

Finding the *Dis/Honour of the Crown*:
A Study of the Federal Government's Response to the Six Nations' Specific Land
Claim and Occupation of the Douglas Creek Estates

by

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Abstract

This thesis explores the response of the Government of Canada to the Six Nations of the Grand River's specific land claims and occupation/protest of the Douglas Creek Estates, Ontario. It argues that the Crown's actions and public statements have failed to full its legal obligations to First Nations. While the Crown continues to promote its position that it is "negotiating" and committed to resolving the crisis there is much evidence to the contrary. This thesis seeks to delineate the political rhetoric from the actual response and show that the utter lack of progress made in finding a resolution of this claim is directly linked to the Crown conflagration of the problem.

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List of Abbreviations

AANDC	Aboriginal Affairs and Northern Development Canada
ADM	Assistant Deputy Minister
ATI	Access to Information
Canada	Federal Government
Confederacy Council	Haudenosaunee Six nations Confederacy Council
Council	Six Nations Council
Crown	Federal governments
BCCA	British Columbia Court of Appeal
DCE	Douglas Creek Estates
DLSU	Departmental Legal Services Unit
DM	Deputy Minister
Henco	Henco Industries Ltd.
MO	Minister's Office
ONC	Office of Native Claims
OPP	Ontario Provincial Police
PCO	Privy Council Office
SCC	Supreme Court of Canada
SCT	Specific Claims Tribunal
SCTA	Specific Claims Tribunal Act

1. Introduction

This paper examines the specific land claims experience of the Six Nations of the Grand River, Ontario, through the lens of the *honour of the Crown*. My questions in their simplest forms are: did the Crown do what it said it would do, and did the Crown do what it is obligated to do? I believe that in answering these questions, there are important lessons that can be learned from the Crown's response to this specific land claim and the occupation/protest of the Douglas Creek Estates (DCE) in Caledonia, Ontario.

In this paper, I am arguing for the Crown's fulfilment of its duty to resolve historical wrongs through timely, fair and reasonable negotiations. I believe that the honour of the Crown creates this duty and it is the Crown's duty to not only focus on addressing historic grievances through this process, but also to improve the broader socio-economic and health conditions of Aboriginal communities. Resolving land claims and improving the Crown-First Nations relationship should ultimately help to support the notion of economic self determination and self-government. The connection between claims, improved social conditions and future prosperity has been acknowledged by government:

In a word, the resolution of land claims, of grievances, of treaty claims, and the determination of the best delivery of services around education, health and housing are all ... an interim measure en route to what ultimately requires agreement around self-government.¹

This ultimate goal is also part of the reason why the current negotiations between the Six Nations, Government of Ontario and Government of Canada are so complicated. The fact is that, besides the specific land claim, the negotiations include broad issues like:

¹ Honourable Michael Bryant, Standing Committee on Estimates, May 27, 2008 (1630).

the re-establishment of a well-defined, constitutionally sound, relationship between the governments and people of Six Nations and of Ontario and Canada that is responsive to present day circumstances, yet respectful of history and past perspectives on that relationship. This negotiation effort represents an ambitious undertaking that demands full briefing and appreciation by those involved of the economic, social, political and legal complexities of the relationship.²

While there are, of course, some questions whether such ambitious goals are reasonable or achievable through a single claim resolution, there can be little doubt that the Mohawks and the state alike view the Six Nations claim as a panacea for all manner of evils. However, this solution will look quite different depending upon whether one sees it from the perspective of the Mohawks or the government, and these different perspectives represent a wide gulf in purpose, approach and strategy.

The disconnect between state and indigenous perceptions of the solution is rarely reflected in the press releases and public statements. For their part, the government has attempted to shape public perceptions of state commitment to expeditious and ethical resolution of the claim through news releases that attempt to provide some sense of progress, stressing a commitment to a “new phase of discussions”³, or by a focus on positive statements like “Canada is committed to resolving the complex land claim”⁴, all of which are engineered to perpetuate the Crown’s preferred view that that “the only solution is ... a negotiated one”.⁵ The general public and stakeholders alike are supposed to be placated by the Crown’s holding line of “in negotiations” -

² Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council et. al., “Written Submission of the Attorney General of Ontario in Response to a Request Made by the Honourable Mr. Justice Marshall on the 5th Day of July 2006,” Court File No.: 48/2006, para 17. p. 9. (Online: <http://www.caledoniawakeupcall.com/court/AGO%20Written%20Submissions.pdf>).

³ News Release, “Minister Jim Prentice Announces Efforts to Advance Negotiations with Six Nations and Bring Peace and Stability to the Caledonia Area,” March 29, 2007. (Online: <http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/j-a2007/2-2856-eng.asp>).

⁴ News Release, “Canada’s New Government Announce Community Liaison Official for Six Nations/Caledonia File,” September 15, 2007 (Online: <http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/s-d2007/2-2937-eng.asp>).

