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Article

Constitutional Reconciliation and Land Negotiations: Improving the Relationship between the **Aboriginal** Peoples and the Government of Ontario

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At first blush, land claims are anything but unifying. And yet, at the heart of every claim is the acknowledgement of a relationship and the desire to explore greater mutuality. The act of settling a land claim is an act of reconciliation across history and societies. Indeed, the settlement of land claims is part of the reconciliation of ***Canada's*** *existence with the prior occupation of the land by* ***Aboriginal*** *peoples. Negotiation is uniquely suited to this purpose for it is enormously flexible and demands responsibility on the part of all parties for the outcome.*

-- Ontario Native Affairs Secretariat, *The Resolution of Land Claims in Ontario: A Background Paper* (Ontario: Ontario Native Affairs Secretariat, 2005), at 4-5.

1. INTRODUCTION

Aboriginal reconciliation in **Canada** in contemporary times embodies the objective of addressing historical wrongs suffered by **Aboriginal** peoples due to colonial imposition of sovereignty. Historically, relations between **Aboriginal** peoples and the colonizing powers were rooted in cooperative efforts, with land treaties, peace-and-friendship agreements, trade arrangements, and military alignments between the original inhabitants and settlers of what is now **Canada**. Based on a nation-to-nation relationship rooted in the *two-row wampum* tradition of autonomy, mutual respect, and friendship, original interactions between **Aboriginal** peoples and newcomers were ubiquitous and largely beneficial for all parties concerned. As Robert Williams Jr. describes,

> [w]hen the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship, and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs, and their ways. The other, a ship, will be for the white people and their laws, their customs, and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel. [FN1]

The *Royal Proclamation, 1763* [FN2] stemmed, in part, from this depiction of the **Aboriginal**-settler relationship. While the early relationship between **Aboriginal** peoples and the colonizing powers entailed the recognition of the primacy of treaties and alliances between nations, the *Proclamation* itself mirrored significant developments that had occurred over time in the **Aboriginal**-Crown relationship. As noted by Brian Slattery, "[t]he *Proclamation*' s provisions re-

flect[ed] the common law principles that had crystallized after a century and half of dealings between Indigenous American peoples and the British Crown." [FN3] Specifically, the overarching purpose of the *Proclamation* was to address issues surrounding **Aboriginal** title in light of the "territorial" and "political" divisions that had developed between the **Aboriginal** and settler communities. The *Proclamation* served to recognize the existence of **Aboriginal** title, namely the exclusive right of **Aboriginal** communities to any of their territories that had not been ceded to the Crown. Ultimately, the **Aboriginal**-Crown relationship embodied in the *Proclamation* served to protect **Aboriginal** lands and provide a mechanism for the surrender of those lands to the Crown, when the Crown determined that further territory was needed for settlement. [FN4] As summarized by Slattery:

> The *Proclamation* addressed a situation in which there were broad factual lines of division between settler communities and Indigenous peoples. The division was both territorial and political. British and French settlements were still relatively small and localized, concentrated along the eastern seaboard and riverbanks. The colonies were governed by their own systems of law and government, based on models imported from the mother countries. Although much of the vast hinterland was claimed by the British Crown, building on the pretensions of its French predecessor, in reality the interior was still largely occupied and controlled by independent Indigenous groups, living under their own laws and systems of government. [FN5]

The Treaty of Niagara followed suit one year after the *Proclamation*, recognizing the distinct sovereignty of **Aboriginal** and European nations as originally exemplified in the *Proclamation* and through a new Covenant Chain of Friendship. Both the *Proclamation* and the Treaty of Niagara attempted to placate **Aboriginal** concerns over potential infringement of **Aboriginal** title and territorial rights. While *oral* emphasis at Niagara was placed on the importance of reconciling the **Aboriginal**-settler relationship, including the delineation and protection of respective territories and jurisdiction, Crown control was enforced through carefully scripted portions in *printed* English, enhancing more wide-ranging European "sovereignty" and "dominion." [FN6]

The *Proclamation* and the Treaty of Niagara would eventually form the basis for modern-day land negotiations in **Canada**, but not before the legitimacy of the original intent of these historical treaties would fall into disrepute. Over time, the **Aboriginal**-Crown relationship disintegrated alongside expanding European power and influence, in part strengthened by a significantly diminished **Aboriginal** population due to the ravages of disease and conflict. The Crown asserted ever-increasing sovereignty, dismantling the precepts on which the *Proclamation* and Treaty of Niagara were built. The Two Row Wampum treaties were abandoned, **Aboriginal** peoples were dispossessed of their lands, and the strength of **Aboriginal** sovereignty was obliterated.

The *St. Catharine's Milling* [FN7] ruling, handed down by the Judicial Committee of the Privy Council in 1888, held that the *Proclamation* was the original source of **Aboriginal** title. **Aboriginal** title was nothing more than "a personal and usufructuary right," constituting a mere burden on Crown interest in the land. [FN8] It was not until the Supreme Court of **Canada's** *Calder* [FN9] ruling in 1973 that the significance of **Aboriginal** title and contemporary land negotiations came to the fore once more, ultimately resulting in an about-face for Canadian government policy. A new era of **Aboriginal** land negotiations began, starting with a government policy on the settlement of claims in areas where **Aboriginal** title was unextinguished. [FN10] Prior to that time, claims were dealt with on an *ad hoc* basis, with few ever being resolved. The Ontario government did not establish an official policy approach for settling claims until 1976, following the federal government's lead. Since that time, the rate of successful settlement of Ontario land claims has been relatively low, with the number of **Aboriginal** claims rapidly increasing, particularly in recent years.

Despite seemingly noble-sounding rhetoric on the part of the Canadian federal and provincial governments, **Aboriginal** discontent with government approaches to addressing land claims continues to intensify, with blockades and protests becoming increasingly popular among **Aboriginal** peoples as tools to convey their frustration with the negoti-

ations process. This hard-line stance has been especially pervasive in the last several years in Ontario, notably with political protests related to Tyendinaga and Six Nations claims. These actions reflect a larger problem affecting the land negotiations process in Ontario. They speak to growing tensions between **Aboriginal** peoples and the province as well as a deteriorating **Aboriginal**-Crown relationship, ultimately underlining the need to find workable solutions to improve the efficiency and effectiveness of the process as a whole. [FN11]

These conflicts are particularly troubling given that **Aboriginal** lands are at the heart of **Aboriginal** identity and many **Aboriginal** peoples are indeed committed to resolving land disputes through negotiations. As stated by the Royal Commission on **Aboriginal** Peoples (RCAP), based on nationwide consultations and hearings with **Aboriginal** communities,

> **Aboriginal** people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.
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> ...
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> The fundamental concern of **Aboriginal** people, as expressed throughout the hearings, was that the resolution of land and resources concerns -- including the recognition, accommodation and implementation of **Aboriginal** rights to and jurisdiction over lands and resources -- is absolutely critical to their goals of self-sufficiency and self-reliance. [FN12]

This paper asks the following interrelated questions: What does **Aboriginal** reconciliation entail? What role does Ontario play in negotiating **Aboriginal** land claims in the province? Is it possible to improve the relationship between **Aboriginal** peoples and Ontario in the context of land negotiations, and if so, how? In response, the paper provides an in-depth evaluation of that process in Ontario, with an eye to determining what **Aboriginal** reconciliation entails and how the negotiations process might be improved in the context of land claims in the province. It is argued that significant adjustments to the land negotiations process in Ontario are necessary in order to reconcile the **Aboriginal**-Crown relationship in the province.

Subsequent to an analysis of the origins and essence of **Aboriginal** reconciliation, a brief assessment of the constitutional scope of Ontario provincial powers in negotiating land agreements is undertaken, alongside an evaluation of the mandate and objectives of the Ontario Ministry of **Aboriginal** Affairs. Especially notable at this stage are the relevant Ontario policies that affect the **Aboriginal** land negotiations process as a whole. Additionally, data are provided on the status of claims in the province. The final portion of the paper takes a critical approach to the land negotiations process in Ontario, assessing areas for improvement alongside crossnational comparisons on relevant policies and data on the status of claims in other provinces and territories. This cross-national comparative approach allows for a more in-depth understanding of the land negotiations process in other Canadian jurisdictions, while simultaneously assisting in the formulation of concrete recommendations for the improvement of that process in Ontario. This, in turn, addresses the objectives of **Aboriginal** reconciliation and the improvement of the **Aboriginal**-Crown relationship in the province.

2. ABORIGINAL RECONCILIATION: CONSTITUTIONAL ORIGINS, EXPRESSION, AND PURPOSE

(a) Aboriginal Reconciliation and Supreme Court Jurisprudence

Aboriginal reconciliation as a constitutional concept originates in section 35(1) of the *Constitution Act, 1982*, [FN13] which recognizes and affirms **Aboriginal** and treaty rights. [FN14] Generally speaking, there are two broad models of **Aboriginal** reconciliation. The first refers to the correction of historical wrongs in order to create and develop a

new relationship between **Aboriginal** peoples and non-**Aboriginal** Canadians. The second involves the coalition of **Aboriginal** and treaty rights with Crown sovereignty. [FN15] As held by the Supreme Court of **Canada**, section 35 attempts to reconcile "the pre-existence of [**A]boriginal** societies with the sovereignty of the Crown." [FN16] At its core, *constitutional reconciliation* in an **Aboriginal** context seeks to balance Canadian legislative authority and the "sovereignty of the Crown" with the prior occupation of **Aboriginal** peoples in what is now **Canada**. By extension, *treaty constitutionalism*, or *treaty federalism*, places primary emphasis on the negotiation of treaties or agreements, rather than litigation, in seeking to resolve **Aboriginal**-Crown conflicts over contested jurisdiction. Canadian governments and the Supreme Court of **Canada** have both expressed preference for negotiation over litigation in settling **Aboriginal** land claims and governance issues. [FN17]

Treaty federalism is rooted in historical treaty negotiations and concomitant **Aboriginal**-Crown relationships, prior to which **Aboriginal** sovereignty and autonomy were acknowledged. [FN18] Where treaties were not finalized in **Canada**, including in most of British Columbia, the assertion of Crown sovereignty was assumed to have extinguished **Aboriginal** sovereignty. According to English common law, which forms the basis of Canadian common law, there are four primary means through which new territories may be acquired by states: conquest, cession or formal transfer, annexation or assertion of sovereignty without military action, or through settlement based on the presumption that the territory in question was previously unoccupied. [FN19] This latter "settlement thesis" is also known as the doctrine of *terra nullius*, a doctrine on which **Canada** has relied primarily in order to justify the acquisition of Crown sovereignty. By extension, where territories are subjected to this doctrine, the underlying assumption is that any inhabitants are too "primitive" to exercise sovereignty, to possess political rights or underlying title that might require recognition by colonial authorities. [FN20]

The Supreme Court first addressed **Aboriginal** reconciliation in *Sparrow* [FN21] through the justification-of-infringement test. The Court found that legislative infringements of **Aboriginal** rights must be supported by valid objectives while simultaneously upholding the Crown's fiduciary duty to **Aboriginal** peoples, [FN22] thereby tempering the impact of constitutional recognition of **Aboriginal** and treaty rights on Canadian legislative authority. [FN23] Several years later in *Van der Peet*, [FN24] the Supreme Court created the "integral to the distinctive culture" test requiring that constitutionally protected **Aboriginal** rights other than title be historically rooted in pre-**Aboriginal**-European contact practices, customs and traditions of distinctive **Aboriginal** cultures. The rationale behind this test was that reconciliation could not be achieved if constitutional protection were granted to **Aboriginal** practices, customs, or traditions that were not fundamental components of the **Aboriginal** cultures in question. [FN25]

The Supreme Court has tied the justification of infringements to the goal of **Aboriginal** reconciliation, but usually to the detriment of **Aboriginal** and treaty rights. [FN26] In *Van der Peet*, the dissenting judgment of McLachlin J., as she then was, addressed this issue. Specifically, while McLachlin J. argued for reconciliation between the prior occupancy of **Aboriginal** peoples and Crown sovereignty, she emphasized reconciliation based on the negotiation of treaties and of a form that recognized equally **Aboriginal** and non-**Aboriginal** legal perspectives. She stated:

> This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of [**A]boriginal** claims.
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> ...
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> The process must ... consider the non-[**A]boriginal** perspective -- how the [**A]boriginal** right can be legally accommodated within the framework of non-[**A]boriginal** law. Traditionally, this has been done through the treaty process, based on the concept of the [**A]boriginal** people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together .... [U]ntil we have exhausted the traditional means by which [**A]boriginal** and non-[**A]boriginal** legal perspect-

> ives may be reconciled it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode [**A]boriginal** rights seriously. [FN27]

Justice McLachlin also criticized the majority ruling of Lamer C.J. in *Van der Peet* with regard to the scope of legitimate infringement of **Aboriginal** rights, most notably in light of the fiduciary duty of the Crown:

> "In the right circumstances", themselves undefined, governments may abridge [**A]boriginal** rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile [**A]boriginal** and non-[**A]boriginal** interests might pass muster. [FN28]

Couched in critical terms, McLachlin J. sought to restore balance to the process of **Aboriginal** reconciliation by drawing attention to those components of the majority ruling that she considered to be fundamentally flawed. In particular, for McLachlin J., the honour of the Crown and corresponding fiduciary duty were fundamental in fairly and justly seeking **Aboriginal** reconciliation through negotiation. [FN29]

