process in Ontario, important, structural reforms to the way that claims are considered, the commitment of greater resources to the land claims process, and improved federal-provincial cooperation. I discuss complementary improvements in public education about Aboriginal peoples and to the capacity of the provincial government and First Nations in chapters 7 and 8 respectively.

Reform in every area is essential, because reform in one area without matching or consistent reform in the others is likely to be insufficient to address the needs in this province adequately.

These reforms respond to the basic issues I have already identified, including the need for harmonious and peaceful resolution of land claims and the need to improve the timeliness, effectiveness, and fairness of the current land claims system.

The overarching role and responsibility of the federal government in land claims cannot be underestimated. However, since this is a provincial inquiry, I focus primarily on provincial strategies and institutions. However, federal/provincial cooperation is crucial to the success of the initiatives I recommend.

The same basic legal regime has governed the land claims process in Ontario for approximately thirty years. No reasonable person could say that it has been effective. Clearly, creativity and new solutions are warranted in this area.

I am encouraged by the response to this issue at the Inquiry by the provincial government. OSAA advised the Inquiry that the provincial government is committed to settling land claims with First Nations and Canada, and that “clearly, it is in the public interest to find a fair and balanced resolution to Aboriginal land claims.”²⁵

My recommendations should not be regarded as a panacea. OSAA quite rightly points out that successful claims negotiations are very time consuming. Nevertheless, I am convinced that the proposed reforms will improve the efficiency, effectiveness, and fairness of the land claims process. In my view, they are practical choices that will achieve meaningful progress.

4.4.1 Objectives

The objective of resolving treaty and land claims must be much more than simply to settle a legal dispute. The aim must be to re-establish relationships that embody the commitment to mutual respect and mutual benefit that was the original foundation for the Indian nations and the Crown when they made treaties with each other.

I suspect that many people in Ontario see the settlement of land claims as a financial issue: “How much do we have to pay to settle the Indian problem?” Approached with that attitude, the claims process in Ontario will continue to generate frustration and anger rather than forming the basis of a constructive and mutually beneficial relationship. Instead of viewing claims settlements as once-and-for-all payoffs that end the treaty relationship, we should see them as new beginnings to ongoing relationships of peace and friendship. The negotiating process itself can contribute to such a relationship, but not if it is conducted in a combative, adversarial style, pitting “our historians against your historians” or “our lawyers against your lawyers.”

The land claims process must reflect, consistently and vigorously, the principles of treaty interpretation enunciated by the Supreme Court of Canada.²⁶ These principles govern the courts in adjudicating disputes about treaties. They should also guide the process that is an alternative to litigation. This approach to resolving treaty issues is particularly apt for Ontario, where many treaties go back to the early period of treaty-making. Documents were few and often imprecise, and much of the agreement was made orally.

Particularly where land and access to resources are at issue, the substance

of claims settlements should be forward-looking. Government negotiators should be concerned not with minimizing what First Nations will recover, but with restoring a stronger economic base to their communities. The Ontario government submission recognized the economic development objective of claims settlements, which I find encouraging.²⁷ Developments in fostering co-management and sharing of resources, a major part of the New Approach to Aboriginal Affairs released by the Government of Ontario, should link to and nourish the economic development aspect of claims settlements.

4.4.2 The Treaty Commission of Ontario

In my view, the efficiency, effectiveness and fairness of the land claims process in Ontario could be significantly improved by establishing a Treaty Commission of Ontario (TCO).

The TCO would not negotiate land claims or decide the meaning of treaties. It would not be a decision-making body. Its job would be to independently and impartially assist the governments of Ontario, Canada, and First Nations to negotiate settlements of land claims. The TCO would oversee the negotiation process to make sure that the parties are working effectively and making progress in negotiations.

The TCO could significantly reduce the adversarial quality of the process by imbuing it with the principles of treaty interpretation set out by the Supreme Court of Canada.

The TCO could also assist governments and First Nations in developing and applying a wide range of tools and processes for clarifying and settling issues in an expeditious and cooperative way.

Finally, the TCO could assist the parties to reach interest-based settlements that help to establish the positive, ongoing relationship between the provincial, federal and First Nation governments, and neighbouring communities necessary for working out consensual approaches to practical matters that go beyond purely legal issues.

Recommending a treaty commission for Ontario is not a new idea. The establishment of provincial treaty commissions was one of the central recommendations of the Royal Commission on Aboriginal Peoples:

The governments of Canada, relevant provinces and territories and Aboriginal and treaty nations establish treaty commissions as permanent, independent and neutral bodies to facilitate and oversee negotiations in treaty processes.²⁸

“Gathering Strength,” the response to the RCAP report by the Government of Canada, endorsed the idea of establishing independent treaty commissions “where its partners agree that such an approach would be useful.”²⁹

Treaty commissions have been established in three provinces. The British Columbia Treaty Commission was established in 1993. Unlike the case in Ontario, very few First Nations in British Columbia had existing treaties with the Crown. The purpose of the BC Treaty Commission is to facilitate the process of making new treaties on land and self-government.³⁰ An Ontario Treaty Commission would be concerned with breaches of treaties made in the past. However, although the BC commission has a different function, it was organized and continues to be maintained through an agreement of First Nations and governments of Canada and British Columbia and is therefore a good precedent for the tripartite support needed for the Treaty Commission of Ontario.³¹