⁵ Ibid.

a position which stops well-short of stating what a solution could look like or how close (or far) the parties are from reaching that solution.⁶ The reality is that February 28, 2012 marked the sixth anniversary of the continuous occupation of the DCE by protesters. This milestone is marred with failed settlement offers, idleness and the “stalled land claims negotiations leav[ing] Six Nations residents poor, angry and desperate to find any route to resolution”.⁷

The motivation behind elevating the claims process to an elixir for all wrongs is likewise curious. There is no doubt that the Mohawks recognized the limelight they fought for - through the protests and occupation of the DCE - and media attention given to them, offered a unique opportunity to capitalize on the state’s present engagement. Pushing the state to acknowledge and address the widest possible array of issues was obviously in the Mohawks’ self-interest. The Six Nations were and still are pushing for what they call a Global Solution, that includes interim measures involving partnerships and resource sharing, increase of land base, entitlements promised in the 1784 Haldimand Treaty, land share agreements, perpetual care and maintenance agreements.⁸ It is their expectation that the Federal government will agree to and sign onto their Global Approach while the negotiations move forward.⁹ Additionally, the Mohawks are seeking a special House of Commons or Senate study on Large Specific Claims and the ultimate “fair and just settlement including return of land and compensation for loss of use”.¹⁰ The Six Nations has estimated their claims to be worth around 14 trillion dollars and Chief Bill Montour recognizes that "Canada can't repay this," so their aim is to "sit down and try a whole new,

⁶ ATI, “Media Lines and Questions and Answers on Caledonia,” November 2 [year not given], p. 4.

⁷ Kevin Swayze “Six Nations land claims along Grand River stalled,” The Hamilton Spectator, July 14, 2011 (Online: <http://www.thespec.com/news/local/article/563562--six-nations-land-claims-along-grand-river-stalled>)

⁸ Six Nations Land Right: Summary, [date note given] (Online: <http://www.sixnations.ca/SNGlobalSolutions-ClaimSummaries-web.pdf>).

⁹ ATI, November 2, p. 15.

¹⁰ Land Right: Summary.

different way to negotiate.”¹¹ The settlement is not solely financial and would include broad issues including better health care, the cleanup of contaminated water systems and access to better education.¹²

The federal government on the other hand has defined its preferred outcome as one that will “(1) achieve final release of all Six Nations historical grievance and related litigation, and (2) encourage the establishment of stable governance of the Six Nations community”.¹³ In fact, the state requires “certainty and finality when it settles a claim” and First Nations must provide the Crown with “release and indemnity” with respect to the claim.¹⁴ However, this blanket policy is at odds with the Crown’s repeated statements that the situation is “intractable”.¹⁵ The government’s official media lines leave “no doubt that the situation in Caledonia is difficult and the issues are extremely complex”¹⁶, and furthermore, that the “governance issues within the Six Nations community ... make a quick resolution of the claims challenging.”¹⁷ At the same time, the government has admitted that it is deeply concerned about “containing a hotspot with potential to create ripple effects in other parts of the country.”¹⁸ Therefore, with all of these factors added up – complex issues, billions at stake, complex internal First Nations governance and the fear that other dissatisfied First Nations across Canada may adopt a Mohawk-style approach to claims and activism - why does the government look to a panacea instead of a

¹¹ Michael-Allan Marion, “New Democrat MPs get crash course on Six Nations issues,” Brantford Expositor, November 2011, (Online: <http://www.brantfordexpositor.ca/ArticleDisplay.aspx?e=3358729>).

¹² Ibid.

¹³ ATI, “Strategic Communications Plan for Negotiations with Six Nations and Community Relations,” September 18, 2007. p.3.

¹⁴ Aboriginal Affairs and Northern Development Canada, “The Specific Claims Policy and Process Guide,” 2009, p. 7. (Online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/plc_1100100030502_eng.pdf).

¹⁵ ATI, “Information Briefing Note, Aboriginal Affairs and Northern Development Canada,” April 5 2007, p.4.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Strategic Communications Plan for Negotiations, p.3.

focused and simplified stepwise approach? Perhaps, the answer is simply that the Crown views its ‘panacea’ as precisely the most effective approach to address the totality of issues surrounding the Six Nations claim in a single process. When I say panacea, I am referring to the ad-hoc process established by the Crown, Ontario and Six Nations to account for the “damages with respect to over 200 years of history and transactions” and will lead to a process and resolution that will be “to the satisfaction of all parties”.¹⁹ In this paper, I will establish the nature of the Crown’s approach to the Six Nations claim and occupation and explain how the panacea approach is problematic.

At face value, the Crown’s lofty goals are hard to argue with. The blanket statement that “[n]egotiated settlements are about justice, respect and reconciliation [and] they are not only about coming to terms with the past and respect for treaties, but also about building a better future for all Canadians” is very appealing.²⁰ Yet, in a very practical sense, does the government’s acceptance of a broader approach and the quest for a ‘final solution’ make their approach too big to succeed? Moreover, if this “big picture” approach relies on framing the problem as equally large, and possibly, implicitly, as too big to solve, will the framing of the size and complexity help to absolve the Crown of responsibility if negotiations fail? If so, the question which then must be asked is: If the Crown’s approach is to portray the claim as so large and complex as to deny resolution, and thus build-in an excuse for failure should this come to pass, how can this approach to claims resolution be said to be honourable? And if it is, in fact,

¹⁹ Aboriginal Affairs and Northern Development Canada, “Exploration Resolution Progress Joint Statement of Canada, Ontario and Six Nations,” April 5, 2006. (Online: <http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/j-a2006/snjs-eng.asp>).

²⁰ Information Briefing Note, April 5, 2007, p.5.

not honourable, does the federal government's approach in and of itself an act that dishonours the Crown's responsibilities to First Nations?