Although Lamer C.J., in *Van der Peet*, held that true reconciliation would allow for equal weight to be placed on both **Aboriginal** and common law approaches to **Aboriginal** rights, [FN30] the formulation and application of the "integral to the distinctive culture" test has been much less balanced in subsequent rulings. Instead, little significance has been accorded to **Aboriginal** perspectives, [FN31] and the Supreme Court arguably has used its constitutional interpretation of reconciliation to permit increased limitations on **Aboriginal** and treaty rights. For instance, the constitutional interpretation of **Aboriginal** reconciliation was different in *Gladstone*, [FN32] wherein the Supreme Court expanded its list of legitimate legislative infringements of **Aboriginal** rights, achieving a reinterpretation of **Aboriginal** reconciliation. [FN33] In *Delgamuukw*, the Court held that "accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure'," [FN34] quite simply because of the unquestionable "underlying title" of the Crown, [FN35] ultimately justifying further infringements on **Aboriginal** rights, including **Aboriginal** title. As contended by Kent McNeil,

> ... one can see how the Chief Justice used the concept of reconciliation to envisage justification of almost any kind of infringement of **Aboriginal** title. Even "the conferral of fee simples for agriculture, and of leases and licences for forestry and mining" on **Aboriginal** title lands, was contemplated by him. So despite its constitutional status, **Aboriginal** title has been rendered more vulnerable than common law real property interests, all in the name of reconciliation. [FN36]

The Supreme Court further limited **Aboriginal** treaty rights in *Marshall II*, [FN37] wherein various aspects of the *Marshall I* [FN38] ruling were clarified. While the Court held in *Marshall I* that the treaty right to fish should be limited to obtaining a moderate livelihood, [FN39] in *Marshall II*, the Court relied on its reinterpretation of reconciliation in *Gladstone* to justify broader infringements of **Aboriginal** treaty rights, specifically in relation to the allocation of fishery resources. [FN40] In *Marshall II*, the Court held that reconciliation justified allocation of fishery resources to non-**Aboriginal** peoples, even if it infringed treaty rights, because non-**Aboriginal** people had been involved in commercial and recreational fishing at the time of and since the Mi'kmaq Treaties of 1760-61. [FN41] Yet, as asserted by McNeil, "subjecting **Aboriginal** and treaty rights to non-consensual redistribution of the substance of those rights to other Canadians for purposes like the pursuit of economic and regional fairness makes a mockery of the constitutional protection that those rights are supposed to enjoy." [FN42] The Court's conception and reinterpretation of **Aboriginal** reconciliation has served to increasingly undermine the special, constitutionally protected status of **Aboriginal** and treaty rights embodied in section 35(1). It was only with *Sappier* and *Gray* [FN43] that the Supreme Court relaxed slightly the "integral to the distinctive culture" test, with Bastarache J., writing for the Court, [FN44] urging courts to be "cautious in considering whether the particular [**A]boriginal** culture would have been fundamentally altered had the gathering activity in ques-

tion not been pursued." [FN45]

The Supreme Court of **Canada** has advanced a more expansive notion of reconciliation in three other relatively recent cases: *Haida*, [FN46] *Taku River*, [FN47] and *Mikisew*, [FN48] though in the context of fiduciary duty and the honour of the Crown. As originally laid out in *Guerin*, "a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf." [FN49] The Supreme Court later extended the Crown's fiduciary obligation to include the protection of **Aboriginal** and treaty rights in *Sparrow*. [FN50]

However, there are limits to the fiduciary doctrine, specifically when the Crown has responsibilities to the larger public or other groups of interest. As argued by Peter Hogg and Patrick Monahan, the Crown is more often in a political trust rather than a legally enforceable trust. [FN51] Timothy Huyer summarizes a fiduciary obligation as "rightfully exist[ing] when the Crown has a trust-like responsibility on behalf of a First Nation and where the exercise of the Crown's discretion is not in conflict with its broader public policy mandate." [FN52] The Supreme Court attempted to clarify further the fiduciary relationship in *Wewaykum*, [FN53] where Binnie J., speaking for a unanimous Court, found that the purpose of the fiduciary duty is "to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of [**A]boriginal** peoples," but at the same time, the fiduciary obligation "does not exist at large but in relation to specific Indian interests." [FN54]

Yet, this can leave **Aboriginal** interests unprotected where they do not fall under the protection of the Crown's fiduciary duty. The Supreme Court of **Canada** has applied the doctrine of the honour of the Crown in order to protect such rights, since the honour of the Crown is a much broader obligation than the Crown's fiduciary duty to **Aboriginal** peoples. Moreover, it is the honour of the Crown that is the source of governmental duty to consult, rather than a fiduciary obligation. [FN55]

In each of *Haida*, *Taku River*, and *Mikisew*, the Court has held that the Crown must consult **Aboriginal** peoples where **Aboriginal** or treaty rights might be infringed, in order to uphold the honour of the Crown. The overarching purpose of such consultation is to seek reconciliation, wherein the Crown is broadly obliged to consult with **Aboriginal** peoples in good faith, while making accommodations where necessary for **Aboriginal** peoples. In *Haida*, the duty to consult was broadened, wherein the Supreme Court held that the Crown's obligation occurs "when the Crown has knowledge, real or constructive, of the potential existence of the **Aboriginal** right or title and contemplates conduct that might adversely affect it." [FN56] *Mikisew* specified that the Crown must give adequate and timely notice of any potential impacts on the affected **Aboriginal** peoples. [FN57]

While the duty to consult has a low threshold, the Crown is not required to enter into extensive consultations with **Aboriginal** peoples in all instances. Consultation was addressed by the Supreme Court of **Canada** in *Delgamuukw*, [FN58] wherein Lamer C.J. held that a duty to consult and accommodate **Aboriginal** peoples exists in respect of **Aboriginal** title. Moreover, consultation and accommodation vary depending on the facts of the case at hand. [FN59] As further clarified in *Haida*, there is a range specifying the degree of consultation and accommodation that are required:

> At one end of the spectrum lie cases where the claim to title is weak, the **Aboriginal** right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding."
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> ...
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> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the **Aboriginal** peoples, and the risk of non-

> compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that **Aboriginal** concerns were considered and to reveal the impact they had on the decision. [FN60]

Yet, only the Crown is required to consult with and accommodate **Aboriginal** peoples; this requirement is not expected of third parties, although it may be in their best interests to participate in any consultation processes. [FN61] Even still, "[t]he honour of the Crown is always at stake in its dealings with **Aboriginal** peoples," and it is assumed that "the Crown must act honourably." [FN62] Consequently, the fiduciary duty can be viewed as a subset of the honour of the Crown. [FN63] Moreover, while the **Aboriginal** communities in question do not have a veto over any outcomes that may affect their lands or rights, [FN64] the process of consultation and accommodation is distinct from the justification test developed in *Sparrow*, *Van der Peet*, *Gladstone*, *Delgamuukw*, and the *Marshall* cases. The duty to consult exists before it is ever determined or justified that a proposed activity might infringe an **Aboriginal** or treaty right. As held by Binnie J. in *Mikisew*,

> Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights. [FN65]

The overarching purpose of consultation and accommodation, as laid out in *Haida*, *Taku River*, and *Mikisew*, is to achieve a level of reconciliation with **Aboriginal** peoples whose **Aboriginal** and treaty rights may be infringed. Extending from the concepts of treaty negotiations and treaty federalism, as noted above the Supreme Court has held that reconciliation entails the negotiation and just settlement of **Aboriginal** claims. In *Haida*, McLachlin C.J. held that

> [w]here treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of **Aboriginal** claims .... Treaties serve to reconcile pre-existing **Aboriginal** sovereignty with assumed Crown sovereignty, and to define **Aboriginal** rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition .... This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate. [FN66]

It would appear, therefore, that more recent Supreme Court of **Canada** jurisprudence has allowed for a more expansive conception of **Aboriginal** reconciliation, albeit in the context of consultation and accommodation, rather than justification of infringement of **Aboriginal** and treaty rights. This development arguably is broad enough to cover almost all aspects of the **Aboriginal**-Crown relationship. Yet, from a practical perspective, the honour of the Crown and the duty to consult with **Aboriginal** peoples and accommodate their interests does not guarantee that this will happen in practice. Nor does this duty guarantee adequate protection for **Aboriginal** and treaty rights, as the balancing of various interests still must occur, as was evident in *Taku River*, where economic value was considered more important than **Aboriginal** title and hunting and fishing rights. [FN67]

(b) Legal Scholarship and Aboriginal Reconciliation: An Expansive Interpretation

James Youngblood Henderson envisions treaty federalism and the role of reconciliation therein more broadly than the approach taken by the Supreme Court of **Canada**. He describes treaty federalism as including **Aboriginal**-Crown negoti-

ations, but extending beyond this, instead placing significance on genuine respect for and "consolidation" of **Aboriginal** perspectives and worldviews as part of the Canadian federation. [FN68] He challenges judicial approaches to reconciliation, asserting that they do little to disturb colonialist assumptions about **Aboriginal** peoples within **Canada**. He asserts the following, which is included at length due to its salience:

> To be an effective reconciliation of unity and diversity, a renewed federal system should establish a harmonious resolution between the First Nations' constitutional rights and the immigrants' perplexing colonial regime. Such a consolidation must have the explicit and clear consent of the existing Treaty First Nations as well as other First Nations.
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> ...
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> Without a balance between **Aboriginal** perspectives and the Eurocentric view, existing federalism reflects political domination and oppression built on colonial misunderstandings. Without a proficiency in indigenous worldviews, languages, rights and treaties, the Canadian legal system cannot equitably talk about authentic democracy. Past attempts to balance treaties and British legal customs and colonial conventions were contrived and superficial.
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> ...
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> Without **Aboriginal** perspectives on the treaties and their constitutional meaning, the existing political and legal perspectives will remain Eurocentric biases of the colonial era. Canadians need to conceptualize First nations in a post-colonial way, recognizing their **Aboriginal** rights, treaty rights and worldviews without losing sight of the maturity and future of **Canada**, the nation. [FN69]

Kiera Ladner makes similar contentions, although her analysis of reconciliation goes further, highlighting **Aboriginal** sovereignty and unrest instead of depictions of **Canada** as a unified nation. [FN70] With regard to the **Aboriginal**-Crown relationship, she asserts that

> [a]s change erupts, reconciliation will become increasingly necessary. Reconciliation will be necessary given that the stories of **Canada** which define and confine perspectives and political realities make it impossible to engage in any meaningful conversation which would resolve unrest and address Indigenous demands for the dismantling of the colonial order. There is no starting point or common position from which to begin as the first thoughts and principles of Indigenous nations run contrary to the first thoughts and principles of the Canadian nation(s). Worse yet, both contest the sovereignty and constitutional claims of the other. [FN71]

Aboriginal reconciliation serves as a foundational grounding for the **Aboriginal**-Crown relationship. Through reconciliation, however conceived, the overarching purpose is to generate and maintain a functional, respectful relationship between **Aboriginal** peoples and the Crown through land and governance negotiations. Difficulties arise, however, when different conceptions of **Aboriginal** reconciliation are at odds. Reconciliation, therefore, calls for a renewed **Aboriginal**-Crown relationship that more closely resembles historical treaty relationships, when **Aboriginal** legal perspectives and approaches to the negotiation of treaties were more fully respected. [FN72] Similarly, a renewed **Aboriginal**-Crown relationship that adequately respects the *sui generis* nature of **Aboriginal** and treaty rights is required. The RCAP outlined a similar argument as part of one of its final recommendations, only it called for a renewed relationship based on "mutual recognition":

> [T]he principle of mutual recognition ... calls on non-**Aboriginal** Canadians to recognize that **Aboriginal** people are the original inhabitants and caretakers of this land and have distinctive rights and responsibilities flowing from that status. It calls on **Aboriginal** people to accept that non-**Aboriginal** people are also of this land now, by birth and by adoption, with strong ties of love and loyalty. It requires both sides to acknowledge and relate to one another as partners, respecting each other's laws and institutions and co-operating for mutual benefit. [FN73]

As noted by the Honourable René Dussault, former co-chair of the RCAP, a broader vision of the constitutional ori-

gins of **Canada** was required in developing the RCAP's approach, so as to include **Aboriginal** peoples and their histories especially in relation to land and resources. [FN74] Reciprocity and sharing were at the forefront of the RCAP's approach, with an emphasis on "the interconnection of all things" alongside the "protection and enhancement of **Aboriginal** identity, languages, cultures, and ways of life." [FN75] Further, reconciliation was viewed as "a matter of trust," and "to succeed, this partnership approach required that partners from both sides leave their comfort zone, question long held views, put aside prejudices often inspired by ignorance and fear, and accept the other in his or her difference." [FN76] Overall, while this RCAP conception dealt more with a renewed relationship between **Aboriginal** and non-**Aboriginal** peoples in **Canada**, the basic underpinnings of mutual respect and partnership are just as relevant and significant to the **Aboriginal**-Crown relationship.

While the RCAP conception deals more with a renewed relationship between **Aboriginal** and non-**Aboriginal** peoples in **Canada**, the basic underpinnings of mutual respect and partnership are just as relevant and significant to the **Aboriginal**-Crown relationship. The same holds true in the context of **Aboriginal** land negotiations in Ontario, although matters are complicated further by potential provincial-federal jurisdictional conflicts, including competing constitutional responsibilities for **Aboriginal** peoples in the province.

3. ABORIGINAL LAND NEGOTIATIONS: ONTARIO'S CAPACITY TO NEGOTIATE AND RESOLVE CLAIMS

(a) Competing Federal and Provincial Jurisdictional Authorities

The jurisdictional division of powers between the Canadian federal and provincial governments is a significant component of the **Aboriginal** land negotiations process. The debate surrounding jurisdictional tensions, which are normally part of **Aboriginal** land claims, necessarily entails a very broad and complex spectrum of related case law and scholarship, a detailed discussion of which could easily be the topic of an entirely separate research undertaking. [FN77] The heart of the jurisdictional debate, in the context of **Aboriginal** land claims, is the determination of which level of government is liable for previous wrongdoing related to **Aboriginal** lands. The very fact of the division of powers means that usually one government alone cannot rectify historic wrongs as they pertain to **Aboriginal** treaties, and instead, both governments are involved in the resolution process. [FN78] These jurisdictional tensions have important ramifications for **Aboriginal** reconciliation inasmuch as they affect the success of the negotiations process and impact the **Aboriginal**-Crown relationship.