Saskatchewan and Manitoba also have treaty commissions. Both were established through bilateral agreements between Canada and organizations representing the treaty nations of the province. To date, the provincial governments have not participated directly in the work of either of these commissions. The Office of the Treaty Commissioner in Saskatchewan was first established in 1989 to review treaty land entitlement issues and treaty education. In 1996, the Federation of Saskatchewan Indian Nations and the Government of Canada agreed to expand the commissioner’s mandate “to create an effective forum for advancing their treaty discussions.”³² Now, the commissioner’s mandate is primarily to foster a common understanding of treaty relations in the province. The mandate does not extend to facilitating the settlement of claims arising from treaties.

The Manitoba Treaty Relations Commission is much newer. It was established in 2003 by the federal Minister of Indian Affairs and Northern Development and the Grand Chief of the Assembly of Manitoba Chiefs.³³ It, too, has a mandate to undertake public education to improve understanding of treaty relationships. It has a mandate to facilitate discussion of treaty issues in the province, but as it the case in Saskatchewan, its mandate does not include facilitating the settlement of specific claims arising from breaches of treaties.

The TCO that I propose is both consistent with and an advance from these three commissions. In some ways, the TCO is an evolutionary step beyond the Indian Commission of Ontario. However, I believe that the TCO will be much more effective.

Not everyone agreed that a treaty commission is needed in Ontario. According to OSAA, third-party intervention in land claims negotiations, of the kind I envisage for the TCO, can be useful in some cases, but it is, on balance, not necessary in all. OSAA stated that the ICO was necessary because there was a

lack of qualified dispute resolution professionals at the time, and it may now be more cost-effective to employ dispute resolution experts as needed rather than to re-establish an ICO-like institution.³⁴

With respect, I disagree. Individual dispute resolution professionals cannot provide the institutional capacity, resources, and processes which I believe are necessary to achieving real reform in this area. Nor can individual professionals provide the accountability, transparency, or educational benefits which Ontarians need to understand land claims better.

4.4.2.1 Permanence, Independence, and Governance

The Treaty Commission of Ontario should be independent and it should be permanent. It must also have the confidence of all three parties to the treaty relationship in Ontario: the provincial government, the federal government, and the First Nations of Ontario.

The independence of the TCO will be assured by establishing it as an independent commission which reports to the Legislative Assembly, not to the Government of Ontario. In effect, the TCO should have the same legislative status and independence as the Environmental Commissioner of Ontario. The TCO, like the Environmental Commissioner, should have a permanent administrative, legal, and research staff, fully independent from governments and First Nations.

To further ensure independence, First Nations and the Ontario and federal governments must all be involved in selecting its head, the Treaty Commissioner of Ontario. The way to provide for this in the statute must be worked out through discussions among the parties. The independence of the TCO requires that the commissioner serve for a fixed but renewable term, say five years, and that the appointment be terminated only upon agreement by First Nations organizations and the Legislative Assembly of Ontario.

It is important that the TCO be permanent and avoid the fate of the Indian Commission of Ontario. The ICO effectively closed after the federal Minister of Indian Affairs unexpectedly declined to renew the order-in-council, notwithstanding the recommendation of a tripartite steering committee that its mandate be renewed for another five years.³⁵ In my view, this means that the TCO must be established in a provincial statute, carefully framed to make it clear that its purpose is to enable Ontario to better discharge its treaty responsibilities.

The provincial government should make every reasonable effort to establish the TCO with the full cooperation of the federal government. If that is not possible, however, the provincial government should proceed to establish the TCO on its own in cooperation with First Nations in Ontario.

Finally, to get the TCO off to a strong start with the people of Ontario, Aboriginal and non-Aboriginal, it should be inaugurated in a prominent and ceremonial way. I suggest a meeting of First Nation leaders, federal and Ontario First Ministers and Aboriginal affairs ministers, and opposition party leaders at Niagara Falls. The ceremony should recall the 1764 Treaty of Niagara and renew its promises of mutual support and respect. The public education value of the event could continue with an annual celebration of its anniversary on an Ontario Treaty Day. Ontarians would be reminded each year that they are all treaty people. It would be best if Treaty Day were held on a school day, with every school in Ontario provided with a suitable presentation on the promises made at Niagara on the first Treaty Day.

4.4.2.2 Mandate and Powers

The TCO would share some of the features of other provincial treaty commissions. Like the Saskatchewan and Manitoba commissions, it should have an education mandate to promote public understanding of the historic roots of treaties in Ontario, their constitutional status, and their continuing importance to the province. The TCO should also follow British Columbia in having the federal and provincial governments and First Nations supporting and participating in its work. However, unlike the other provincial treaty commissions, the Treaty Commission of Ontario must have a mandate to facilitate the timely and fair settlement of claims arising from the breach of treaty obligations by the federal and provincial Crown. That should be its primary mandate. In effect, it would replace and update the Indian Commission of Ontario as the provincial agency for overseeing and facilitating the process for dealing with First Nation claims, but with a broader and stronger mandate.