The managerial approach to these complex issues must be malleable enough to respond to the dynamics of the situation. The state knows only too well that the process of addressing outstanding specific land claims is fraught with problems and that the Six Nations claim in particular is extremely complex due to the scope, size and history. Therefore, while "Canada's primary role is at the lands claim negotiation table", the state must also frame that role carefully and strategically; it must undertake a politically-expedient communications approach that is "strategically responsive with proactive efforts made in relation to developments at the negotiations table."²¹ In other words, it is in the government's best interests to emphasize the complexity and magnitude of the claim – a strategy which simultaneously masks and justifies government inaction, and affords the state space to create an image of action even if little is happening. Proof of this approach can be found in the fact that since the largely fruitless negotiations began in 2006, Canada has been holding the same line that "negotiations are the appropriate route to follow in order to find a lasting solution to these complex issues".²² This is of course, notwithstanding the apparent fact that, thus far, this route has lead to nowhere. It is difficult not to wonder whether the state has agreed to an expanded discourse because conflating the conflict in this manner renders the problem so large that, in effect, no one can fault the state for not resolving it! If the claim and the conflict it has inspired has fragmented into a remarkably wide and complex list of issues and demands, its resolution – and arguably also a means by which the entire conflagration might have been avoided – may well reside in how clearly and

²¹ Strategic Communications Plan for Negotiations, p.9.

²² Information Briefing Note, April 5, 2007, p.5.

ethically the state chooses to demonstrate its honour. The honour of the Crown should press the state to hold its obligations as fiduciary to the Mohawks, as to all Aboriginal people, firmly in mind as it responds to the claim and its attendant issues.

The claims and issues presented by the Six Nations are many and while this paper cannot, given its short span and limited focus, elucidate the fate of each of those issues, it can critique the approach the Crown has taken. Thus, the focus will be upon the manner and degree to which the honour of the Crown has infused the state's response to the claim, the protest and the occupation of the disputed lands. Although this is a far more narrow focus, it is, I believe, easily argued that, had the government remained true to the principle of the honour of the Crown in dealing with the claim, the path to resolution would have been far clearer and shorter.

1.1 First Nations' Context in Canada

Canada's history with Crown-First Nations' rights is well recognized to be one marked by discrimination and driven by assimilation-based policies. It is a history that involves all levels of government that at times have failed to fulfill obligations and promises made by successive governments to First Nations. This history was underwritten by calculated efforts by the federal government to assimilate, disrupt and dismantle First Nations' communities, culture and language. The disenfranchisement of Aboriginal people in Canada has been well documented. The *Indian Acts* (1876, 1880 & 1886) were clearly written with the underlying policy intent of forced assimilation through the abolishment of an independent Aboriginal status, legislated band membership rules, abolition of traditional leadership and political systems, federally controlled

electoral systems, the banning of First Nation's spiritual activities, the creation of residential and industrial schools and heavily restricted access to legal representation and provincial and federal elections.²³ These disruptions are not just isolated incidents that have been long since forgotten – at least not by Aboriginal people. The effects of these policies have clear consequences for modern First Nations communities in a constellation of disadvantages that has been described as “the embodiment of inequity”, whereby Aboriginal people are over-represented in disparity rates that span social, criminal justice, health, political and economic sectors.²⁴ It is now largely accepted fact that Canada's actions have had a demonstrable and deleterious effect on First Nations people.

The Aboriginal reality in Canada is poor but not without hope. The Crown and its supporters would contend that apologies have been made,²⁵ programs for reconciliation established,²⁶ and new treaties have been forged.²⁷ Pointedly, the Crown has stated that with the official opening of the Specific Claims Tribunal (SCT), Canada and First Nations can jointly accelerate the resolution of specific claims and find “justice for First Nations claimants and certainty for government, industry and all Canadians.”²⁹ The Prime Minister, Stephen Harper has even went so far as to say as recently as January 24, 2012 that

²³ Union of British Columbia Indian Chiefs, Aboriginal Rights Position Paper Resource Kit [undated] p. 106-108. (Online: <http://www.ubcic.bc.ca/files/PDF/AboriginalRightsResourceKit1980.pdf>).

²⁴ Naomi Adelson, “The Embodiment of Inequity: Health Disparities in Aboriginal Canada,” *Canadian Journal of Public Health*, March-April 2005, p 46. (Online: <http://pubs.cpha.ca/PDF/P24/22247.pdf>).

²⁵ Aboriginal Affairs and Northern Development Canada, “Statement of Apology to the Former Students of Indian Residential Schools,” June 11, 2008. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100015644>).

²⁶ Aboriginal Affairs and Northern Development Canada, “Indian Residential School Resolution Canada,” Last Modified 2012-03-20. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100015576/1100100015577>).

²⁷ Aboriginal Affairs and Northern Development Canada, “Acts, Agreements and Land Claims,” Last Modified: 2010-09-15. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100028568/1100100028572>).