Jurisdiction can be exclusively exercised by one government or concurrently exercised, where it is shared between two or more governments, such as between the Canadian federal and provincial governments. When jurisdiction is held concurrently, the doctrines of paramountcy [FN79] and interjurisdictional immunity [FN80] apply in order to determine which government's laws prevail where conflicting jurisdiction exists. Sections 91 and 92 of the *Constitution Act, 1867* [FN81] delineate the federal and provincial division of powers. Specifically with regard to **Aboriginal** peoples, section 91(24) specifies exclusive federal legislative and executive authority over "Indians and Lands reserved for the Indians." This responsibility was originally given to Parliament because it was thought that the federal government was further from local interests, and therefore, would be more likely to deal fairly with **Aboriginal** peoples. [FN82] However, this does not isolate **Aboriginal** lands completely from provincial areas of jurisdiction. There are several subsections under section 92 which outline areas of provincial jurisdiction that directly impact **Aboriginal** land disputes and negotiations. For instance, section 92(5) covers the management and sale of provincial lands, section 92(13) deals with "[p]roperty and [c]ivil rights in the [p]rovince," while section 92(16) refers to "all [m]atters of a merely local or private [n]ature in the [p]rovince." Section 92A delineates "[n]on-renewable [n]atural resources, [f]orestry resources and [e]lectrical energy" as

falling under provincial authority, while section 109 covers provincial ownership of lands and natural resources.

When issues of **Aboriginal** and treaty rights are at play, especially those pertaining to land disputes, the constitutional waters are muddied by jurisdictional overlap and competing government responsibilities. Uncertainty or lack of clarity over the federal-provincial jurisdictional divide, and which government should control or administer certain lands in question, also exacerbates tensions and causes delays in the land negotiations process. The practical challenge of the federal-provincial division of powers as it relates to **Aboriginal** lands and land negotiations is determining which lands are "lands reserved" and which are not. Provinces may pass laws of general application falling within provincial jurisdiction that affect **Aboriginal** peoples, provided that they are not inconsistent with the *Indian Act*, [FN83] do not interfere with the "core" of **Aboriginal** identity, and do not single out **Aboriginal** peoples for special treatment. [FN84]

St. Catharine's Milling was the first major court decision, and the leading judicial ruling for approximately 100 years, affecting **Aboriginal** land rights in **Canada**. [FN85] At issue in *St. Catharine's Milling* was **Canada's** assertion that **Aboriginal** title to the area had been extinguished because of **Aboriginal** surrender under the provisions of Treaty 3 of 1873, and consequently, the interest in the contested lands had transferred to the federal Crown. Based on the federal authority under section 91(24), the federal Crown could administer treaty lands. Ontario challenged this federal assertion, maintaining that section 91(24) only pertained to parcels of land that had been specifically set aside as reserves, not treaty lands. [FN86]

The Judicial Committee of the Privy Council found that upon **Aboriginal** surrender of the lands in question, administration and control of the lands passed to the "original" owner, namely Ontario, because the underlying legal title had been "cleared" of the burden of **Aboriginal** title, reverting to the Crown in right of the Province, not **Canada**. [FN87] Subsequent to this ruling, if treaties were signed or reserve lands surrendered, the province could delay or interfere with the agreements, sometimes resulting in surrendered lands that were never sold as promised. Either way, these lands could remain under the control of the province. [FN88] The jurisdictional complications that arose from *St. Catharine's Milling* were significant and unresolved until a series of legislative agreements passed by Parliament and the Ontario government in 1924 that specifically clarified land issues and competing jurisdictional powers. [FN89] A subsequent agreement in 1986, and confirmed by corresponding legislation, [FN90] also further clarified federal and provincial jurisdictional responsibilities concerning land claims.

The Supreme Court's *Delgamuukw* ruling in 1997 fully clarified this jurisdictional matter. The case centred on the Gitksan and Wet'suwet'en Nations' claims to their traditional lands, asserting **Aboriginal** title and self-government rights that had never been surrendered or covered by treaty. [FN91] The Court found that **Aboriginal** title and **Aboriginal** title lands, including reserve lands, are at the heart of section 91(24) federal jurisdiction. As a result, provincial laws cannot apply to unextinguished **Aboriginal** title and rights, thereby limiting the constitutional capacity of provincial governments in respect of **Aboriginal** lands. [FN92] In 2006, in *Morris*, at issue was the application of provincial legislation of general application, by virtue of section 88 of *Indian Act*, that infringed the right of the Tsartlip Band in British Columbia to hunt. The Supreme Court held that treaty rights are also at the core of section 91(24) jurisdiction, and therefore provincial laws cannot apply in this respect. In *Tsilhqot'in Nation* at the British Columbia Supreme Court, **Aboriginal** title, hunting rights, and the **Aboriginal** right to trade were asserted over an area of the Cariboo Chilcotin region in British Columbia. The Court held that **Aboriginal** title and rights are at the core of section 91(24). [FN93]

Ultimately, these judicial rulings have significantly shaped the constitutional division of powers pertaining to **Aboriginal** and treaty rights. More specifically, the scope of federal jurisdiction has become much broader over time. [FN94] The result is that provincial governments must be more careful in passing legislation that could affect **Aboriginal** and treaty rights, since such rights fall under the core of section 91(24) federal jurisdiction.

It is against this backdrop of case law that the negotiation of **Aboriginal** land claims occurs across the country, including in Ontario. Through these cases, the Supreme Court has clarified to a great extent the authority of the federal government relative to the provincial governments in relation to **Aboriginal** and treaty rights. In the context of **Aboriginal** land negotiations, each claim that is submitted is unique and distinctive in its own ways and must be addressed on a case-by-case basis. Yet, it is apparent from the relevant case law that provincial governments do not have the constitutional authority that the federal government has in finalizing treaties. This, in turn, has considerable bearing on the responsibilities of the federal and provincial governments in resolving land claims. Since **Aboriginal** and treaty rights fall under the core of section 91(24) federal jurisdiction, then the federal government must hold the primary obligation in rectifying historical wrongs as they relate to land claims.

(b) Ontario Government Policy on Aboriginal Land Negotiations: An Historical Overview

As mentioned near the beginning of this paper, Ontario did not have any sort of policy direction for negotiating land claims until 1976, at which time a new Office of Indian Claims was created as part of the Ministry of Natural Resources. Even then, there was no official Ontario policy on **Aboriginal** land claims, but the Office of Indian Claims did receive a small number of land claims to resolve. In 1977, the provincial government established a Royal Commission, headed by Justice E. Patrick Hartt, to assess resource exploitation in northern Ontario. One of Justice Hartt's fundamental recommendations was rooted in the significance he attached to **Aboriginal** treaty rights and land claims. He advocated for negotiation of land claims over litigation, and the creation of a tripartite body with federal, provincial, and **Aboriginal** representatives to oversee the negotiations process, as well as the establishment of a secretariat to aid the tripartite body in negotiations. [FN95] In response to Justice Hartt's report, the Indian Commission of Ontario (ICO) was created in 1978, the mandate of which stemmed from a resolution between the Chiefs of Ontario and parallel Orders-in-Council of the federal and provincial governments. The ICO's first Commissioner was Justice Hartt, and its mandate was threefold: the Commission facilitated examination and resolution of issues that arose during negotiations, it provided a forum for the negotiation of **Aboriginal** self-government issues, and it served the larger Ontario public interest through education. [FN96]

Most claims that were facilitated by the ICO involved both the federal and Ontario governments, covering a wide range of land issues. The federal government usually participated under the auspices of its **specific claims** policy. [FN97] In 1988, the Ontario government transferred responsibility for negotiating land claims in the province from the ICO to the newly created Ontario Native Affairs Directorate, which later became known as the Ontario Native Affairs Secretariat (ONAS). It was not until this time that the Ontario government finally created a formal policy on the negotiation and resolution of **Aboriginal** land claims in the province, based on a three-stage historical, legal, and policy review. While this policy was never made public, if claims passed the three-stage review, the Minister Responsible for Native Affairs would approve the commencement of negotiations. [FN98] The ICO's operating budget peaked in the mid-1990s, and in 2000, the federal government failed to renew the relevant Order-in-Council, resulting in the closure of the ICO. [FN99]

(c) Aboriginal Land Negotiations in Ontario: Contemporary Policies and Approaches

Historically, the Minister Responsible for Native Affairs was also the Attorney General in the province. This was the case until 2006, when the Ontario government appointed David Ramsay as Minister of **Aboriginal** Affairs and Minister of Natural Resources. In 2007, the Ontario government created a new stand-alone Ministry of **Aboriginal** Affairs in the province. [FN100] A “new approach” to **Aboriginal** affairs had been embraced by the Ontario government in 2005 with a foundational policy document called *Ontario's New Approach to **Aboriginal** Affairs: Prosperous and Healthy **Aboriginal** Communities Create a Better Future for **Aboriginal** Children and Youth*. [FN101] This policy is still in place.

Among other aspects, the policy outlines a commitment to negotiation over litigation, alongside economic and community development as offshoots of the resolution process. Additional focus is paid to “effective” settlements and “good relations” between the negotiating parties. [FN102]

At the current time, the Ontario government provides all of its relevant **Aboriginal** land claims policies on the Ontario Ministry of **Aboriginal** Affairs website. [FN103] Most current policies originate in the policy framework completed by the Ontario government in 1998, following a review by **Aboriginal** organizations and the larger public. Based on this framework, the Ontario government defines a land claim as “a formal assertion by an **Aboriginal** community that it has a legal entitlement in respect of land.” [FN104] This definition contains two specific aspects: first, **Aboriginal** interest in the land is held by the community as a whole, not by individual members, and therefore, claims must be negotiated by authorized representatives on behalf of the entire community; second, a claim necessarily entails an **Aboriginal** assertion that the Crown has breached a legal obligation owed to the community. Ontario requires that a submitted claim include a clear statement on the nature of the land claim and its basis in law, along with an historical report and corresponding copies of historical documents outlining the circumstances surrounding the claim. [FN105]

The Ontario Ministry of **Aboriginal** Affairs receives three general types of claims: treaty-based claims, surrender for sale of reserve lands claims, and **Aboriginal** title claims. Notably, the Ministry does not classify claims as “specific” or “comprehensive” as does the federal government in its handling of claims. Instead, since most of Ontario's land mass is already covered by historical treaties, there have been no comprehensive claims submitted or negotiated in the province. Most claims are much more specific in nature, while none have dealt with self-government issues to date. [FN106] Treaty-based claims usually stem from disagreements between the **Aboriginal** community and the Crown over the terms of original treaties. **Aboriginal** assertions usually pertain to aspects of treaties that the Crown did not honour. This might include altering the size or location of reserves, flooding the land for hydroelectric power, or taking part or all of the land for public use, including for the development purposes, all without compensation. Surrender for sale of reserve lands claims arise from **Aboriginal** land that has been surrendered to the Crown in exchange for payment or sale in order to benefit the **Aboriginal** community, but which was never sold or paid for. In these instances, the **Aboriginal** community in question usually seeks compensation for or return of the land. **Aboriginal** title claims are the most complicated types of claims, since they contest the underlying Crown assertion that the lands in question were surrendered to the Crown, thereby contending that the **Aboriginal** interest in the land remains. [FN107]

Ontario maintains that it will meet any legal obligations it owes **Aboriginal** claimants. The Ontario review process allows for a determination of whether the government should undertake negotiations, beginning with an historical review of past events surrounding the claim and based on the original historical documents submitted. External historical research is a central factor at this stage, with particular emphasis placed on private rights and interests that may be attached to the land. According to a policy report submitted by the Ontario Native Affairs Secretariat to the Ipperwash Inquiry, “[a] decision to enter into negotiations that may remove land from the province's administration and control must be justified on the basis of fact and law and reveal a knowledge and consideration of the rights and interests of affected third parties.” [FN108]

Once the historical review is completed, all materials are referred to lawyers for an analysis of whether the province has any legal obligations. If the legal assessment yields a positive opinion in support of the submitted claim, Ontario conducts a policy assessment concerning third-party community interests and the risks involved if the claim is not negotiated. The potential for successful conclusion of a settlement that is in line with the government's policy direction is of primary concern at this stage, constituting the most subjective aspect of the review process. [FN109]

Ontario policies also emphasize the importance of costand time-effective approaches to settling land claims in order

to promote **Aboriginal** stability, self-reliance, and economic and community development. Private property will not be expropriated in order to achieve settlement, nor will leases, licences, or permits for Crown land or natural resources be revoked during their terms unless consent is received from the permit holders. The Ontario government places significant emphasis on public and third-party interests during negotiations processes through public consultation to enhance public involvement and to ensure that the process is accountable. The Ontario government also maintains its commitment to create a "public environment for economic development on and off reserve through the resolution of land claims." [FN110] Of note, Ontario chooses to focus on those claims that have a high potential for successful and lasting resolutions, while emphasising the need for closure and certainty in concluding settlements. [FN111] A "fast-track" process is in place for claims that involve no land compensation or where Ontario's monetary share of compensation is less than $2 million, [FN112] and some negotiating support is available to **Aboriginal** claimants through loans.

The federal government must accept claims for negotiation in order for them to proceed, which entails its own review process. This can cause further complications and additional delays if replication of historical and legal reviews occurs. However, attempts are made to coordinate government resources across the provincial and federal levels in order to improve efficiency in the resolution process. [FN113] Overall, the Ontario government maintains that the federal government "has primary responsibility for the resolution of **Aboriginal** land claims," [FN114] and as demonstrated above, the case law on the division of powers supports this premise. That said, there is still an important role for the provincial government to play.