I recommend, therefore, that the TCO be given a strategic mandate to assist governments and First Nations find more efficient and fairer ways of settling claims. In my view, the TCO's strategic mandate should include four parts:

First, the TCO should be given the authority to assist governments and First Nations, independently and impartially, in developing and applying a wide range of tools and processes for clarifying and settling issues in an expeditious and cooperative way. To further that aim, the TCO should be given the authority to prioritize, consolidate, or batch claims in whole or in part, to encourage joint fact-finding and historical research, to identify consensual ways of dealing with issues common to claims associated with a particular treaty or region, and to encourage interest-based settlements.

The TCO should also have the authority to work with the parties to simplify

the process for claims that require relatively little historical or legal research and to find ways to unblock bottlenecks in the process.

I believe that this approach could result in a much more efficient process. It would not only consume less time, it would also avoid duplication of effort by governments and First Nations and would tailor the process to the nature of the claim.

Second, the TCO should be given a mandate to improve the efficiency and cost-effectiveness of land claims in Ontario. It should be given the authority to work with parties to establish and publish benchmarks for the processing of claims and to require parties to use various forms of dispute resolution, binding as well as non-binding, if the benchmarks are not met.

Third, the TCO should have a mandate to make the claims process accountable and transparent to all Ontarians. As the Environmental Commissioner of Ontario does, the TCO should keep the public and the parties informed of the process and its achievements and failures, offering explanations for failures and suggestions for making the process work better.

Like similar commissions or offices with a public accountability function, the Treaty Commissioner should report annually to the Legislative Assembly, and to the Ontario public, on the overall state of the claims process and on particular successes and problems. In addition, the commissioner should be mandated to publish reports on specific situations where one or more parties are exceptionally uncooperative or causing unreasonable delay. I realize that governments, including First Nation governments, do not welcome potential exposure to public criticism in this way. However, I believe that it would provide a strong incentive to the parties to do their best to avoid prolonged deadlocks and unreasonable delays.

Fourth, the public education function of the TCO should be considerably more robust than the ICO mandate “to acquaint the residents of Ontario with the nature of the matters before the ICO.”³⁶ The TCO should be given a broad mandate to undertake public education about treaties, treaty relationships, and land claims in Ontario, and the specific authority to develop programs on treaty history designed to be part of the Ontario school curriculum.³⁷

4.4.2.3 *Resources*

Resources for the TCO must be better than they were for the ICO. Before its budget was cut by about 25% in 1996, the annual ICO budget had reached about \$1,160,000. The TCO must produce better results and it will have an important education function. It will therefore need more money than was allocated to the ICO at its peak.

The 2005/2006 operating budget for the BC Treaty Commission was

\$2.19 million. The BC Commission has a full-time commissioner, four part-time commissioners, and thirteen staff. The Government of Canada contributes 60% and the BC government contributes 40%. In addition to its operating budget, the BC Treaty Commission funds support for negotiation. Since it opened its doors in May 1993, it has allocated approximately \$362 million in negotiations support funding, to more than fifty First Nations—\$289 million in the form of loans and \$73 million in the form of contributions.³⁸

Both levels of government should fund the TCO, as they do in BC. Both governments have treaty responsibilities, and both governments have a significant interest in improving the land claim process in Ontario.

I do not consider the BC budget allocations as a precedent or benchmark for the TCO. The circumstances and needs are unique to each province. I recommend that the federal and provincial governments negotiate an appropriate sum to ensure that the TCO can achieve its objectives.

The resources invested in the TCO should be considered an investment in a faster, fairer, more flexible process for settling land claims, one that should pay for itself by eliminating many of the significant costs of dealing with Aboriginal occupations and protests.

4.5 Other Provincial Initiatives to Support the Land Claims Process

Establishing the TCO is my key recommendation for improving the land claims process in Ontario. However, the TCO alone will not be able to achieve significant progress on land claims without several other initiatives at the provincial and federal levels. Five provincial issues are crucial:

- Eligibility for the Ontario land claims process
- Consideration of non-Aboriginal interests
- Provincial capacity, coordination, and support
- Accountability and transparency
- Funding

I discuss federal issues later in this chapter.

4.5.1 Eligibility to Enter the Ontario Land Claims Process

In an expeditious and fair process, the threshold decision on whether a claim will be negotiated should not wait almost seven years to be made unilaterally by

a minister. That threshold decision should be simply a determination of whether the documentation supporting a First Nation statement of claim provides sufficient grounds for bringing the parties together to work out a negotiated settlement of the claim. The threshold decision that in effect opens or closes the gateway to negotiations should be made by the Treaty Commission through its registration process.

There should be provision for a party to appeal the decision of the TCO, either to the independent tribunal contemplated under pending federal legislation (which I will discuss below) or to the courts. Appeal to the courts would mean losing the advantages of the claims negotiating process. That would be regrettable, but it would be better to proceed at the earliest possible stage rather than after years of waiting for a ministerial decision. Moreover, a decision that a claim lacks sufficient substance to merit an effort at a negotiated settlement may be easier to accept, after full argument before a court of law, than it would be when the decision is made by a minister alone.