²⁹ Specific Claims Tribunal Canada, “Welcome to the Specific Claims Tribunal Canada,” Last Modified: 2012-01-011. (Online: http://www.sct-trp.ca/hom/index_e.htm).

our Government has worked hard to deal with matters of abiding concern to members of Canada's First Nations ... concrete action, has been our election promise to First Nations people in 2004, in 2006, in 2008 and in 2011. And to those commitments, we have been faithful. For example, Our Government has addressed historic grievances by accelerating the settlement of both comprehensive and specific claims.³⁰

However, and beyond the political rhetoric, the First Nations recent reality in Canada has also been characterized by federal cuts to Aboriginal agencies, such as the National Aboriginal Health Organization (NAHO),³¹ the Native Women's Association of Canada (NWAC),³² the National Centre for First Nations Governance (NCFNG),³³ and the Assembly of First Nations (AFN) in Budget 2012.³⁴ In fact, for all of the aforementioned organizations, said the AFN, the Conservative government's budget cuts mean that these organizations will cease to exist. Simply put, the same government that espouses a *working for First Nations* mantra has eliminated the funding for four internationally recognized Aboriginal organizations that are mandated to help improve the health and rebuilding of First Nations in Canada.

The actions recently taken by the Crown undermines the plausibility of a sincere interest in the health and welfare of First Nations. More importantly for this paper is that negative Crown actions have not been limited to health and governance sectors: In the summer of 2011 the government announced that it was intending to "cut off Specific Claims negotiations" and the

³⁰ Stephen Harper, "Statement by the Prime Minister of Canada at the Crown-First Nations Gathering," 24 January 2012. (Online: <http://pm.gc.ca/eng/media.asp?id=4597>).

³¹ National Aboriginal Health Organization, "Announcement," April 5, 2012. (Online: <http://www.naho.ca/wp-content/uploads/2012/04/NAHO-Announcement-5-APR-12.pdf>).

³² Native Women's Association of Canada, "Marilyn Buffalo, Past President of NWAC calls out for support from NAO leaders to oppose federal cuts to Aboriginal health funds," April 13, 2012. (Online: <http://www.nwac.ca/media/release/17-04-12>).

³³ National Centre for First Nations Governance, "Feds Cut NCFNG Nation Rebuilding Services," April 16, 2012. (Online: http://fngovernance.org/news/news_article/feds_cut_services_that_develop_healthy_independent_first_nations).

³⁴ Assembly of First Nations, "Assembly of First Nations Health Capacity Reduced by Federal Cuts," April 19, 2012. (Online: <http://www.afn.ca/index.php/en/news-media/latest-news/assembly-of-first-nations-health-capacity-reduced-by-federal-cuts>).

Crown was preparing final “take it or leave it offers”.³⁵ Effectively, First Nations negotiators have said that all existing specific land claims were to be completed by October 16, 2011 and “all previous offers made at the negotiating table by federal officials will be formally revoked.”³⁶ All outstanding claims would be forced to be submitted to the Specific Claims Tribunal (SCT) for review and processing. At present it has been difficult to report on what has happened with this initiative but First Nations claim holders are obviously alarmed.

The push to have all specific land claims resolved under the SCT is problematic. This is largely due to the SCT claims ceiling of \$150 million per claim and that the SCT as a resolution body and process has been opposed strongly by many First Nations. The SCT’s opposition includes the AFN, the Federation of Saskatchewan Indian Nations, the Canadian Bar Association and the Indigenous Bar Association.³⁷ The concerns with the SCT include the Tribunal’s rules being “too court like, not flexible enough and not culturally sensitive”,³⁸ and not only is the Tribunal limited to an award of \$150 million for a single claim but it can only award \$250 million per year to for all processed specific claims.³⁹ But also, as Carolyn Bennett, Liberal Critic for Aboriginal Affairs and Northern Development says, “[u]se of the Specific Claims Tribunal process alone to settle claims will deny First Nations justice and financial fairness, and will not fully and respectfully honour Canada’s lawful obligations to First Nations”.⁴⁰

³⁵ Josh Grummett, “Sources: feds ending negotiation specific claims,” APTN National News, July 25, 2011. (Online: <http://aptn.ca/pages/news/2011/07/25/sources-feds-ending-negotiation-on-specific-claims/>).

³⁶ Ibid.

³⁷ Federation of Saskatchewan Indian Nations, “Treaty Right to Land: Specific Claims,” 2010. (Online: <http://www.fsin.com/index.php/treaty-rights-to-lands.html>).

³⁸ Ibid

³⁹ Rick Garrick, “Land claim process concerns NAN leaders,” August 18, 2011. (Online: http://www.wawataynews.ca/archive/all/2011/8/18/land-claim-process-concerns-nan-leaders_21782).

⁴⁰ Dr. Carolyn Bennett, “Government must maintain good faith negotiations with First Nations on Specific Claims,” July 26, 2011. (Online: <http://www.liberal.ca/newsroom/news-release/government-maintain-good-faith-negotiations-nations-specific-claims/>).

1.2 My Perspective

The Six Nations' land claims and protest are the canvas upon which I will draw out my examination of the federal government's actions and which will illustrate where law and politics meet. The first step in articulating the colourful tapestry of specific land claims is to provide some important definitions, set out the parameters under which this paper operates, its methodology and offer some background information. Following this, I will delve into background of the Six Nations' claim and issues. Once this is established, I will work through my main arguments that the honour of the Crown obligates that the crown negotiate specific land claims settlements in good faith and consistent with its fiduciary obligations to First Nations. I will argue that the state's response to the Mohawk protest and occupation of the DCE reflects an abandonment of its fiduciary responsibilities and an abdication of leadership on Aboriginal claims in particular. This argument will be supported through an analysis of the policy and public positions taken by the state over the course of the protest, and the actions which followed from these positions. The failure of the state to entrench meaningful dialogue within their response to the protest will be revealed as one of the pivotal failings of the state in responding to the conflict at the DCE.