(d) Aboriginal Negotiations and Settlement in Ontario: A Statistical Review

Since Ontario started reviewing **Aboriginal** land claims in the 1970s, there have been several negotiated and implemented agreements. Over time, the number of claims submitted has increased dramatically, while the rate of settlement has not. As a result, there is a significant backlog in the finalization of claims, despite Ontario Ministry policy goals to the contrary. *Table 1* provides data on the number of **Aboriginal** land claims that have been submitted to the Ontario government since 1973. Included are all those claims that are still under review, in negotiation, implemented, or awaiting implementation, as well as those files that are inactive, have been closed, or are in litigation. No data could be obtained on claims that have been dismissed by the Ontario government following the review process discussed above. Most notable about the data in *Table 1* is that 45.1 percent of claims are still at the review stage of the process, indicating where the largest backlog occurs. Only 6.8 percent of the claims have been fully implemented, with another 4.5 percent of claims awaiting implementation. Only 3 percent have reached the agreement-in-principle stage, while another 7.5 percent currently are being negotiated. The rest are either in litigation (22.6 percent), inactive (9 percent), or closed (1.5 percent).

Table 1. Status of Aboriginal Land Claims Received by the Ontario Government

Under Review	In Negotiation	Agreementin-Principle Reached	Awaiting Ratification	Awaiting Implementation	Implemented Agreements	Inactive Files	Closed Files	In Litigation
60	10	4	0	6	9	12	2	30

TOTAL: 133

Notes:

Data on inactive files, closed files, or claims in litigation are current as of March 2005. Other data are current as of 2008.

Source: Ontario Ministry of **Aboriginal** Affairs; correspondence with Research Coordinator, Ontario Ministry of **Aboriginal** Affairs (March 2008); Coyle, *supra* note 8 at 108-109.

Table 2 provides data that deal specifically with the claims currently under review by the Ontario government. As indicated, starting in 1995, the number of claims submissions began to increase significantly, but the review process has not kept pace. Currently, 6.7 percent of claims were submitted before 1990, while another 6.7 percent of claims were submitted before 1995, and they are still at the review stage of the process.

Table 2. Status of Aboriginal Land Claims under Review by the Ontario Government

Years Received	Number of Claims Received
1985-1989	4
1990-1994	4
1995-1999	18
2000-2004	21
2005-2008	13
TOTAL	**60**

Aggregate time for government review of claims (based on average): approximately 6 years.

Notes:

Claims have active status. Data are current as of 2008.

Source: Ontario Ministry of **Aboriginal** Affairs; correspondence with Research Coordinator, Ontario Ministry of **Aboriginal** Affairs (March 2008); Coyle, *supra* note 8 at 108-109.

With regard to those agreements that have been accepted for negotiation by the Ontario government, *Table 3* provides an in-depth look at those under negotiation, those that have reached the Agreement-in-Principle (AIP) stage, [FN115] and those in the process of being implemented, as well as those that have been fully implemented. Also included are the years when the claims were first submitted and the years for the most recent activity, as well as the total time frames since the claims were first submitted. For each stage in the process, an average time frame for completion is included. As evident, completion rates are very lengthy indeed, ranging from approximately fifteen to twenty years, regardless of the stage in the process. In fact, what is most striking is the fact that most of the agreements at the negotiations stage have been in process roughly the same amount of time as have fully implemented agreements. This would indicate that the negotiation process is actually becoming slower, despite government policy objectives to the contrary.

Table 3. Aboriginal Land Claims Submitted to the Ontario Government: Time Frames for Negotiation and Settlement by Claim Status, 1973-2008

Current Status	Agreement	Year Claim First Submitted	Year of Most Recent Activity	Time Frame (Years)
Implemented Claims	Nipissing	1973	1995	**22**
	Brunswick House	1976	1995	**19**
	Assabaska	1977	2000	**23**
	Garden River	1979	1994	**15**
	Whitefish River	1980	1998	**18**

	Mississauga #8	1983	1994	**11**
	Thessalon	1983	2000	**17**
	Big Grassy	1985	2000	**15**
	Wikwemikong	1986	1995	**9**

Average Time Frame for Full Implementation: 16.6 years

Agreements Being Implemented	Wahta	1981	2004	**23**
	Rainy River	1982	2005	**23**
	Manitoulin Island	1987	1990	**3**
	Tyendinaga	1995	2005	**10**
	Lake Nipigon	1994*	2005	**11**
	Sand Point	1984	2006	**23**

Average Time Frame to Reach the Implementation Stage: 15.5 years

Agreementin-Principle Reached	Temagami	1973	2000	**27**
	Wasauksing	1981	1998	**17**
	Pic Mobert	1983*	2002	**19**
	Rocky Bay	1983*	1998	**15**

Average Time Frame to Reach the Agreement-in-Principle Stage: 19.5 years

Claims Under Negotiation	Algonquin	1983	Current	**25**
	Fort William	1986	Current	**22**
	Haudenosaunee/Six Nations	1988	Current	**20**
	Pays Plat	1991	Current	**17**
	Wabigoon	1992	Current	**16**
	Michipicoten	2000	Current	**8**
	Stanjikoming	2006	Current	**2**
Average Time Frame Under Negotiation: 15.7 years				

Notes:

Awaiting confirmation of year from Ontario Ministry of **Aboriginal** Affairs.

Source: Ontario Ministry of **Aboriginal** Affairs; correspondence with Research Coordinator, Ontario Ministry of **Aboriginal** Affairs (March 2008); Coyle, *supra* note 8 at 108-109.

Table 4 provides a similar picture, only the data presented therein are based on **Aboriginal** land claims that have been received by the federal government, but which implicate the Ontario government. While the total volume of claims is roughly double that received by the Ontario government, the breakdown of claims is quite similar to the data presented in *Table 1*. As of 2007, 41.6 percent of the claims were under review. Only 7.5 percent were in negotiation, with 12.4 percent settled, and another 2.2 percent resolved through administrative remedy. [FN116] Dismissed claims constituted 8.9 percent, inactive files made up 2.9 percent of the claims, while 5.6 percent of the files had been closed. As with the cases submitted to Ontario, other than those claims under review, the next largest category of claims were in litigation, at 18.4 percent in 2007. Finally, one file is currently being reviewed by the Indian Claims Commission (ICC), [FN117] an independent, impartial body which facilitates negotiations and reviews federal government decisions on land claims at the request of **Aboriginal** claimants in an attempt to recommend some sort of settlement. [FN118]

Table 4. Status of Aboriginal Land Claims in Ontario, Received by the Federal Government, 1970-2007

Under Review	In Negotiation	Settled Claims	Administrative Remedy	Inactive Files	Dismissed	Closed	In Litigation	Under ICC Process
111	20	33	6	8	24	15	49	1

Total: 267

Notes:

Source: Indian and Northern Affairs **Canada**, **Specific Claims** Branch, *Public Information Status Report* (Ottawa: Ministry of Public Works and Government Services **Canada**, 2007).

Table 5 provides a federal-provincial comparison of percentage values based on comparable categories of claims submitted to Ontario or the federal government, implicating Ontario: those under review, in negotiation, settled, or in litigation, as well as inactive, dismissed, or closed files. Once again, these data provide a comparative snapshot of **Aboriginal** land claims that implicate the Ontario Crown. Those claims being dealt with by the Ontario Ministry of **Aboriginal** Affairs appear to be slower to proceed through the review and resolution process. There are more claims under review by the Ontario government and fewer that have been settled. At the same time, there are more claims submitted to Ontario that are now in litigation, but more under negotiation than at the federal level. It appears that the difference in this regard is found in the "Dismissed/Closed/Inactive" section of files, where the federal government has a much higher value. [FN119] The reasons behind these slight variations are unknown, but a review of the negotiations process in other Canadian jurisdictions may provide some illumination. This issue is discussed below.

Table 5. Aboriginal Land Claims Implicating Ontario: A Federal-Provincial Comparison

	Under Review	Under Negotiation	Settled	In Litigation	Dismissed/	Total Number of Claims
Claims Submitted to the Ontario Government	45.1%	10.5%[FN [FNa1]]	11.3%[FN [FNaa1]]	22.6%	10.5%	133

Claims Submitted to the Federal Government	41.6%	7.5%	14.6% FN [FNaaa1]	18.4%	17.4%	267

FNa1. Includes claims that have reached the AIP stage.
FNaa1. Includes claims that have been implemented or are awaiting implementation.
FNaaa1. Includes claims settled through negotiation or administrative remedy.

4. RESOLVING ABORIGINAL LAND CLAIMS IN ONTARIO: A CRITICAL ASSESSMENT AND SUGGESTIONS FOR ABORIGINAL RECONCILIATION

In light of Ontario's current policy approach to resolving land claims, and given the constitutional framework within which the province can negotiate **Aboriginal** land agreements, can the relationship between **Aboriginal** peoples and the Ontario government be improved? Can **Aboriginal** reconciliation be achieved in Ontario? Given the above data on the Ontario land claims resolution process, there are several conclusions that can be drawn, not only with respect to problems in the current process, but also regarding prescriptive solutions for improvement. A critical assessment of the **Aboriginal** land negotiations process in Ontario is best approached with three interrelated perspectives in mind: efficiency, effectiveness, and fairness. The efficiency of the land negotiations process is crucial, since it is indicative of how well the procedures in place work. It may also be symbolically representative of the Ontario government's dedication to resolve claims in a timely manner. A more efficient process is likely to be perceived as more effective, and therefore, efficiency and effectiveness are inextricably linked in this regard. Yet, efficacious negotiations also speak to the functionality of the resolution or outcome of the process. In other words, if the negotiations process is effective, it will produce workable solutions and final resolutions to claims that are welcomed and embraced by all negotiating parties. [FN120] This, in turn, relates to the fairness or perceived fairness of the negotiations process. A final agreement that is considered in some way unfair or unjust to one or more parties cannot be seen as reasonably successful. Negotiations that are efficient, effective, and fair can form the bedrock of working **Aboriginal**-Crown relations in Ontario, thereby leading to truly successful outcomes and **Aboriginal** reconciliation.

The significance of land claims resolution cannot be overemphasized especially in light of increasing **Aboriginal** unrest such as protests and blockades, many of which stem directly from failed or stalled land negotiations. One of the foundational legal maxims of Canadian law is that justice should be provided in a timely and efficient manner. Despite the fact that negotiations are altogether a unique process, an average of six years for the Ontario government to determine whether it will negotiate a claim is excessive. Further, most claims take approximately twenty years for final implementation to occur, which is tedious at best and outrageous at worst. The root sentiment among **Aboriginal** claimants, which goes to the heart of land grievances, is a profound sense of injustice: historical injustice in the mishandling of treaties and contemporary injustice when the process is so protracted that it indicates, purposefully or not, disinterest on the part of the Crown. [FN121] In the end, this undermines attempts at **Aboriginal** reconciliation. Similar contentions are summar-

ized well by the Honourable Justice Sidney Linden, Commissioner for the Ipperwash Inquiry:

> The evidence 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. [FN122]

As shown in the data presented above, the current land negotiations process in Ontario is a protracted affair. These delays are likely due to a variety of factors, including varying approaches taken by **Aboriginal** and government negotiators, the involvement and influence of **Aboriginal** communities in the negotiations process, and overall inefficiency in the process itself. [FN123] Despite the delays inherent in settling claims, the Ontario government has implemented a few measures to achieve more efficiency where possible. For instance, a "bundling" approach has been instituted, whereby land claims related to the same fact situations are assessed in tandem in order to avoid duplication of resources at the historical and legal review stages. The province also works with other parties, including the federal government, to undertake joint historical research if possible. Additionally, where minor changes to agreements are needed during the negotiations process, measures have been streamlined to speed up the approval process through the authorization of negotiators to initial relevant changes of the agreements in question. [FN124] Yet, despite these efforts, the rate of completion is still protracted, with the majority of backlogs occurring at the front end of the process during Ontario's three-stage review of claims.

Ontario is not the only government faced with this sort of backlog. As shown in *Table 4* and *Table 5*, the federal government also has a significant accumulation of claims which implicate Ontario in some respect. The same can be said for other provinces and territories. *Table 6* shows the number of land claims currently in process that have been submitted to the federal government implicating each relevant province and territory. [FN125] While these data speak directly to the federal government's ability to review and resolve land claims, the provincial or territorial governments are also involved in the negotiation and resolution processes, thereby involving the capacity of these governments to remedy the land disputes in question through tripartite negotiations. [FN126]

Table 6. Summary of Specific Land Claims Submitted to the Federal Government by Province or Territory, 1970-2007

Province	Under Review	In Negotiation	Settled Claims	Administrative Remedy	Inactive/ Dismissed/ Closed	In Litigation	In ICC Process	TOTAL
Prince Edward Island	0 (0%)	1 (50%)	0 (0%)	0 (0%)	1 (50%)	0 (0%)	0 (0%)	2
Nova	9	3	2	5	9	0 (0%)	0 (0%)	**28**

Scotia	(32.1%)	(10.7%)	(7.1%)	(17.9%)	(32.1%)			
New Brunswick	12 (40%)	6 (20%)	4 (13.3%)	2 (6.7%)	6 (20%)	0 (0%)	0 (0%)	**30**
Quebec	68 (58.6%)	4 (3.4%)	19 (16.4%)	3 (2.6%)	20 (17.4%)	0 (0%)	2 (1.7%)	**116**
Ontario FN [FNa1]	111 (41.6%)	20 (7.5%)	33 (12.4%)	6 (2.2%)	47 (17.6%)	49 (18.4%)	1 (0.4%)	**267**
Manitoba	25 (27.2%)	10 (10.9%)	35 (38%)	3 (3.3%)	17 (18.5%)	0 (0%)	2 (2.2%)	**92**
Saskatchewan	41 (28.5%)	13 (9%)	52 (36.1%)	1 (0.7%)	20 (13.9%)	2 (1.4%)	15 (10.4%)	**144**
Alberta	33 (25.6%)	12 (9.3%)	42 (32.6%)	2 (1.6%)	27 (20.9%)	10 (7.8%)	3 (2.3%)	**129**
British Columbia	306 (58.6%)	41 (7.9%)	88 (16.9%)	9 (1.7%)	60 (11.5%)	7 (1.3%)	11 (2.1%)	**522**
Yukon	4 (16%)	0 (0%)	7 (28%)	0 (0%)	14 (56%)	0 (0%)	0 (0%)	**25**
Northwest Territories	3 (27.3%)	1 (9.1%)	2 (18.2%)	4 (36.4%)	0 (0%)	1 (9.1%)	0 (0%)	11

Source: Indian and Northern Affairs **Canada**, **Specific Claims** Branch, *Public Information Status Report* (Ottawa: Ministry of Public Works and Government Services **Canada**, 2007).