I recommend that access to the claims process depend entirely on whether the documentation filed by the First Nation provides *prime facie* evidence that there has been a breach of the legal obligations of the Crown. I have pointed out that, under the current Ontario process, a finding of legal obligation based on an historical review and legal review of a claim does not commit Ontario to negotiating the claim. Over and above the review of the legal merits, there is a policy review and a final decision by the Minister Responsible for Aboriginal Affairs. During the years this process has been operating, the minister has rejected only two claims that have passed through the historical and legal review stages. Nevertheless, the requirement for a ministerial decision delays negotiations and applies policy considerations which should be taken up in the negotiating process, not in assessing the eligibility for negotiation.

Eliminating the ministerial gatekeeper will not, by itself, resolve delays in the land claims process,³⁹ but it would bring the Ontario process more closely in line with the federal Specific Claims Process and promote consistency and coordination between the two governments. Access to the federal process depends on an assessment by the Department of Justice of the legal merits of the claim. If the Department finds that the claim has substance, “Canada will negotiate with the First Nation in an effort to agree on compensation.”⁴⁰

4.5.2 Consideration for Non-Aboriginal Interests

One aspect of the existing Ontario process that is working well is the attention to ensuring that non-Aboriginal communities and interests which may be affected

by the settlement of a land claim are kept informed of the claim and that their concerns are considered during the negotiation. A variety of third-party interests may have concerns about a given claim. More often than not, the Ontario process deals with land claims that go beyond monetary compensation to call for some adjustment of reserve boundaries or that raise other land issues. Municipalities will be concerned about the implications of additions to reserves where municipal services, infrastructure, and the municipal tax base are involved. Businesses involved in extracting natural resources in the area of the claim will be concerned about the possible impact on their investments and revenues. Land developers will be concerned about the security of their investments and property rights. Recreational users of lands and waters in the area will be concerned about possible restrictions on their activities. Non-Aboriginal residents in the area will want reassurance that their properties will not be expropriated and that their convenient access to their properties will not be impaired. These are reasonable and settled expectations that the provincial land claims process properly acknowledges. When land claims are asserted in the urban areas of Southern Ontario, these concerns are likely to be especially acute. Caledonia is the most prominent example.

The provincial government keeps third parties informed of land claims and tries to ensure that third parties are given an opportunity to voice their concerns. As the OSAA paper put it, the Ontario process seeks “to configure the negotiation process in such a manner that the parties move closer together rather than further apart,” and to do this in way that does not permit a third-party veto over land claim settlements.⁴¹ According to OSAA, it is not unusual to find negotiators spending half of their negotiating time on public consultation activities.

This program of public consultation is one part of the Ontario process that enhances accountability and it should be continued. In addition to contributing to the accountability and openness of the land claims process, it has the potential to lead to settlements that strengthen relationships between First Nation communities and their non-Aboriginal neighbours.

Settling claims without damaging the interests of non-Aboriginal people is a long-standing principle of the land claims policy in Ontario. An important part of this policy is that expropriation of private property as a means of settling claims is ruled out. 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 a land claim.”⁴² This is what the province did at Caledonia.⁴³ Access to private property is also assured. This policy extends beyond privately owned land to lease-holders on Crown lands. Potential impacts on existing commercial use of land “are minimized as much as possible.”⁴⁴ This means that settlements must avoid

revoking mining claims or timber allocations or other licenses and permits before they expire.

It is not difficult to understand the political rationale for this part of the land claims process. It would be difficult to find majority acceptance for the claims policy without assurances that non-Aboriginal communities and interests have nothing to fear from the settlement of land claims. However, it is important to recognize that, from the perspective of First Nations, according this privilege to non-Aboriginal property and economic interests is difficult to accept. This is especially so when the private property or commercial interest protected by the policy is on land proven to have been taken from or denied to a First Nation illegally.

Although I do not suggest that this part of Ontario's claims policy be changed, I recommend that the province make the policy and the rationale for it much more widely known. Non-Aboriginal people tend to see the result of land claims in terms of Aboriginal people gaining land at their expense. Acknowledging that the land claims policy aims to protect non-Aboriginal property and interests even when it means that Aboriginal people will be unable to recover lands that are rightfully theirs, might serve to correct this false perception. At the same time, Ontario should continue to emphasize in its public consultations the ways in which land claim settlements can generate benefits locally and contribute to the general economic progress of the province. This approach will help to foster understanding that treaty relationships contribute to the wellbeing of everyone in Ontario.

4.5.3 Provincial Support, Capacity, and Coordination

To be effective the land claims process in Ontario and the TCO will need the strong support of the Ontario government. I believe it is more likely to receive that support if Ontario follows the example of British Columbia and creates a stand alone ministry dedicated to Aboriginal affairs. In chapter 8, I discuss the merits of establishing an Ontario Ministry of Aboriginal Affairs in more detail.