I believe that when contrasted with the Crown's response to other, similar crises, such as that at Oka in 1990, the reaction of the Crown to the Caledonia situation was vastly improved. No lives were lost and multiple players in this more recent conflict have been and are engaged in negotiations that have the potential to result in meaningful reconciliation. However, there have also been some very questionable decisions and actions taken by the Crown in addressing the Six

Nations' claims and response to the occupation/protest. The focus of this paper is on the questionable actions taken by the Crown that have resulted in what I would describe as the *dis-honour of the Crown*.

1.3 Methodology

As I stated in my introduction, I have asked fairly simple and straight forward questions as to whether or not the Crown and honoured its obligations to the Six Nations. The natural extension of this and the approach that I've taken with this paper is to compare and contrast the government's public statements against its actions. The lens in this comparison is of course the requirements found in the honour of the Crown. The process that I have taken to test my thesis statement is to research and evaluate the Crown's public statements on the crisis. In doing so, I used many sources including public documents, media reports, and sought out non-public documents through Access to Information requests for qualitative research. My thesis is based on the hypotheses that the Crown's response to the Six Nations specific land claim and occupation/protest of the DCE constituted a breach of fiduciary duties and the honour of the Crown. To test this theory I have reviewed the Crown's statements against actions and against the internal briefings and communications material I received from my multiple ATI requests. Using comparative analysis I reviewed and analyzed the material to see if the Crown did what it said it would do.

The search for accurate information on a state position on situations like the Six Nations claim, protest and occupation of the DCE is difficult. Negotiations, discussions and briefings are often

shrouded behind closed-door negotiations, and information is often withheld as a matter of confidentiality. I have used my experience working in both the public service and as a Parliamentary Assistant to scour both federal and provincial government records in Hansard, searched the municipal records for Haldimand Norfolk County, and through Six Nations records including documents produced by the Six Nations Council, Six Nations Lands and Resources office and documents available through the Public Archive of Canada. I have scanned through years of media reports, press release and articles on the Six Nations' land claim and protests. To bolster my knowledge and research I have engaged in a discourse analysis using a broad range of scholarship on law and Aboriginal rights, Canadian legal cases, and submissions by stakeholders and *amicus curiae*. At the very core my methodology is to use the information freely available to hold the Crown to account. It is to the details of this method that this thesis now turns.

2. Theory and Framework

2.1 The Conceptual Framework and the Honour of the Crown

At the very core of this paper is a conversation about the integrity of the government and the question of whether and how the Crown has fulfilled its obligations to the Six Nations people. I use the word integrity advisably. The term 'integrity' draws into the discussion a set of moral, legal and ethical principles which should inform government action generally, but most importantly and specifically in the realm of Crown-First Nations relations. Here it is not simply enough for the government to say that it is doing something, it must fully honour its obligations through meaningful actions that reflect the priority a fiduciary should give to those who share this relationship of trust and protection. I have also chosen the word integrity because it invokes

a sense of character that can cut through the nonsense of the political gamesmanship. Political gamesmanship is, in my opinion, the practice of the government or political parties seeking an advantage in a dispute or on a particular issue through dubious tactics. For example, in March 2008 the Minister of Indian and Northern Affairs Canada (INAC) announced that “Canada's New Government has expanded its negotiations mandate to allow more flexibility in moving these historical claims forward.”⁴¹ However, in reality the government has made only one offer to settle a few of the Six Nations land claims - specifically the Grand River Navigation Company investment, Block 5 (Moulton Township), Welland Canal flooding, and Burtch Tract – that were subsequently flatly rejected.⁴² The government has not countered the Six Nations’ settlement offers or shown any flexibility in moving the Six Nations’ claims forward.⁴³ Likewise, Canada’s tactical manoeuvre to position the Crown as a champion for negotiating a solution reads as false when the government negotiations only began in earnest following the Six Nation’s occupation. I believe that using the term political gamesmanship is apt because the Crown’s use of dubious tactics is in direct conflict with the State’s ability to fulfill its responsibilities and character under the *honour of the Crown*. The Crown should act with integrity which has been poetically summed up by J.C. Watts when he said, “Character is doing the right thing when nobody's looking.”⁴⁴

My conceptual framework for this paper is that the honour of the Crown must govern all Crown-First Nations relations and, expressly, the reconciliation of specific land claims. This is not a

⁴¹ News Release, “Minister Jim Prentice Announces Efforts to Advance Negotiations”.

⁴² Ontario Ministry of Aboriginal Affairs, “Haudenosaunee/Six Nations Haldimond Tract Negotiations: Frequently Asked Questions,” Last Modified July-07-11. (Online: <http://www.Aboriginalaffairs.gov.on.ca/english/negotiate/sixnations/faq.asp>).

⁴³ Jackson Hayes, “Six Nations rejects land claim offer,” The Hamilton Spectator, September 09, 2008. (Online: <http://www.numberswatchdog.com/numbers%20docs/Six%20Nations%20rejects%20land%20claim%20offer.pdf>).