FNa1. The data for Ontario are duplicated in this table for comparative purposes. Percentages may not equal 100% due to rounding. Currently, there are no **specific claims** in Newfoundland and Labrador. The *Labrador Inuit Land Claims Agreement* is a comprehensive agreement that was ratified in 2005.

The data demonstrate that the majority of provinces have the largest backlog of claims at the review stage of the process, but other than British Columbia, this generally does not hold true in the West. [FN127] The number of claims that have been concluded in Manitoba, Saskatchewan, and Alberta relative to the number of claims currently under review in

those provinces is striking. [FN128] With regard to claims in litigation, other than Alberta, the percentage of claims in each province or territory is quite small relative to the total number of claims in process. This is much different from Ontario, where claims in litigation constitute the largest group after claims under review: 49 claims, or 18.4 percent, of the total claims submitted to **Canada** are in litigation, [FN129] and of claims submitted directly to Ontario, thirty, or 22.6 percent, are in litigation.

(a) The Scope of Canadian Government Policies on Aboriginal Land Negotiations: A Brief Regional Comparison

How can these regional differences be explained, and do they offer comparative insight into the Ontario land negotiations process? An extensive, cross-national policy review was conducted for the purposes of this assessment in order to achieve a better sense of the approaches that the Canadian federal, provincial, and territorial governments take in negotiating and resolving **Aboriginal** land claims.

The federal government and provincial governments in the West have the most far-reaching, extensive, comprehensive policies on **Aboriginal** land negotiations compared to anywhere else in the country, including Ontario. More specifically, these official policies span various aspects of the land claims process, from negotiation and resolution, **Aboriginal** governance, **Aboriginal** consultation, **Aboriginal** economic and community development to **Aboriginal** reconciliation and the improvement of the **Aboriginal**-Crown relationship, including with Métis and the off-reserve and urban **Aboriginal** populations. [FN130]

The extent of government policy attention paid to **Aboriginal** land negotiations and related **Aboriginal** affairs appears to be regionally based, more generally. As noted, this is certainly the case in the West, while an opposite trend emerges in Atlantic **Canada** where there are fewer government policies. While Newfoundland and Labrador as well as Nova Scotia have policies on land, governance, reconciliation, consultation, and economic and community development, [FN131] they are not as comprehensive or far-reaching as the policies in the West. The one exception is the *Made-in-Nova Scotia Process*, [FN132] a short framework agreement outlining federal, Nova Scotia, and Mi'kmaq objectives to negotiate outstanding issues related to land. Prince Edward Island and New Brunswick have essentially no formal policies, except one in New Brunswick on **Aboriginal** reconciliation. [FN133] Ontario and Quebec are nearly equivalent with regard to policy scope and substance, [FN134] although Quebec has more completed claims, more claims under review, and fewer claims in negotiation relative to Ontario. [FN135]

Nearly every provincial and territorial government across the country emphasizes the importance of resolving **Aboriginal** land claims in a timely manner, either in policy documents or on Ministry web pages. Of course, maintaining this stance does not automatically translate into tangible gains. However, in Manitoba and Saskatchewan, the existence of treaty land entitlement agreements stands out as a unique mechanism used to minimize potential conflict during negotiations, most notably because these agreements outline in detail the requirements and expectations of all parties to the negotiations. It is argued that in reducing the potential for conflict in this way, the overall negotiations process is hastened.

When these observations are assessed in light of the data presented in *Table 6*, it appears that more extensive, comprehensive, aggressive policies may contribute to more efficient and effective negotiation outcomes, as seen in western **Canada** *vis-à-vis* the rest of the country. However, in order to make a clearer determination regarding this assertion, it is necessary to undertake a brief and cursory analysis of the types of claims being submitted in western **Canada** versus the rest of the country. The purpose in doing so is to ascertain whether it is, in fact, the conduct of the governments involved or instead the nature of the claims which is contributing to the differences in outcome in western **Canada**. While the focus of this paper deals with **specific claims** as defined according to federal government policies, [FN136] by their very nature, some **specific claims** are more complex than others, given a variety of historical, political, social, and legal

factors. An in-depth analysis in this regard is beyond the scope of this paper, but it is possible at this point to evaluate the nature of **specific claims** brought across the country.

Upon reviewing extensive status reports released by the federal government in 2008 on 1308 **specific claims**, [FN137] the range in the nature of claims submitted across the country is quite staggering, to the extent that it is difficult to categorize claims easily. Nevertheless, broadly speaking, the claims deal with contested reserve boundaries and land surrender; compensation for land surrender; access to traditional lands; wrongful alienation of lands and resources; general breaches of Crown fiduciary obligations; provision of agricultural and economic benefits; and the mismanagement of lands and trust funds. Significantly, these broad categories of claims occur across the entire country, demonstrating that the nature of claims in western **Canada** is not significantly different from that in other parts of the country. Consequently, it can be surmised that the nature of the claims brought in western **Canada** are not the reason behind the greater success in that area of the country in resolving claims. In fact, the greater proportion of claims in western **Canada** *vis-àvis* the rest of the country is further evidence of the success in resolution in that part of the country. Instead, it would appear that government approaches and policies are crucial in effecting positive change in the negotiation of **specific claims** in western **Canada**.

With these analyses in mind, the first central recommendation of this paper is the creation of more far-reaching Ontario policies related to **Aboriginal** land negotiations. Rather than generic policies that seek to answer broad public questions, policies that explicitly outline each stage of the negotiation process, beyond the review stage, are suggested in order to provide additional structure and enhance efficiency and effectiveness of the negotiations process. Similarly, the creation of an Ontario-wide treaty accord to act as a blueprint for future land negotiations in the province, similar to those used in Manitoba and Saskatchewan, is suggested. Such an accord should include detailed and thorough discussion of the specific processes for claim submission, land and resources selection and acquisition, setting aside of reserve lands, agreement implementation, specific provincial-federal jurisdictional roles in negotiating land claims, and third-party interests. [FN138]

Of course, the formulation of such a detailed agreement entails a potentially lengthy process, and would necessitate additional resources and attention in its creation. In this way, the diversion of fiscal and human resources away from claims resolution arguably could amount to a temporary exacerbation of the backlog of claims and delays in the resolution process. The actual creation of such a treaty accord would also likely need to be spearheaded by the federal government, given its primary jurisdictional role. This, in turn, would add to the complicated nature of the creation and implementation of a province-wide accord. However, it is argued here that such a process would ultimately prove worthwhile in improving the efficiency of the process in Ontario, especially given the ever-increasing spate of **Aboriginal** claims. While delays and expended resources would necessarily occur in its creation, an overarching blueprint such as a province-wide accord would provide for less confusion and more consistency in the claims submission and negotiation processes, alongside greater clarity in the roles that each government plays, thereby improving efficiency overall. Increased expenditure of resources should be viewed as a temporary necessity, with primary emphasis instead placed on the longer-term, fundamental objectives of enhanced efficiency, clarity, and consistency in negotiations alongside smoother implementation of settlement agreements.

(b) Efficient and Effective Land Negotiations: Instituting an Independent Dispute Mechanism

Only the federal government, Manitoba, Saskatchewan, and British Columbia have independent, impartial bodies in place to facilitate disputes that may arise during the land negotiations process. These include the aforementioned ICC at the federal level. The Manitoba Treaty Relations Commission was established jointly in 2003 by the Grand Chief of the

Assembly of Manitoba Chiefs and the federal Minister of Indian Affairs and Northern Development. The Saskatchewan Office of the Treaty Commissioner was first created in 1989 with a mandate geared towards review of treaty land entitlement and treaty education. In 1996, the scope of its mandate was expanded to foster common understanding of treaty issues. Currently, it does not include the facilitation of settling treaty claims, as does the British Columbia Treaty Commission, which primarily facilitates the negotiation of new treaties on **Aboriginal** land and governance in the province. [FN139]

Ontario has had no such mechanism since the closure of the ICO in 2000. This paper recommends that a foundational improvement to the efficiency and effectiveness of the **Aboriginal** land negotiations process in Ontario would be achieved through the implementation of a new independent, impartial body to facilitate claims and disputes that arise during the negotiations process, including jurisdictional tensions between the provincial and federal negotiating parties. [FN140] Again, the Western provinces lead the way in the development of proactive mechanisms to aid in efficient settlement of **Aboriginal** land claims, and therefore, an Ontario equivalent could be fashioned after the treaty commissions in the West or the ICC. However, it is asserted that the mandate of such an independent body would need to diverge from that of the former ICO in order to be more effective than its predecessor. The directive of the new resolution body would need to be fairly broad in nature with concrete, substantive authority to guide and resolve disputes that may arise, more similar in nature to the roles of the ICC, the BC Treaty Commission, or the imminent **Specific Claims** Tribunal at the federal level. [FN141] The ICO did not have an extensive mandate, and therefore could not be as effective in its resolution capabilities. The overarching purpose of such an institution would need to focus on enhanced efficiency, effectiveness, and fairness of the negotiations process, providing for alternative means of resolution. [FN142] Equally important, the neutrality of the process would add legitimacy to the land negotiations process in Ontario, more generally.

It has been suggested elsewhere that enforceable time limits for each stage of the negotiations process, from the review stage to implementation, would be useful. [FN143] This paper recommends that the implementation of concrete timelines for completion would be effective in Ontario, but consultation and discussion would be required in order to arrive at reasonable, yet timely, deadlines. However, this approach would only constitute an effective and reasonable mechanism if a caveat were provided wherein negotiating parties would have the option of unanimously waiving a deadline at a given stage in the process. This would help to avoid the possibility that one or more parties to the negotiations might use these time limits as incentives to refuse to proceed, with the purpose of achieving preferred results that might flow from the mere failure to meet prescribed deadlines. Of course, there is still the potential for parties to use enforceable time limits to their advantage, and thus it would be necessary to address this issue before officially implementing this recommendation. One possibility would be that, in order to effect meaningful change alongside legitimacy, the same independent, impartial body responsible for resolving disputes during negotiations would also oversee the process and application of time limits.

(c) Aboriginal Reconciliation: Policies to Effect Change?

As discussed near the start of this paper, **Aboriginal** reconciliation necessarily entails the resolution of land claims agreements. This, in turn, is contingent on the **Aboriginal**-Crown relationship. In the context of Ontario, and elsewhere in **Canada**, where land negotiations can be arduous, complex, or where they fail outright, there are direct implications affecting the **Aboriginal**-Crown relationship. Where negotiation processes are deemed inefficient or ineffective, negative feelings are bred. Given the power imbalances at play during negotiations -- which are largely to the detriment of **Aboriginal** peoples -- feelings of injustice are likely to be much more pronounced on the **Aboriginal** side of the "equation." [FN144] Since the final decision on whether or not to undertake negotiations rests solely with the federal and provincial governments, this puts **Aboriginal** peoples at a considerable disadvantage in the process. Additionally, where conflicts

arise during the negotiations process, if there is no independent body to facilitate disputes, **Aboriginal** claimants must either cease negotiations or pursue litigation instead, the financial burdens of which are often too much to bear.

If the core of **Aboriginal** reconciliation entails the settling of disputes through negotiation rather than litigation, then the honour of the Crown is at stake in ensuring that negotiations are conducted as justly as possible. There is extensive jurisprudence and related scholarship that speak to the honour of the Crown in dealing fairly with **Aboriginal** peoples, especially in land negotiations. [FN145] Most provinces and territories, especially in Western **Canada**, as well as the federal government, have policies that address, at least to some extent, the importance of reconciliation and the significance of the **Aboriginal**-Crown relationship. [FN146] Ontario does fairly well in this respect, with emphasis placed on the importance of a working relationship between **Aboriginal** peoples and the Crown as part of Ontario's central policy approach to **Aboriginal** affairs. Ontario asserts its dedication to improving the relationship between **Aboriginal** peoples and the Ontario government. [FN147] However, the tangible results of the negotiations process are contrary to these sentiments. High percentages of claims at the review stage and in litigation on the one hand, with relatively few claims resolved on the other hand, are not demonstrative of a process that is working smoothly or effectively. This, in turn, undermines the stated policy objectives of the Ontario government to achieve some sort of **Aboriginal** reconciliation.