4.5.4 Funding and Planning

If the claims process is to become a creditable way to resolve past injustices that can secure the confidence of First Nations, it must be adequately funded. The effectiveness of new structures and processes will be greatly diminished if they are not accompanied by a commitment to fund the process to the degree necessary. Funding must be adequate in two ways. First, governments must be willing to commit enough funds to enable the process to resolve claims within an acceptable period. Second, if the process is to be fair as well as efficient, funds

must be available for First Nations to participate in the claims and for compensation for breaches of legal obligations.

Funding and business planning go hand in hand. Governments must be able to predict, with reasonable certainty, what may be paid out in compensation in a given year. The provincial government and TCO, working closely with First Nations and the federal government, should therefore develop a business and financial plan to estimate the resources needed to resolve claims and to meet reasonable benchmarks during the land claims process. Once completed, the province and TCO would be able to estimate an annual budget allocation for settling treaty and land claims. The estimate should be made public, of course, so that it may be understood and, if necessary, debated publicly and in the Legislature.

I realize that, with so many claims in the system, what I am suggesting will take complex planning, and that success will depend not only on adequate funding, but also on the availability of the necessary human resources—experienced lawyers, knowledgeable historians, and capable mediators. I am convinced that these people can be found in Ontario, and that significant economies can be realized by abandoning the adversarial approaches of the past.

There is no question that a reformed and revitalized claims process will require more money than Ontario or Canada have been prepared to spend on settling claims in the past. I noted earlier that the 2001 federal contingent liability for specific claims was estimated at more than \$2.6 billion⁴⁵ and that we do not have an equivalent estimate for Ontario. The fiscal planning exercise I recommend would provide such an estimate, at least in part.

In considering the merits of spending more money on settling land claims, the provincial government and the people of Ontario must bear three things in mind. First, the money and land in settlement of claims discharges a debt found to be owing to First Nations. It is not a donation. Second, the money or land that First Nations gain from settling claims contributes to the local and provincial economies. It will strengthen the economic base and self-sufficiency of First Nations, which is in the interest of us all. Third, the cost of failing to settle claims is very high, and rising.

4.6 Federal-Provincial Cooperation

Federal-provincial cooperation is clearly an essential feature of an effective process for settling land claims in Ontario. Ontario claims arise from treaties between First Nations and the Crown. In our federal constitutional structure, the Crown exercises its authority and discharges its responsibilities through two levels of government, federal and provincial. In Ontario, the Crown in right of

Canada and the Crown in right of Ontario are inextricably intertwined in treaty relations. They must work together in resolving treaty issues and land claims.

It is important to understand the historical and constitutional foundation for this federal-provincial responsibility. When the Canadian federation was formed in 1867, the federal government took over from Britain the responsibility for treaty relations with Indian nations and the obligation to carry out the policy stated and the promises made in the 1763 *Royal Proclamation*. After Confederation, the federal government entered into treaties with Indian nations to acquire land for new settlements and economic development. This means that the federal government, as the Crown in right of Canada, is a party to all of the treaties, pre-Confederation and post-Confederation, which together cover nearly all of Ontario. Also, under the Constitution of Canada, the federal government and parliament have exclusive control over the lands which, through treaties, became Indian reserves, and for any dealings relating to those reserve lands. Thus, the federal government must be a party to any negotiation concerning Ontario treaties and the obligations arising from them.

The Ontario government, as the Crown in right of the province, has exclusive jurisdiction over the off-reserve lands and resources which, through treaties, First Nations agreed to share with European settlers. This means that the provincial government, as the custodian of provincial Crown lands, is responsible for any adverse effect on First Nation treaty rights arising from development on these lands. It must be a party to any land settlement that would return provincial Crown lands to reserve status. Thus, the Ontario government must be involved in the settlement of most land claims in the province.

Even though federal-provincial cooperation is essential, there has been no systemic, institutional coordination of federal and provincial participation in the settlement of land claims in Ontario since the ICO closed in 2000.

There have been some recent efforts to revitalize the tripartite process in dealing with Aboriginal issues in Ontario. The first intergovernmental meeting in seven years which involved Aboriginal leaders and ministers of the federal and Ontario governments was held on June 10, 2005. Since then, a number of tripartite initiatives have been launched and meetings have been held.

As I write this report, it appears that the current tripartite process is stalled. In my view, this underscores the need for a more formal and ultimately more effective institutional structure to address land claims in Ontario, with better resources and a better strategy.

The situation in Caledonia demonstrates the urgency, but there are some encouraging signs in the present circumstances. The tripartite initiative shows that all three parties to land claims in Ontario acknowledge the need for such a

tripartite body or process. The federal government agrees with First Nations that the status quo in handling specific claims “is not sustainable.”⁴⁶ Potential amendments to the *Specific Claims Resolution Act (SCRA)* aim to meet Aboriginal objections by establishing the Canadian Centre for the Independent Resolution of First Nations Specific Claims. The Centre would have two divisions: a commission to facilitate claims negotiations and a tribunal to resolve disputes.

If the *SCRA* is amended in ways that meet Aboriginal concerns and obtain parliamentary approval, it would fit well with the Treaty Commission of Ontario I recommend. Like the proposed federal commission, the TCO would facilitate the settlement of claims, and where appropriate, enable parties to make use of the new federal tribunal.