⁴⁴ J.C. Watts, “Quotes on Integrity”, undated. (Online: <http://www.quotearden.com/integrity.html>).

novel statement. The Crown's honour, as the Supreme Court of Canada (SCC) noted in *R. v. Badger*, "is always at stake" in its dealings with Aboriginal peoples.⁴⁵ Yet, the perplexing question is what constitutes the fulfilment of the obligations required of the honour of the Crown. In my attempts to answer this question, I have become fixated on three pillars that I believe best support the notion of the honour of the Crown. The first pillar is synonymous with Aboriginal rights discussions and defines the essence of Canada's Crown-First Nation relationship - fiduciary duty. The second pillar is what I believe sets the standard for government conduct that will uphold the honour of the Crown – good faith. Finally, the third pillar speaks to how the Crown should negotiate disputes – fairly. With these three pillars combined and employed in the claims process, I believe that the integrity of the Crown could remain intact.

In layman's terms, I believe that the definition of *honour of the Crown* is for the Crown to respect its fiduciary duty and act in good faith and negotiate disputes fairly. Mine is a simple definition of what has become, in the political realm, an unnecessarily complex idea. One of the reasons why the definition of the honour of the Crown is so complex is because the courts have been asked to grapple with the unique relationship that the Crown has with First Nations. If the Crown had been ethical in all its dealings with First Nations in the first place, the courts would not have had to educate the Crown on ethics and honour. The honour of the Crown in its dealings with Aboriginal people is further complicated by the Crown's obligations to everyone else. While it can be argued that the First Nation fiduciary duty should trump these other interests – as the fiduciary duty is designed specifically to protect the minority from the more powerful majority - politics often override good policy, especially when the duty is owed to a minority population. I have reduced my definition of the honour of the Crown to these three

⁴⁵ *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41.

principles because I believe this is in essence what the courts are trying to explain. Moreover, the honour of the Crown is a mode of operation that should govern all legislation, regulation and Crown conduct as it relates to First Nations. This is not to say that First Nations must approve of all Crown action, but that state conduct must take into consideration First Nations' interests and, as the Courts have confirmed, First Nations must be consulted. Yet, the requirement for consultation is not a simple endeavour. This requirement constitutes a genuine obligation to engage in a meaningful way and utilize the results.

The Crown also has a legal duty to consult and accommodate First Nations. “The *foundation of the duty in the Crown’s honour and the goal of reconciliation*, suggest that the duty arises 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 [emphasis added]”.⁴⁶ The Crown’s duty to consult is proportionate to the strength of the Aboriginal claim. The Crown does not have a duty to agree, nor does it give First Nations a right to veto, but rather requires “good faith on both sides” and requires the Crown to make a *bona fide* commitment to the principle of reconciliation over litigation.⁴⁷ The legal duty for the Crown to consult with First Nations arises from the protection of Aboriginal and treaty rights set out in Section 35(1) of the *Constitution Act, 1982*. The purpose of such protection has been interpreted by the Supreme Court of Canada as “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”.⁴⁸ Accordingly, the duty to consult is an aspect of the reconciliation

⁴⁶ Justice Ronald S. Veale, “The Duty to Consult and Accommodate: The Crown’s Duty to Consult and Accommodate with Respect to Aboriginal and Treaty Rights,” undated. (Online: http://www.cba.org/cba/cle/PDF/ADM09_Veale_slides.pdf).

⁴⁷ *Ibid.*

⁴⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *supra*, at para. 31.

process which flows from the historical relationship between the Crown and Aboriginal Peoples and is “grounded in the honour of the Crown”.⁴⁹

As important as it is that the courts have demanded that First Nations be consulted, the real question rests with whether or not the consultation process and the ensuing results, effectively protect First Nations’ rights. The Supreme Court in *Haida Nation v. British Columbia* was clear that consultation was to be meaningful and the nature of this obligation to be based on:

... consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honorable process of reconciliation that s. 35 demands. It preserves that Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation ... [para. 37]

The common thread on the Crown’s part must be ‘the intention of substantially addressing [Aboriginal] concerns’ as they are raised ... through a meaningful process of consultation [para. 42]

Meaningful consultation *may* oblige the Crown to make changes to its proposed action based on information obtained through consultations [para. 46][emphasis added]⁵⁰

So while it is clear in *Haida* that consultation is supposed to be meaningful, the challenge is whether consideration of First Nations’ interests constructively results in the possibility of changing or cancelling the proposed activity. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, the Court said:

Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. [para. 54]

⁴⁹ Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650 para 32.

⁵⁰ Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 Para 37-46.

The continued protection of First Nations' rights and interest is therefore a Crown obligation. However, Aboriginal interests can be impacted by a broad range of activities including, "construction, operation, and eventual abandonment" of a disputed site. Each of these activities – signally and cumulatively - may negatively impact "Aboriginal rights and title and the (sovereign) exercise of those rights and enjoyment".⁵¹ These considerations ultimately lead to the larger and more substantive problem of addressing First Nations' options for recourse in cases where they believe that their rights have been infringed.

In *Tcheachten First Nation v. Canada (A.G)*, the British Columbia Court of Appeal (BCCA) confirmed that the Federal Court has the exclusive jurisdiction "in respect of challenges to federal Crown decision based on alleged failures of consultation".⁵² Unfortunately, Rule 302 of the Federal Court Rules limits the number of applications for judicial review to one per remedy being sought.⁵³ This rule, in the context of First Nation's consultations, is problematic because of the complex nature of this often multi-decision process.⁵⁴ Furthermore, Section 18 of the *Federal Courts Act* seems to "provide for similarly limited judicial review processes by focusing on a single decision of a statutory tribunal."⁵⁵ Therefore, I believe that it is fair to question the recourse provisions available to First Nations when there are challenges to the Crown's fulfilment of its duty to consult and to address effective resolutions. Moreover, when one

⁵¹ Gregory J. McDade, QC, and Maegen Giltrow, "Federal Court Judicial Review and Aboriginal Consultation Cases," *Federal Court Practice*, 2007, p. 6. (Online: <http://www.cle.bc.ca/PracticePoints/ABOR/Fed%20Ct%20Judicial%20Review%20and%20Aboriginal%20Consultation.pdf>).