Would more concrete, far-reaching policies with explicit, detailed reference to the significance of reconciliation be effective in this respect? This paper argues that these policies are indeed important and would ultimately reflect a greater level of understanding on the part of the Ontario government of the issues faced by **Aboriginal** peoples in the context of land claims and during negotiation and settlement. Ultimately, more aggressive policies would be helpful in directing the Ontario government's approach to reviewing, negotiating, and settling **Aboriginal** land claims. Yet, at the same time, the mere existence of policies in and of themselves cannot achieve successful negotiation relationships in practice. Currently, Ontario policies highlight the importance of the **Aboriginal**-Crown relationship and accompanying negotiations in achieving **Aboriginal** reconciliation, but they have not adequately effected meaningful change in the negotiations process itself. Instead, it is contended that **Aboriginal** reconciliation is more complex than symbolic words in policy documents. Reconciliation plays out in practice in far more nuanced ways than can be illustrated by data findings, in part because reconciliation consists of more than successfully finalized claims. Instead, **Aboriginal** reconciliation is a developmental process that occurs through evolving land negotiations over time and concomitant working relationships between the negotiation parties. **Aboriginal** reconciliation indeed requires policy statements that speak to appropriate sentiments. In this way, policies are crucial in laying the foundational groundwork for future improvement in the **Aboriginal**-Crown relationship and in advancing **Aboriginal** reconciliation. At the same time, however, meaningful change must be based on “policy-in-action,” achieved through efficient and effective negotiation processes that build mutual trust, respect, and friendship. **Aboriginal** reconciliation must simultaneously be informed by **Aboriginal** perspectives and inform the **Aboriginal**-Crown relationship, while guiding land negotiations. Ultimately, this will reflect, and almost ironically, progress into an historical understanding of reconciliation, one which surpasses the restrictive depiction of reconciliation embodied in Supreme Court jurisprudence and embraces the original nation-to-nation approach embodied in the *two-row wampum*.

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[FN1]. Robert Williams. Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing

the White Man's Indian Jurisprudence" (1986) Wis. L. Rev. 219 at 291. For further historical discussion of treaty-making, see Bradford Morse, "Indigenous-Settler Treaty Making in **Canada**," in Marcia Langton, *et al*., eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing, 2004) 50.

[FN2]. *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1.

[FN3]. Brian Slattery, "The Metamorphosis of **Aboriginal** Title" (2006) 85 Can. Bar. Rev. 255 at 261.

[FN4]. *Ibid*. at 260-261.

[FN5]. *Ibid*. at 260.

[FN6]. 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 at 159-162; Harold Johnson, *Two Families: Treaties and Government* (Saskatoon, Sask.: Purich Publishing, 2007) at 41-54; *Report of the Ipperwash Inquiry*, vol. 2, Policy Analysis, "Treaty Relations in **Canada**" (Toronto: Queen's Printer for Ontario, 2007) at 45-46 [*Ipperwash Inquiry*].

[FN7]. *St. Catharine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, 1888 CarswellOnt 22 (Ont. P.C.) [*St. Catharine's Milling*].

[FN8]. *Ibid*. at 54, 58. For further discussion, see Michael Coyle, *Addressing* ***Aboriginal*** *Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future* (Research Paper Commissioned by the Ipperwash Inquiry, Ontario, 2005), available online: <http:// www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_ part/ research/pdf/Coyle.pdf>, at 21-22 [Coyle].

[FN9]. *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, 1973 CarswellBC 83, 1973 CarswellBC 263.

[FN10]. Department of Indian Affairs and Northern Development, *Statement on Claims of Indian and Inuit People* (Ottawa: Queen's Printer, 1973). Under section 35 of the *Constitution Act, 1982*, **Aboriginal** title, as subsumed under **Aboriginal** and treaty rights, can no longer be extinguished without the consent of the **Aboriginal** peoples. In *Sparrow*, the Supreme Court of **Canada** set out its "clear and plain" intention test, wherein "the Sovereign's intention must be clear and plain if it is to extinguish an [**A]boriginal** right" (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099, 1990 CarswellBC 756, 1990 CarswellBC 105) [*Sparrow*]. For further discussion on extinguishment of **Aboriginal** title in the context of **Aboriginal** land claims, see Jennifer E. Dalton, "**Aboriginal** Title and Self-Government in **Canada**: What is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev. Legal & Social Issues 29 at 38-41 [Dalton, "**Aboriginal** Title and Self-Government"]. For comparative discussion of land claim policies, see Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia,* ***Canada****, New Zealand, and the United States* (New York: Routledge, 2006).

[FN11]. For further discussion on the problems that plague the **Aboriginal**-Crown relationship, more generally, see J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in* ***Canada***, 3rd ed. (Toronto: University of Toronto Press, 2000).

[FN12]. Royal Commission on **Aboriginal** Peoples, *Restructuring the Relationship*, vol. 2, Report of the Royal Commission on **Aboriginal** Peoples (Ottawa: **Canada** Communications Group, 1996), available online: <http:// www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>.

[FN13]. *Constitution Act, 1982*, being Schedule B to the ***Canada*** *Act 1982* (U.K.), 1982, c. 11.

[FN14]. Section 35(1) reads as follows: "The existing **aboriginal** and treaty rights of the **aboriginal** peoples of **Canada** are hereby recognized and affirmed."

[FN15]. For further discussion, see Carole Blackburn, "Producing Legitimacy: Reconciliation and the Negotiation of **Aboriginal** Rights in **Canada**" (2007) 13 J. of the Royal Anthropological Institute 621.

[FN16]. *R. v. Van der Peet*, (sub nom. *R. v. Vanderpeet)* [1996] 2 S.C.R. 507 at para. 31, 1996 CarswellBC 2310, 1996 CarswellBC 2309.

[FN17]. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186, 1997 CarswellBC 2359, 1997 CarswellBC 2358 [*Delgamuukw*]; *Sparrow*, *supra* note 10 at 1105; *R. v. Sioui*, (sub nom. *Sioui v. Quebec (Attorney General))* [1990] 1 S.C.R. 1025 at 1071, 1990 CarswellQue 103, 1990 CarswellQue 103F; *R. v. Horseman*, [1990] 1 S.C.R. 901 at 934, 1990 CarswellAlta 653, 1990 CarswellAlta 47. Yet, at the same time, the Supreme Court of **Canada** has handed down judgments that have taken the sovereignty of the Crown for granted, without addressing how that sovereignty was acquired without **Aboriginal** consent. For in-depth critical discussion on assumed Crown sovereignty, see Michael Asch & Patrick Macklem, "**Aboriginal** Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537.

[FN18]. For further discussion on the history of treaty federalism, see James (sákéj) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241 at 250-251 [Henderson]; Kiera L. Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can. J. Pol. Sci. 923.

[FN19]. For further discussion see generally Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of the Territory* (Ph.D. Dissertation, University of Oxford, 1979).

[FN20]. Michael Asch defends this assertion and criticizes the Supreme Court of **Canada's** approach to the doctrine of *terra nullius* in Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling **Aboriginal** Rights with the Canadian Constitution" (2002) 17 C.J.L.S. 23. An alternative to this doctrine is put forward in Michael Asch & Norman Zlotkin, "Affirming **Aboriginal** Title: A New Basis for Comprehensive Claims Negotiations" in Michael Asch, ed., ***Aboriginal*** *and Treaty Rights in* ***Canada****: Essay on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 208. For further discussion, see Michael Asch & Patrick Macklem, "**Aboriginal** Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 Alta. L. Rev. 498; Michael Asch, "**Aboriginal** Self-Government and the Construction of Canadian Constitutional Identity (1992) 30:2 Alta. L. Rev. (Constitution Series) 464; Michael Asch, "Errors in the *Delgamuukw* Judgment: An Anthropological Perspective" in Frank Cassidy, ed., ***Aboriginal*** *Title in British Columbia: Delgamuukw v. The Queen* (Vancouver & Montreal: Oolichan Books and the Institute for Research on Public Policy, 1992) 221; Michael Asch & Catherine Bell, "Definition and Interpretation of Fact in Canadian **Aboriginal** Title Litigation: An Analysis of Delgamuukw" (1994) 19:2 Queen's L.J. 503; Patrick Macklem, *Indigenous Difference and the Constitution of* ***Canada*** (Toronto: University of Toronto Press, 2001) at 95; Kent McNeil, "The Post-*Delgamuukw* Nature and Content of **Aboriginal** Title," in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in* ***Canada*** *and Australia* (Saskatoon, Sask.: Native Law Centre, University of Saskatchewan, 2001) 102 at 121-123; Angela Pratt, "Treaties vs. *Terra Nullius*: 'Reconciliation,' Treaty-Making and Indigenous Sovereignty in Australia and **Canada**" (2004) 3 Indigenous L.J. 43.

[FN21]. *Sparrow*, *supra* note 10.

[FN22]. *Ibid*. at 1113-1114.

[FN23]. For further discussion, see Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous L.J. 1 at 2-3 [McNeil, "Reconciliation"].

[FN24]. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

[FN25]. *Ibid*. at paras. 31, 46.

[FN26]. For further discussion, see Jennifer E. Dalton, "**Aboriginal** Self-Determination in **Canada**: Protections Afforded by the Judiciary and Government" (2006) 21:1 C.J.L.S. 11 at 14-18 [Dalton,"**Aboriginal** Self-Determination"].

[FN27]. *Van der Peet*, *supra* note 24 at paras. 310, 313.

[FN28]. *Ibid*. at para. 309.

[FN29]. *Ibid*. There is an extensive body of case law and scholarship on the fiduciary obligations of the Crown, particularly with respect to the Crown's fiduciary duty of care and the corresponding honour of the Crown in its fair dealings with **Aboriginal** peoples. Relevant case law includes *R. v. Guerin*, [1984] 2 S.C.R. 335, 1984 CarswellNat 813, 1984 CarswellNat 693; *Kruger v. The Queen* (1985), 17 D.L.R. (4th) 591, 1985 CarswellNat 55F, 1985 CarswellNat 97 (F.C.A.); *Blueberry River Indian Band v. **Canada** (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344, 1995 CarswellNat 1278, 1995 CarswellNat 1279; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 CarswellBC 2704, 2001 CarswellBC 2703; *Wewaykum Indian Band v. **Canada***, (sub nom. *Roberts v. R.)* [2002] 4 S.C.R. 245, 2002 CarswellNat 3438, 2002 CarswellNat 3439. Case law on fiduciary obligations of the provincial governments includes *Mitchell v. Peguis Indian Band*, (sub nom. *Mitchell v. Sandy Bay Indian Band)* [1990] 2 S.C.R. 85, 1990 CarswellMan 380 [*Mitchell v. Peguis*]; and *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, 1991 CarswellOnt 1021, 1991 CarswellOnt 600; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 CarswellBC 2657, 2004 CarswellBC 2656; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 CarswellBC 2655, 2004 CarswellBC 2654; *Mikisew Cree First Nation v. **Canada** (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 CarswellNat 3757, 2005 CarswellNat 3756. Scholarly discussion is found in Mary C. Hurley, *The Crown's Fiduciary Relationship with **Aboriginal** Peoples* (Ottawa: Parliamentary Research Branch, 2002); Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the **Aboriginal** Peoples" in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in **Canada** and Australia* (Saskatoon, Sask.: Native Law Centre, University of Saskatchewan, 2001) 309; James Reynolds, *A Breach of Duty: Fiduciary Obligations and **Aboriginal** Peoples* (Saskatoon Sask.: Purich Publishing, 2005); Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in **Canada*** (Toronto: University of Toronto Press, 1996); Leonard Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Government Power and Responsibility" (1994) 32:4 Osgoode Hall L.J. 735; Leonard Rotman, "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to **Aboriginal** Peoples?" (2004) 37:1 U.B.C. L. Rev. 219.

[FN30]. *Van der Peet*, *supra* note 24 at paras. 49-50.

[FN31]. See McNeil, "Reconciliation," *supra* note 23 at 5, especially with regard to *R. v. Pamajewon*, [1996] 2 S.C.R. 821 and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

[FN32]. *R. v. Gladstone*, [1996] 2 S.C.R. 723, 1996 CarswellBC 2306, 1996 CarswellBC 2305 [*Gladstone*].

[FN33]. *Ibid*. at paras. 73, 75; Dalton, "**Aboriginal** Self-Determination", *supra* note 26 at 17.

[FN34]. *Delgamuukw*, *supra* note 17 at para. 82.

[FN35]. *Ibid*. at para. 145.

[FN36]. McNeil, "Reconciliation," *supra* note 23 at 20. For in-depth discussion of **Aboriginal** reconciliation and land tenure, see James (sákéj) Youngblood Henderson, Marjorie L. Benson, & Isobel M. Findlay, ***Aboriginal*** *Tenure in the Constitution of* ***Canada*** (Scarborough: Carswell, 2000) at 331-395.

[FN37]. *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533, 1999 CarswellNS 350, 1999 CarswellNS 349 [*Marshall [No. 2]*].

[FN38]. *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456, 1999 CarswellNS 282, 1999 CarswellNS 262.

[FN39]. *Ibid*. at para. 58.

[FN40]. *Marshall [No. 2]*, *supra* note 37 at para. 41.

[FN41]. *Ibid*. at para. 38.

[FN42]. McNeil, "Reconciliation," *supra* note 23 at 25. For further discussion, see Gordon Christie, "Judicial Justification of Recent Developments in **Aboriginal** Law" (2002) 17 C.J.L.S. 41 at 54-55.

[FN43]. *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 CarswellNB 677, 2006 CarswellNB 676 [*Sappier; Gray*]

[FN44]. The ruling was unanimous save for the concurring judgment of Binnie J.

[FN45]. *Sappier; Gray*, *supra* note 43 at para. 41.

[FN46]. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 CarswellBC 2657, 2004 CarswellBC 2656 [*Haida*].

[FN47]. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 CarswellBC 2655, 2004 CarswellBC 2654 [*Taku River*].

[FN48]. *Mikisew Cree First Nation v.* ***Canada*** *(Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 CarswellNat 3757, 2005 CarswellNat 3756 [*Mikisew*].

[FN49]. *Guerin v.* ***Canada***, [1984] 2 S.C.R. 335 at 385, 1984 CarswellNat 813, 1984 CarswellNat 693.

[FN50]. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 62, 1990 CarswellBC 756, 1990 CarswellBC 105.

[FN51]. Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 257-260.

[FN52]. Timothy Huyer, "Honour of the Crown: The New Approach to Crown-**Aboriginal** Reconciliation" (2006) 21 Windsor Rev. Legal Soc. Issues 33 at 36 [Huyer].

[FN53]. *Wewaykum Indian Band v.* ***Canada***, [2002] 4 S.C.R. 245, 2002 CarswellNat 3438, 2002 CarswellNat 3439.