Federal/provincial cooperation will be crucial to the sustained effectiveness of the TCO. Both governments must commit to its success through funding and through political and administrative support. Establishing the TCO in cooperation with First Nations would be very much in keeping with the commitment by the Government of Ontario to develop a new and respectful relationship with Aboriginal peoples in the province.⁴⁷

Federal/provincial cooperation with respect to the TCO should be complemented by other federal/provincial initiatives to improve the efficiency, effectiveness, and fairness of the land claims process in Ontario in the areas of claims registration, dispute resolution, legal liabilities, and common benchmarks/policies.

As with the establishment of the TCO, the provincial government should make every reasonable effort to seek the federal government’s cooperation on these issues. If that cooperation is not forthcoming, however, the provincial government should proceed to address these issues on its own in cooperation with First Nations in Ontario.

4.6.1 Registration

Eliminating confusion about the level of government to which First Nations in Ontario should submit claims is a crucial area where federal-provincial cooperation in a reformed claims process is essential. In their submission to the Inquiry, the Chiefs of Ontario pointed to the virtual impossibility of untangling the respective responsibilities of Canada and Ontario.⁴⁸

It must be possible for the two governments, or the two commissions when they are established, to create a common registry for Ontario claims. The claims process would be less frustrating and confusing for First Nations and more timely and efficient for everyone. Cooperation on a common registry is more likely

if the claims process at both levels is under the aegis of an independent commission instead of officials of the two governments. If Ontario abandons the application of policy considerations and ministerial approval in admitting claims to the negotiating process as I recommend, the federal and provincial processes will be subject to the same criteria. This will also facilitate a common registry for land claims.

4.6.2 Dispute Resolution

An important responsibility of the TCO will be to work with the parties to make use of a variety of dispute resolution techniques to overcome the impasses and bottlenecks which have simply stopped progress in negotiations for years and years. Dispute resolution methods work best when the parties participate in them voluntarily, but there is too much at stake here to give any party veto power over the decision to resort to a procedure to break the deadlock. I agree with Professor Coyle that where disagreements on crucial questions of history and law arise in the negotiations and have not been resolved within a reasonable time, a party should be able to ask the TCO, as the claims facilitation body, to require that the parties obtain the non-binding legal opinion of a jointly selected expert.⁴⁹ Moreover, when the impasse continues after consensual dispute resolution methods have been attempted, it would be best, in my view, if a party could request a binding resolution, either from a federal claims tribunal if one has been established, or from a third-party arbitration process established by Ontario.

This dispute resolution structure would significantly improve the fairness of the land claims process in Ontario, but establishing key parts of it depends on federal-provincial cooperation. For example, the provincial and federal governments would have to agree to binding arbitration for claims. The provincial government would be extremely unlikely to agree to be subject to binding arbitration if the federal government does not, and it would be unfair in any event. Moreover, given that the federal parliament has exclusive jurisdiction over “Indians, and Lands reserved for the Indians,” binding arbitration within the Ontario process would probably have to be authorized by federal legislation.⁵⁰

4.6.3 Legal Liabilities

The settlement of land claims in Ontario is often impeded because the federal and provincial governments do not agree on their respective legal liabilities. It is very difficult, and in my view inappropriate, to try to resolve disputes of this kind by political means. Such disputes are best resolved by professional and independent arbitration, and I urge the federal and provincial governments to

agree to use binding arbitration by a mutually chosen arbitrator. The “honour of the Crown,” a principle that the Supreme Court of Canada says should guide relations with Aboriginal peoples, must surely mean that disputes between the two faces of the Crown should not be a barrier to rectifying injustices to Aboriginal peoples.

4.6.4 Benchmarks and Policies

Federal-provincial cooperation to establish a common registry and agreed-upon instruments for settling legal disputes would go a long way to improving the land claims process in Ontario.

Another helpful initiative would be federal-provincial collaboration in working out benchmark time periods for each stage of the claims process, and common, or at least consistent, policies and processes.

I believe that this kind of collaboration is more likely if the participants are independent federal and provincial commissions rather than government departments.

Recommendations

1. The provincial government should establish a permanent, independent, and impartial agency to facilitate and oversee the settling of land and treaty claims in Ontario. The agency should be called the Treaty Commission of Ontario.
2. The Treaty Commission of Ontario should be established in a provincial statute as an independent agency reporting directly to the Legislative Assembly of Ontario. The Treaty Commission of Ontario should have permanent administrative, legal, and research staff and should be fully independent from the governments of Canada, Ontario, and First Nations. The statute should specify that the purpose of the Treaty Commission of Ontario is to assist Ontario in discharging its treaty responsibilities.
3. The provincial government should make every reasonable effort to establish the Treaty Commission of Ontario with the full cooperation of the federal government. If that is not possible, the provincial government should establish the Treaty Commission of Ontario on its own in cooperation with First Nations in Ontario.
4. The governments of Ontario, Canada, and First Nations should jointly select

the head of the Treaty Commission of Ontario—the Treaty Commissioner of Ontario. The selection process should be set out in the statute following discussions among the parties. The Treaty Commissioner should serve for a fixed but renewable term and should be removed only upon agreement by First Nations and the Legislative Assembly of Ontario.