⁵² McDade. P. 2.

⁵³ *Ibid*

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

considers the honour of the Crown and the Crown's fiduciary obligations to First Nation, it is only fair to wonder if the Crown should be compelled to intervene.

It is well established that the fiduciary relationship exists between the federal Crown and First Nations. However, it must be remembered that this relationship, as described in *Quebec (Attorney General) v. Canada (National Energy Board)*, and in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, is tempered by the fact that “not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation”.⁵⁶ It is the nature of the relationship between the Crown and First Nations group that “defines the scope, and the limits, of the duties that will be imposed.”⁵⁷ However, one can see from *Beckman v. Little Salmon/Carmacks First Nation*, the duty to consult and accommodate First Nations is located within the framework of the honour of the Crown.⁵⁸ The duty to consult is therefore a supporting doctrine. On the other hand, the honour of the Crown is a constitutional principle and as stated in *Haida*, “In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.”⁵⁹

2.2 The Pillars

2.2.1 Fiduciary Duty

The Crown-Aboriginal relationship is said to be a special trust relationship based on the unique legal and constitutional position of Aboriginal people. Canada's fiduciary duty is an evolving

⁵⁶ *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, *C Fiduciary Duty* and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

⁵⁷ *Ibid.*

⁵⁸ *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 para 38.

⁵⁹ *Haida*, para. 41.

concept that defines the state-First Nations relationship. This duty informs the boundaries of the honour of the Crown and influences virtually all interactions between the Crown and First Nations and interpretation of any statutory or other mechanisms informing those interactions. The Crown's fiduciary duty towards the First Peoples is held to a high standard because of this unique relationship that should be guided by the honour of the Crown. By contrast the *Indian Act* sets out the federal government's exclusive authority to legislate in relation to "Indians and Lands Reserved for Indians".⁶⁰ The Act also defines who is an "Indian" and provides certain legal rights and legal encumbrances for registered Indians. The Supreme Court of Canada in the 1950 *St. Ann's Island Shooting & Fishing Club Ltd. V. R.* case explained further that the *Indian Act* "embodie[s] the accepted view that these aborigines are ... wards of the state, whose care and welfare are a political trust of the highest obligation."⁶¹ Since *St. Ann*, Court has provided numerous landmark decisions that have helped to shape and define the Crown-First Nation relationship and therefore legal-political consequences of this relationship. For example, the Court in *R. v. Sparrow* determined that "the Government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples" and that this relationship is "trust-like, rather than adversarial".⁶² The concept of the Crown's fiduciary duty was expanded in *R. v. Marshall* where the Court asserted that the honour of the Crown is at stake in all the Crown's dealings with Aboriginal people and thus any legislative infringement of their rights must be justifiable in terms consistent with this trust and the honour of the Crown.⁶³ In basic terms, the honour of the Crown is the guiding principle that informs all aspects of the fiduciary relationship between the Crown and First Nations.

⁶⁰ *Indian Act*, R.S.C., 1985, c. I-5.

⁶¹ *St. Ann's Island Shooting & Fishing Club Ltd. V. R.*, [1950] S.C.R. 211; [1952] 2 D.L.R. 225, at para 232.

⁶² *R v. Sparrow*, [1990] 1 S.C.R. 1075 p.35.

⁶³ *R. v. Marshall*, [1999] 3 S.C.R. 456 p.47.

The honour of the Crown and its related fiduciary duties to First Nations people are the source of both much of the challenge and, potentially, the resolution of Aboriginal land claims. Tensions arise between First Nations, the Crown and non-Aboriginals because of their competing understandings of Aboriginal rights, state responsibility and the perceived and potential impacts of resolving outstanding claims on stakeholders. Tensions also reside in the difficulty posed by the *sui generis* nature of Aboriginal rights as described in *R. v. Guerin* and other cases.⁶⁴ When the courts refer to these rights as *sui generis*, they are describing a unique collective right First Nations have to the use of and jurisdiction over their ancestral lands.⁶⁵ As such, this right is not derived from the Crown, but from the First Peoples' relationship to those lands defined by their historic use and occupation of them. Aboriginal title and rights are thus a unique set of rights afforded to First Nations which are unique and separate from those rights afforded to non-Aboriginal Canadians.⁶⁶

Sui generis rights are not, however, unlimited as the Courts have placed limits on the scope of the Crown's fiduciary duty. In *Wewaykum Indian Band v. Canada*, it was determined by the Court that "the fiduciary duty of the Crown does not exist at large, but rather in relation to specific Indian interests".⁶⁷ Thus, the Crown assumes "discretionary control over specific Aboriginal interests" and the manner in which that control is exercised must respect the nature of the Crown's trust relationship with Aboriginal people.⁶⁸ The honour of the Crown is, for the

⁶⁴ *Guerin v. The Queen*, [1984] 2 S.C.R. 33, p. 383.