[FN54]. *Ibid*. at paras. 79, 81.

[FN55]. *Haida*, *supra* note 46 at para. 18.

[FN56]. *Ibid*. at para. 35.

[FN57]. *Mikisew*, *supra* note 48 at para. 64.

[FN58]. Consultation was first addressed in *Sparrow* as an essential aspect of the test for justifiable infringement.

[FN59]. *Delgamuukw*, *supra* note 17 at para. 168.

[FN60]. *Haida*, *supra* note 46 at paras. 43-44. See also Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult **Aboriginal** People" (2003) 41 Alta. L. Rev. 49 at 61.

[FN61]. See *Haida*, *ibid*. at para. 53. For further discussion, see Thomas Isaac, Tony Knox, & Sarah Bird, "The Crown's Duty to Consult and Accommodate **Aboriginal** Peoples: The Supreme Court of **Canada** Decision in *Haida*" (2005) 63:5 The Advocate 671.

[FN62]. *Haida*, *ibid*. at para. 16.

[FN63]. *Ibid*. at para. 18. For further discussion, see Huyer, *supra* note 52 at 42-43.

[FN64]. *Haida*, *ibid*. at para. 48.

[FN65]. *Mikisew*, *supra* note 48 at para. 59 [emphasis in original].

[FN66]. *Haida*, *supra* note 46 at para. 20.

[FN67]. *Taku River Tlingit*, *supra* note 47 at paras. 42, 44-46. For further discussion, see Huyer, *supra* note 52 at 53-54.

[FN68]. Henderson, *supra* note 18 at 244-245.

[FN69]. *Ibid*.

[FN70]. Kiera L. Ladner, "Take 35: Reconciling Constitutional Orders," in Annis May Timpson, ed., *First Nations First Thoughts* (Vancouver: UBC Press, 2009) 279 at 280-281.

[FN71]. *Ibid*. at 3.

[FN72]. For further discussion of **Aboriginal** legal perspectives, see Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders," in Law Commission of **Canada**, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77.

[FN73]. Royal Commission on **Aboriginal** Peoples, *Looking Forward, Looking Back*, vol. 1, Report of the Royal Commission on **Aboriginal** Peoples (Ottawa: **Canada** Communications Group, 1996), available online: <http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpteng.asp#chp3>. For further discussion, see Paul Chartrand, "Towards Justice and Reconciliation: Treaty Recommendations of **Canada's** Royal Commission on **Aboriginal** Peoples (1996)" in Marcia Langton, Maureen Tehan, Lisa Palmer, & Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 120; Kiera L. Ladner, "Negotiated Inferiority: The Royal Commission on **Aboriginal** People's Vision of a Renewed Relationship" (2001) 31:1-2 Amer. Rev. Can. Stud. 241.

[FN74]. Honourable René Dussault, "The Vision of the Royal Commission on **Aboriginal** Peoples" (2007) 70 Sask. L. Rev. 93 at 94.

[FN75]. *Ibid*.

[FN76]. *Ibid*. at 95.

[FN77]. There are numerous judicial cases that have addressed the federal-provincial jurisdictional divide in the context of **Aboriginal** lands and **Aboriginal** rights, including **Aboriginal** title (see *Delgamuukw*, *supra* note 17; *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 CarswellBC 3120, 2006 CarswellBC 3121 [*Morris*]; *Lovelace v. Ontario*, (sub nom. *Ardoch Algonquin First Nation & Allies v. Ontario)* [2000] 1 S.C.R. 950, 2000 CarswellOnt 2461, 2000 CarswellOnt 2460 [*Lovelace*]; and *Tsilhqot'in Nation v. British Columbia*, (sub nom. *Xeni Gwet'in First Nations v. British Columbia)* 2007 Car-swellBC 2741, 2007 BCSC 1700 [*Tsilhqot'in Nation*]). There is also a plethora of scholarship on the topic, including Kent McNeil, "**Aboriginal** Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction," in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in **Canada** and Australia* (Saskatoon, Sask.: Native Law Centre, University of Saskatchewan, 2001) 249 [McNeil, "**Aboriginal** Title"]; Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L.J. 57 [Wilkins]; and Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. LJ 185.

[FN78]. For further discussion, see Coyle, *supra* note 8 at 36-38.

[FN79]. Where federal and provincial laws directly conflict, federal laws are paramount over provincial laws, thereby rendering the latter inoperative to the extent that they directly conflict with the federal laws in question. For further discussion on the **Aboriginal** context in this regard, see Kent McNeil, "The Jurisdiction of Inherent Right **Aboriginal** Governments," Research Paper for the National Centre for First Nations Governance (11 October 2007), available online: <http://fngovernance.org/pdf/Jurisdiction_of_Inherent_Rights.pdf>.

[FN80]. Interjurisdictional immunity provides protection for federal persons, things, or undertakings from provincial regulatory regimes which would significantly interfere with them. Supreme Court of **Canada** jurisprudence on this doctrine relating to **Aboriginal** peoples includes *Dick v. The Queen* (sub nom. *R. v. Tenale*), [1985] 2 S.C.R. 309, 1985 Carswell-BC 399, 1985 CarswellBC 814; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, 1986 CarswellBC 755, 1986 CarswellBC 66; *Morris*, *supra* note 77. For further discussion on interjurisdictional immunity in the context of **Aboriginal** peoples, and specifically Métis, see Kent McNeil, "The Métis and the Doctrine of Interjurisdictional Immunity: A Commentary" [forthcoming] (on file with author).

[FN81]. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[FN82]. See the concurring judgment of Dickson C.J. in *Mitchell v. Peguis*, *supra* note 29 at 108-109.

[FN83]. *Indian Act*, R.S.C. 1985, c. I-5. For further discussion on the role of the *Indian Act* in this respect, see Kent McNeil, "**Aboriginal** Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C. Law Rev. 159; Kerry Wilkins, "'Still Crazy after All These Years': Section 88 of the Indian Act at Fifty" (2000) 38 Alta. Law Rev. 458.

[FN84]. See *Delgamuukw*, *supra* note 17; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, 1993 CarswellBC 1167; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, [2002] 2 S.C.R. 146, 2002 CarswellBC 618, 2002 CarswellBC 617 [*Kitkatla Band*]; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 CarswellBC 2433, 2003 CarswellBC 2432. As per section 88 of the *Indian Act*,

"[s]ubject to any terms of any treaty and any other Act of the Parliament of **Canada**, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or bylaw made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

[FN85]. The current discussion deals with case law that specifically pertains to jurisdictional issues as they relate to **Aboriginal** lands or treaties.

[FN86]. *St. Catharine's Milling*, *supra* note 7 at 48-49. Ontario's argument stemmed from section 109 of the *Constitution Act, 1867*, which had vested in the province's underlying title to Crown lands that were within the newly created provincial boundaries at the time of Confederation.

[FN87]. *Ibid*. at 60.

[FN88]. For further discussion, see Coyle, *supra* note 8 at 41-42.

[FN89]. See *An Act for the settlement of certain questions between the governments of **Canada** and Ontario respecting Indian Lands*, R.S.C. 1891, 54-55 Vict., c. 5; ***Canada**-Ontario Indian Reserve Lands Agreement*, R.S.C. 1924, c. 48.

[FN90]. *Indian Lands Agreement (1986) Act*, S.C. 1988, c. 39.

[FN91]. *Delgamuukw*, *supra* note 17 at para. 7.

[FN92]. *Ibid*. at paras. 172-183. For further discussion, see McNeil, "**Aboriginal** Title," *supra* note 77 at 259-277; Wilkins, *supra* note 77 at 62-64.

[FN93]. *Tsilhqot'in Nation*, *supra* note 77 at paras. 1001-1003.

[FN94]. Two exceptions are *Lovelace* and *Kitkatla Band*, where the Supreme Court of **Canada** found in favour of the provinces. At issue in *Lovelace* was the restriction as per the *Ontario Casino Corporation Act, 1993*, that proceeds from reserve-based, commercial gaming activities could only be distributed among First Nations in Ontario who were registered as bands under the *Indian Act*. The Supreme Court of **Canada** found that the exclusion of "non-status" **Aboriginal** communities did not affect the core of section 91(24) federal jurisdiction. The province did not violate the **Aboriginal** rights embodied in section 35(1) of the *Constitution Act, 1982*, nor did it impair the "Indianness" of the appellants, since the province was merely exercising its spending power (*Lovelace*, *supra* note 77 at paras. 34, 40, 49). *Kitkatla Band* revolved around the application of the British Columbia *Heritage Conservation Act* to **Aboriginal** heritage sites and objects. The Supreme Court of **Canada** held that the provisions in question applied to both **Aboriginal** and non-**Aboriginal** people, with any disproportionate effects against **Aboriginal** peoples occurring only because **Aboriginal** peoples have created the largest number of heritage sites and objects. The legislation did not apply specifically to **Aboriginal** peoples, and therefore, did not fall under federal jurisdictional authority (*Kitkatla Band*, *supra* note 84 at paras. 60-63, 65-69, 75, 78).

[FN95]. For further discussion, see Coyle, *supra* note 8 at 44-45.

[FN96]. *Ibid*. at 45.

[FN97]. The **specific claims** policy of the federal government stemmed from two primary policy documents: Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy* (Ottawa: Supply and Services **Canada**, 1981) [

In All Fairness]; Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy* (Ottawa: Indian and Northern Affairs **Canada**, 1982) [*Outstanding Business*].

[FN98]. See Coyle, *supra* note 8 at 46, n. 200.

[FN99]. *Ibid*. at 47-48.

[FN100]. The Honourable Michael Bryant was the first Minister of **Aboriginal** Affairs, while the Honourable Brad Duguid is the current Minister of **Aboriginal** Affairs. For further information, see Office of the Premier, News Release, *McGuinty Government Creates Ministry of **Aboriginal** Affairs* (21 June 2007), available online: <http://www.premier.gov.on.ca/news/event.php? ItemID=3986&Lang=EN>; Office of the Premier, Backgrounder, *Ontario and **Aboriginal** Leadership -- Moving Forward Together* (21 June 2007), available online: <http://www.premier.gov.on.ca/news/ProductPrint.asp?ProductID=1422> [Backgrounder].

[FN101]. Ontario Ministry of **Aboriginal** Affairs, *Ontario's New Approach to **Aboriginal** Land Claims* (Toronto: Queen's Printer for Ontario, 2005) [Ontario].

[FN102]. *Ibid*. at 22.

[FN103]. <http://www.aboriginalaffairs.gov.on.ca/>.

[FN104]. Ontario Native Affairs Secretariat, *The Resolution of Land Claims in Ontario: A Background Paper*, presented to the Ipperwash Inquiry -- Part 2, Land Claims in Ontario (Toronto: Queen's Printer for Ontario, 2005) at 12 [ONAS].

[FN105]. *Ibid*. at 12, 18.

[FN106]. For a discussion of how the federal government currently defines specific, comprehensive, and self-government **Aboriginal** claims, see the **Specific Claims** Branch, Comprehensive Claims Branch, and Self-Government Claims Branch of the Indian and Northern Affairs **Canada**, <http://www.ainc-inac.gc.ca/ps/clm/index_e.html>. Relevant federal policy documents and statutes include Indian Affairs and Northern Development, *Comprehensive Claims Policy and Status of Claims* (Ottawa: Public Works and Governments Services, 2003); Indian Affairs and Northern Development, *Federal Policy Guide, **Aboriginal** Self-Government: The Government of **Canada**'s Approach to Implementation of the Inherent Right and the Negotiation of **Aboriginal** Self-Government* (Ottawa: Public Works and Government Services, 1995); ***Specific Claims** Resolution Act*, R.S.C. 2003, c. 23.

[FN107]. For in-depth discussion see the Ministry's web page at <http://www.aboriginalaffairs.gov.on.ca/english/negotiate/negotiate.asp>; Office of the Premier, *Backgrounder*, *supra* note 100.

[FN108]. ONAS, *supra* note 104 at 18. Third-party interests figure prominently in **Aboriginal** land negotiations in Ontario. For the purposes of this paper, however, they are given little attention, since the primary focus is placed on **Aboriginal** reconciliation and the **Aboriginal**-Crown relationship.

[FN109]. *Ibid*. at 19.

[FN110]. *Ibid*. at 15.

[FN111]. *Ibid*.

[FN112]. As of 2005, no claims had qualified for this process (Coyle, *supra* note 8 at 49, n. 213).

[FN113]. *Ibid*.; Ontario, *supra* note 101; Ontario Ministry of **Aboriginal** Affairs, ***Aboriginal*** *Land Claim Settlements* (Toronto: Queen's Printer for Ontario, 2005), online: <http:// www.aboriginalaffairs.gov.on.ca/english/negotiate/settlement.htm>; Ontario Ministry of **Aboriginal** Affairs, ***Aboriginal*** *Land Claims and Public Involvement* (Toronto: Queen's Printer for Ontario, 2005), online: <http:// www.aboriginalaffairs.gov.on.ca/english/negotiate/public.htm>; Ontario Ministry of **Aboriginal** Affairs, *Ontario's Negotiation Process* (Toronto: Queen's Printer for Ontario, 2005), online: <http:// www.aboriginalaffairs.gov.on.ca/english/negotiate/process.htm>.

[FN114]. See Ontario Ministry of **Aboriginal** Affairs, *About Land Claims* (Toronto: Queen's Printer for Ontario, 2006), online: <http:// www.aboriginalaffairs.gov.on.ca/english/negotiate/about.htm>.

[FN115]. An AIP contains all of the central components of the final agreement, but in draft form. The negotiations leading to the AIP are usually the most difficult.

[FN116]. An administrative remedy refers to the return of surrendered, but unsold, land.