5. The Treaty Commission of Ontario should be inaugurated in a prominent and ceremonial way. The ceremony should recall the 1764 Treaty of Niagara and renew its promises of mutual support and respect.
6. The Treaty Commission of Ontario should be given a four-part, strategic mandate:
 - a. The TCO should be given the authority to assist governments and First Nations, independently and impartially, in developing and applying a wide range of tools and processes to clarify and settle issues in an expeditious and cooperative way. In furtherance of this mandate, the TCO should be given the authority to prioritize, consolidate, or batch claims, in whole or in part, to encourage joint fact-finding and historical research, to identify and find consensual ways of dealing with issues common to claims associated with a particular treaty or region, and to promote interest-based settlements.
 - b. The TCO should be given the mandate to improve the efficiency and cost-effectiveness of the land claims process in Ontario. The TCO should be given the authority to work with parties to establish and publish benchmarks for processing claims and to require parties to use various forms of dispute resolution, binding as well as non-binding, when the benchmarks are not met.
 - c. The TCO should be given the mandate to make the claims process accountable and transparent to all Ontarians.
 - d. The TCO should be given a broad mandate to undertake public education about treaties, treaty relationships, and land claims in Ontario. The TCO should be given the specific authority to develop programs about treaty history designed to be part of the Ontario school curriculum.
7. The provincial and federal governments should commit sufficient resources to the TCO to enable it to achieve its objectives.

8. Access to the Ontario land claims process should depend entirely on whether the documentation filed by the First Nation provides *prime facie* evidence that there has been a breach of the legal obligations of the Crown.
9. The provincial government should improve public education about its land claim policies.
10. The provincial government should commit sufficient funds to enable the Ontario land claims process to resolve claims within an acceptable period. This includes funding for First Nations to participate in the land claims process and for compensation for breaches of legal obligations by the Crown.
11. The provincial government and the TCO should work together to develop a business and financial plan for the Ontario land claims process. The objective would be to estimate the resources needed to resolve claims and to meet reasonable benchmarks during the land claims process.
12. The federal government should cooperate fully with the provincial government and First Nations in Ontario to establish the Treaty Commission of Ontario and promote its effectiveness.
13. The federal and provincial governments should work with the TCO and any equivalent federal agency to improve the efficiency, effectiveness, and fairness of the federal and provincial land claims processes. Together, they should undertake to do the following:
 - a. Establish a common registry for federal and Ontario land claims.
 - b. Establish a dispute resolution process that includes access to non-binding and binding resolution.
 - c. Use binding arbitration to determine the legal liabilities of the federal and provincial governments.
 - d. Develop common or consistent benchmarks and policies for federal and Ontario land claims.

The provincial government should make every reasonable effort to seek the federal government's cooperation on these issues. If that cooperation is not possible, the provincial government should proceed to address these issues on its own in cooperation with First Nations in Ontario.

Endnotes

- 1 Province of Ontario, Ontario Native Affairs Secretariat, “The Resolution of Land Claims in Ontario: A Background Paper” (Inquiry project), p. 6.
- 2 I appreciate that statistical “box scores” on complex issues can sometimes be misleading. In this instance, however, I believe that this analysis is an appropriate measure of the historical record.
- 3 Michael Coyle, “Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future” (Inquiry research paper), p. 52. Professor Coyle’s data are drawn from the Ontario Native Affairs Secretariat website and are presented in Appendix 6 of his paper.
- 4 *Ibid.*, p. 56.
- 5 Indian and Northern Affairs Canada, “Mini Summary by Province, Specific Claims Branch,” <http://www.ainc-inac.gc.ca/ps/clm/msp_e.html>.
- 6 The allegations include failure to provide land as required by treaty; taking of reserve land without a proper surrender; failure to live up to the terms of a reserve land surrender; failure to protect reserve lands (for example from flooding); and mismanagement of First Nation trust funds garnered from land surrenders.
- 7 A leading example of such a claim is the Algonquins of Golden Lake claim to 3.4 million hectares of the Ottawa Valley.
- 8 More than thirty claims allege that a First Nation did not receive the reserve lands to which it was entitled, which means Ontario has wrongly received lands; over twelve claims allege damage to reserve lands from flooding resulting from provincially authorized water projects; at least six claims assert that Ontario built highways across reserve lands, either without proper legal authority or without paying compensation; and at least six claims concern alleged failures by Ontario either to sell surrendered reserve lands or to pay the proceeds of the sale to the First Nation.
- 9 Province of Ontario, Ontario Native Affairs Secretariat.
- 10 *Ibid.*, p. 22.
- 11 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 54.
- 12 Province of Ontario, Ontario Native Affairs Secretariat, p. 35.
- 13 *Ibid.*, pp. 32-4.
- 14 *Ibid.*, p. 22.
- 15 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 54.
- 16 Province of Ontario, Ontario Native Affairs Secretariat, pp. 25-7.
- 17 *Ibid.*, p. 23.
- 18 Information from Ontario Native Affairs Secretariat, January 2007 (on file with the Inquiry), update to its report of April 2005.
- 19 Province of Ontario, Ontario Native Affairs Secretariat, p. 27. The table shows that between 1973 and 1985, there were twenty-six active land claims. During this period, no settlements were concluded and the province was only able begin negotiations on two claims. By way of contrast, in the period between 1996 and 2004, there were eighty-six active claims, thirty-six of which had passed through legal review, including nine agreements in principle and five final agreements.
- 20 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 48. See also Province of Ontario, Ontario Native Affairs Secretariat, p. 19.
- 21 Chiefs of Ontario Part 2 submission, pp. 23-4.

- 22 Indian and Northern Affairs Canada, “Backgrounder, Canadian Centre for the Independent Resolution of First Nations Specific Claims,” <http://www.ainc-inac.gc.ca/nr/prs/s-d2003/02433bk_e.html>.
- 23 Chiefs of Ontario, Grand Council Treaty #3, “Reconciling the Relationship” (Inquiry project), p. 6.
- 24 Ibid.
- 25 Province of Ontario, Ontario Native Affairs Secretariat, p. 7.
- 26 I discuss the principles of treaty interpretation enunciated by the Supreme Court of Canada in chapter 3.
- 27 Province of Ontario, Ontario Native Affairs Secretariat, p. 10.
- 28 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol. 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996), Part One, recommendation 2.2.15.
- 29 Canada. Indian and Northern Affairs Canada. *Gathering Strength: Canada’s Aboriginal Action Plan* (Ottawa: 1997), p.18.
- 30 The BC Treaty Commission’s most recent report is: *Six Perspectives on Treaty Making* (Vancouver: BC Treaty Commission, 2006).
- 31 On the establishment of the BC Treaty Commission, see Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 1996).
- 32 Saskatchewan. Treaty Commissioner of Saskatchewan, *Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: October, 1998), p. 3.
- 33 Indian and Northern Affairs Canada, News Release, November 19, 2003, “Memorandum of Agreement Signing for Treaty Relations Commission in Manitoba” <<http://www.ainc-inac.gc.ca/nr/prs/s-d2003/2-02438e.html>>.
- 34 Province of Ontario, Ontario Native Affairs Secretariat, p. 35.
- 35 Coyle, “Addressing Aboriginal Land and Treaty Rights,” pp. 41-7. The Indian Commission of Ontario (ICO) was established by a resolution of the Chiefs of Ontario and parallel orders-in-council by the federal and provincial governments in 1978. Professor Coyle’s paper summarizes the mandate and history of ICO.
- 36 Ibid., p. 45.
- 37 I discuss the educational mandate of the Treaty Commission of Ontario in chapter 7.
- 38 See generally the BC Treaty Commission, “Funding,” <http://www.bctreaty.net/files_3/funding.html> (accessed December 2006).
- 39 See Michael Coyle, “Senate Committee Submission on the Specific Claims Process,” October 3, 2006, <<http://www.law.uwo.ca/info-news/senatesubmissioncoyle1.html>> (accessed February 16, 2007). Although the federal review of claims is based solely on legal/historical considerations, it appears to be at least as slow as the Ontario process, if not slower. Based on data provided by Indian and Northern Affairs Canada, the Ontario claims still under legal review were, on average, filed eight and a half years ago.
- 40 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 38. Since the federal government does not have jurisdiction over provincial Crown lands, it negotiates claims that seek only monetary compensation. This, of course, makes it of limited value to First Nations in Ontario, which often seek to recover land and access to resources through claims.
- 41 Province of Ontario, Ontario Native Affairs Secretariat, p. 12. For example, the Secretariat reported that as soon as negotiations begin, “key stakeholders” are contacted. This notice initiates “a process of public consultation that will extend through the entire settlement negotiation and implementation process.” This public consultation dimension of the process involves a range of approaches, including teleconferences,

newsletters, websites, and side-tables where stakeholders can discuss issues of concern with the parties.

- 42 Ontario Secretariat for Aboriginal Affairs, “Ontario’s Approach to Aboriginal Land Claims” <<http://www.nativeaffairs.jus.gov.on.ca/english/negotiate/approach.htm#private>> (accessed February 16, 2007).
- 43 Ibid., “Six Nations (Caledonia) Negotiations, Frequently Asked Questions,” <<http://www.nativeaffairs.jus.gov.on.ca/english/caledonia/faq.htm#douglasreek>>.
- 44 Ibid., “Ontario’s Approach to Aboriginal Land Claims.”
- 45 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 54.
- 46 See note 22.
- 47 Ontario. *Ontario’s New Approach to Aboriginal Affairs* (Toronto: Queen’s Printer of Ontario, Spring 2005).
- 48 Chiefs of Ontario Part 2 submission, p. 22.
- 49 Coyle, “Addressing Aboriginal Land and Treaty Rights,” p. 59.
- 50 Ontario has used this approach in the past, adopting parallel legislation with Canada to address First Nation land issues, as in the *Indian Lands Agreement Act*, S.O. 1988, c. 39, and its federal counterpart.