[FN117]. It should be noted that the ICC is distinct from the ICO, and the creation of the former was not related to the abolishment of the latter. Instead, the ICO, which only negotiated claims in the province of Ontario between 1978 and 1988, played more of a facilitative role than that of the ICC; the ICC has played a more prominent role in the official resolution of claims, and has done so specifically at the federal level. The Government of **Canada** first created the Indian **Specific Claims** Commission, later renamed the ICC, in 1991. Its creation occurred in response to federal government consultations in 1990 with First Nation Chiefs on ways to improve the land claims process. The Chiefs Committee on Claims produced a document of recommendations entitled the *First Nations Submission on Claims*, which was based on consultations between First Nation Chiefs and community members. This document received support of a special assembly of the Assembly of First Nations in 1990. Included among the recommendations was the need to create an independent, impartial Commission of Inquiry to assist in the negotiation of claims and resolution of complex issues. The Commission's first Chief Commissioner was Justice Harry S. LaForme, who served until 1994. Other Commissioners have included Daniel J. Bellegarde and P.E. James Prentice, Phil Fontaine and Renée Dupuis. The ICC's mandate involves addressing disputes that arise out of the **specific claims** process at the federal level, based on **Canada's Specific Claims** Policy (see *Outstanding Business*, supra note 97). Under this policy, the ICC may review government decisions on First Nations **specific claims**, with an eye to relieving deadlock and resolving disputes. Prior to the creation of the ICC, First Nations could only contest federal government decisions on claims through the courts. In November 2003, Parliament passed the ***Specific Claims*** *Resolution Act* (*supra* note 106) to establish the Canadian Centre for the Independent Resolution of First Nations **Specific Claims**. While formal establishment of this Centre has not occurred, ***Specific Claims****: Justice at Last* speaks to the federal government's recent policy initiatives on expanding the mandate of the ICC. The current Conservative government has outlined its proposals to enhance the power and permanency of the ICC's mandate (see Indian and Northern Affairs **Canada**, ***Specific Claims****: Justice at Last* (Ottawa: Ministry of Public Works and Government Services **Canada**, 2007)). In addition, in June 2008, the ***Specific Claims*** *Tribunal Act*, S.C. 2008, c. 22, received Royal Assent, coming into effect on October 16, 2008. This legislation establishes a new independent body to replace the ICC, called the **Specific Claims** Tribunal, to oversee dispute resolution in the negotiation and settlement process. The *Act* also requires certain minimum standards for the submission of claims, accountability standards, and annual reporting requirements. For further information on the ***Specific Claims*** *Tribunal Act*, see <http:// www.aincinac.gc.ca/al/ldc/spc/jal/fct3-eng.asp> and <http://www.ainc-inac.gc.ca/al/ldc/spc/jal/mss-eng.asp>.

[FN118]. Numbers do not add up to 100 percent due to rounding.

[FN119]. It is possible that if the data were available on dismissed claims submitted to the Ontario government the value in the "Dismissed/Closed/Inactive" category for Ontario would be somewhat higher.

[FN120]. This does not include the complications surrounding third-party interests, a discussion of which is beyond the scope of this paper.

[FN121]. For further discussion, see Coyle, *supra* note 8 at 52.

[FN122]. *Ipperwash Inquiry*, *supra* note 6 at 77.

[FN123]. From the data presented above, it is not possible to conclude determinatively the extent to which specific factors contribute to the overall inefficiency of the settlement process. Notably, the numbers of claims submitted for review in Ontario and at the federal level are relatively comparable (see *Table 5*). This issue is addressed below.

[FN124]. ONAS, *supra* note 104 at 19.

[FN125]. These do not include comprehensive claims.

[FN126]. Due to space constraints, detailed data on land claims submitted directly to each provincial or territorial government were not attainable.

[FN127]. British Columbia's process may be somewhat slower given the sheer volume of claims submitted. The land negotiations process in British Columbia is different from anywhere else, in part because most of the province was never covered by historical treaties. The British Columbia Treaty Process has replaced the federal comprehensive claims policy in the province (*British Columbia Treaty Commission Act*, S.C. 1995, c. 45).

[FN128]. The same is also true in the Yukon, although the number of claims currently in process is quite small.

[FN129]. It should be noted that a large proportion of these claims have been submitted by the Six Nations of the Grand River Territory.

[FN130]. Relevant polices in Manitoba include Manitoba **Aboriginal** and Northern Affairs, *A Reference Manual for Municipal Development and Services Agreements* (Winnipeg: Government of Manitoba, 2004); Manitoba **Aboriginal** and Northern Affairs, *Framework Agreement: Treaty Land Entitlement* (Winnipeg: Government of Manitoba, 1997); Manitoba **Aboriginal** and Northern Affairs, *Vision, Mission and Goals* (Winnipeg: Government of Manitoba, 2007), online: < http://www.gov.mb.ca/ana/info.vmg.html>. Policies in Saskatchewan include Saskatchewan First Nations and Métis Relations, *Bilateral Protocol* (Regina: Government of Saskatchewan, 2003); Saskatchewan First Nations and Métis Relations, *Framework for Governance of Treaty First Nations* (Regina: Government of Saskatchewan, 2000); Saskatchewan First Nations and Métis Relations, *History of Treaty Land Entitlement in Saskatchewan* (Regina: Government of Saskatchewan, 2008); Saskatchewan First Nations and Métis Relations, *The Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision Makers* (Regina: Government of Saskatchewan, 2006); Saskatchewan Métis and First Nations Relations, *Métis Tripartite Memorandum of Understanding* (Regina: Government of Saskatchewan, 2003). In Alberta, there are the following relevant policies: Alberta Ministry of International, Intergovernmental and **Aboriginal** Relations, *Alberta/Métis Nation of Alberta Association (MNAA) Framework Agreement* (Edmonton: Government of Alberta, 2001); Alberta Ministry of International, Intergovernmental and **Aboriginal** Relations, *An Understanding on First Nations/Alberta Relations*, signed November 10, 1995; Alberta Ministry of International, Intergovernmental and **Aboriginal** Relations, *Strengthening Relationships: The Government of Alberta's **Aboriginal** Policy Framework* (Edmonton: Government of Alberta, 2000). British Columbia has the following policies: British

Columbia **Aboriginal** Relations and Reconciliation, *Métis Nation Relationship Accord* (Victoria: Government of British Columbia, 2006); British Columbia **Aboriginal** Relations and Reconciliation, *The New Relationship* (Victoria: Government of British Columbia, 2005); British Columbia **Aboriginal** Relations and Reconciliation, *Transformative Change Accord* (Victoria: Government of British Columbia, 2005); British Columbia **Aboriginal** Relations and Reconciliation, *Treaties and Other Negotiations* (Victoria: Government of British Columbia, 2007), online: <http://www.gov.bc.ca/arr/treaty/default.html>. Finally, most of the federal government policies are covered in *In All Fairness*, *supra* note 97; *Outstanding Business*, *supra* note 97; Indian Affairs and Northern Development, *Gathering Strength: **Canada's Aboriginal** Action Plan* (Ottawa: Public Works and Government Services **Canada**, 1997). For further information, see Indian Affairs and Northern Development, *Gathering Strength -- **Canada's Aboriginal** Action Plan: A Progress Report* (Ottawa: Public Works and Government Services **Canada**, 2000); Indian Affairs and Northern Development, *Gathering Strength -- **Canada's Aboriginal** Action Plan: A Progress Report, Year One* (Ottawa: Public Works and Government Services **Canada**, 1998); Indian and Northern Affairs **Canada**, Saskatchewan Region, *A Synopsis of the Saskatchewan Treaty Land Entitlement Framework Agreement* (Ottawa: Indian and Northern Affairs **Canada**, 1992).

[FN131]. All relevant polices in Newfoundland and Labrador are covered generically in Newfoundland and Labrador Department of Labrador and **Aboriginal** Affairs, *Business Plan* (St. John's: Government of Newfoundland and Labrador, 2006). Nova Scotia's policies include Nova Scotia Office of **Aboriginal** Affairs, "*Made-in-Nova Scotia Process": Mi'kmaq-Nova Scotia-**Canada** Framework Agreement* (Halifax: Government of Nova Scotia, 2007); Nova Scotia Office of **Aboriginal** Affairs, *Made-in-Nova Scotia Process Update* (Halifax: Government of Nova Scotia, 2008); Nova Scotia Office of **Aboriginal** Affairs, *Province of Nova Scotia Consultation with the Mi'kmaq: Interim Consultation Policy* (Halifax: Government of Nova Scotia, 2007); Nova Scotia Office of **Aboriginal** Affairs, *Terms of Reference for a Mi'kmaq-Nova Scotia-**Canada** Consultation Process* (Halifax: Government of Nova Scotia, 2006); Nova Scotia Office of **Aboriginal** Affairs, *What We Do* (Halifax: Government of Nova Scotia, 2007), online: < http://www.gov.ns.ca/abor/officeofaboriginalaffairs/whatwedo>.

[FN132]. A follow-up policy document released in 2006 was the Mi'kmaq-Nova Scotia-**Canada** Tripartite Forum, *2006 Strategic Direction Document* (Truro: Mi'kmaq-Nova Scotia-**Canada** Tripartite Forum, 2006).

[FN133]. New Brunswick **Aboriginal** Affairs Secretariat, *What We Do* (Fredericton: Government of New Brunswick, 2007). Prince Edward Island has no office or ministry to address **Aboriginal** affairs, but it also has only one claim in negotiations and another that has been closed or dismissed.

[FN134]. Ontario's land claim policies are found *supra* notes 101, 113, 114, and also include Ontario Native Affairs Secretariat, *Draft Guidelines for Ministries on Consultation with **Aboriginal** Peoples Related to **Aboriginal** Rights and Treaty Rights* (Toronto: Queen's Printer for Ontario, 2006). Quebec's policies include: Secrétariat aux affaires autochtones du Québec, *Amerindians and Inuit of Québec: Interim Guide for Consulting the **Aboriginal** Communities* (Québec: Gouvernement du Québec, 2006); Secrétariat aux affaires autochtones du Québec, *Claims and Demands* (Québec: Gouvernement du Québec), online: < http://www.saa.gouv.qc.ca/relations_autochtones/revendications_ demandes/revendications_demandes_en.htm>; Secrétariat aux affaires autochtones du Québec, *Mission and Orientations of the Secrétariat* (Québec: Gouvernement du Québec), online: <http://www.saa.gouv.qc.ca/secretariat/mission_ secretariat_en.htm>; Secrétariat aux affaires autochtones du Québec, Quebec Relations with **Aboriginal** People: Toward a New Partnership for the Twenty-First Century (Québec: Gouvernement du Québec, 2005).

[FN135]. It is not necessary to discuss the small number of claims in the North, and most land negotiations there are comprehensive in nature. Relevant policies in the Yukon are covered in Yukon Land Claims/First Nations Relations, *Land Claims Overview* (Whitehorse: Government of Yukon, 2007), online: <http://

www.eco.gov.yk.ca/landclaims/overview.html>. Those in the Northwest Territories include Northwest Territories Department of **Aboriginal** Affairs and Intergovernmental Relations, *Implementation* (Yellowknife: Government of the Northwest Territories, 2008), online: <http://www.daair.gov.nt.ca/_ live/pages/wpPages/Implementation.aspx>; Northwest Territories Department of **Aboriginal** Affairs and Intergovernmental Relations, *Lands Negotiation* (Yellowknife: Government of the Northwest Territories, 2008), online: <http://www.daair.gov.nt.ca/negotiations/lands_negotiations.html>; Northwest Territories Department of **Aboriginal** Affairs and Intergovernmental Relations, *Negotiations* (Yellowknife: Government of the Northwest Territories, 2008), online: <http://www.daair.gov.nt.ca/_live/pages/wpPages/Negotiations.aspx>; Northwest Territories Department of **Aboriginal** Affairs and Intergovernmental Relations, *Policy and Legislation Section* (Yellowknife: Government of the Northwest Territories, 2008), online: <http://www.daair.gov.nt.ca/who-we-are/policy.html>.

[FN136]. See the **specific claims** policies of the federal governments, *supra* notes 97, 117, 130 and *infra* note 137.

[FN137]. Indian and Northern Affairs **Canada**, *Public Information Status Report, **Specific Claims** Branch* (Ottawa: Indian and Northern Affairs **Canada**, 2008). Across **Canada**, this includes 600 claims under review, 131 in negotiations, 34 at the ICC, and 543 concluded at the federal level.

[FN138]. This type of blueprint might allude to the creation or existence of an independent, impartial resolution body such as the Indian Commission of Ontario, but the treaty accord would be different in essence from such a body since the former would serve the purpose of providing a guiding and overarching framework for claims resolution in the province.

[FN139]. *British Columbia Treaty Commission Act*, S.C. 1995, c. 45.

[FN140]. For further discussion, see Dalton, "**Aboriginal** Title and Self-Government", *supra* note 10 at 53.

[FN141]. See *supra* note 117.

[FN142]. Currently, **Aboriginal** claimants can only pursue litigation if disputes arise during negotiations.

[FN143]. See Coyle, *supra* note 8 at 55. Conversely, the Ontario Native Affairs Secretariat, as it then was, argued against such a mechanism (see ONAS, *supra* note 104 at 36).

[FN144]. For further discussion on the complexities of the power imbalances at play, see Dalton, "**Aboriginal** Title and Self-Government", *supra* note 10 at 53-55; Andrea Gaye McCallum, "Dispute Resolution Mechanisms in the Resolution of Comprehensive **Aboriginal** Claims: Power Imbalance Between **Aboriginal** Claimants and Governments in Negotiation" (1995) 2:1 Murdoch U.E.J.L., online: <http://www.austlii.edu.au/au/journals/MurUEJL/1995/13.html>.

[FN145]. As noted earlier in this paper, the topic of the honour of the Crown in dealing with **Aboriginal** peoples and corresponding fiduciary duty is large enough for an entirely separate research undertaking (*supra* note 29).

[FN146]. These policies are *supra* notes 130-135.

[FN147]. Ontario, *supra* note 101 at 5-9, 29.
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