⁶⁵ John Borrows, "With or Without You: First Nations Law (in Canada)," *McGill Law Journal*, Vol. 41, 1996 p. 640 (Online: <http://lawjournal.mcgill.ca/documents/41.Borrows.pdf>).

⁶⁶ *Ibid.* p. 634.

⁶⁷ *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, para 79.

⁶⁸ *Ibid.*

state, a central guiding principle and a ‘check’ on the Crown’s role as a fiduciary and where that honour informs the execution of the Crown’s fiduciary obligations, the trust will be respected and the integrity of Aboriginal interests preserved. The *Wewaykum* limitation stipulates, however, that this trust is not a general one, but must attach to a specific Aboriginal interest.⁶⁹ Where such an interest does arise, its proper administration should be guided by the honour of the Crown, as with all dealings between the Crown and Aboriginal people.⁷⁰ Clearly, then, this trust relationship is not absolute or unqualified.

With the advent of the *Constitution Act, 1982*, the government of Canada created room for the expansion of Aboriginal rights in Canada but did not expressly define them, preferring to leave this to the courts. The honour of the Crown is something that has always existed in the Crown-First Nations relationship. So, while the Constitution allows for the expression of significant Aboriginal rights and legal interpretation of section 35 has expanded the judicial authority, there has always been at a minimum an ethical and moral obligation on the government to treat First Nations and all people’s interests honourably and with good faith.⁷¹ With regard to specific land claims, it is not the Constitution or courts which should drive the resolution agenda, rather that momentum should stem from the ethical fact that resolution is the *right thing to do*.

Specific land claims that are valid should be resolved in a fair and transparent manner. Unfortunately, this is a loaded statement as there many potential problems characterizing the definition of what constitutes a valid claim and what constitutes fair resolution. The Crown is both a party and a judge in claims resolution, and the Crown has a vested interest in actually

⁶⁹ *Wewaykum*, para 92.

⁷⁰ *Ibid.*, para 80.

⁷¹ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*, section 35.

minimizing claims which may be argued to conflict both with its role as a fiduciary and, at least potentially, with the honour of the Crown. The difficulty is largely the independence of the process, a problem that the Crown asserts the creation of the independent Specific Claims Tribunal attempts to correct. As previously stated, many First Nations do not share the Crown's position and argue that the burden of proving a claim should not be on the Aboriginal claimants. Instead, Aboriginal groups say that the "government that should bear the burden of establishing the validity of its claim to the unfettered administration and control of Aboriginal lands, and that the Crown, as a fiduciary obliged to protect the interests of Aboriginal people, should act with propriety."⁷² For the Crown, land claims also hinge on disputable facts or inconclusive evidence, yet clearly even those that may appear on their face to have little merit should be given due diligence, afforded a clear rationale for why the claim is invalid and the Department of Aboriginal Affairs and Northern Development work with the community to address outstanding issues. There are also problems with determining the validity of a claim as it extends to the understanding of the meaning of the text in a treaty. Each of the main parties – First Nations, Crown and the Courts – has struggled with how the text of a treaty should be understood whether by a literal, liberal or conceptual interpretation? However, one must be attentive to the principle stated in *Marshall* that "the words of the Treaty must be given the sense which they would naturally have held for the parties at the time ..."⁷³ Yet, even this statement needs to be qualified as the language used in treaties and their meaning may have - indeed clearly have been - interpreted differently by the parties. This lack of consistency and clarity serves to further

⁷² Tina Keeper, quoting the Report of the Royal Commission on Aboriginal Peoples, 39th Parliament, 2nd Session No.: 093, May 12, 2008. (Online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3488711&Language=E&Mode=1>).

⁷³ Indian Claims Commission, Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry, quoting p. 67 *R. v. Marshall*, [1999] 3 SCR 456 at para. 78. (Online: <http://portal.usask.ca/docs/ICC/inqandmedrep/Redearth2008.pdf>).

confound the equitable resolution of claims. For example, in *Dreaver v. R.* and *R. v. Johnston*, the Courts were challenged to interpret the promise of a “medicine chest”.⁷⁴ In *Dreaver*, the Court decided that medicine chest was to cover all prescription drugs for Treaty 6 bands.⁷⁵ However, in *Johnston*, the Court found that the promise of a medicine chest did not even extend to the provision of a doctor’s services.⁷⁶ So while the treaties themselves are incredibly important and a symbol of Aboriginal sovereignty, a consistent and fair interpretation of the text and establishment of what is a valid claim is also paramount.

2.2.2 Good Faith

Good faith is essential to negotiations and a pillar that supports the honour of the Crown. Good faith is associated with the legal rules related to honesty, fairness and reasonableness “the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community.”⁷⁷ The Vienna Convention on the Law of Treaties (1969) states in Article 26: “‘*Pacta sunt servanda*’ Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁷⁸ Good faith in simple common sense terms means that “agreements must be kept”.⁷⁹ The parties to a negotiation should conduct themselves in a just and honest manner; particularly the Crown, which is also to be guided by honour in all its dealings with Aboriginal people. Canadians (assuming they care) and First

⁷⁴ The Aboriginal Justice Implementation Commission, “The Justice System and Aboriginal People: The Inquiry and the Issues,” November 1999, Chapter 5. (Online: <http://www.ajic.mb.ca/volume1/chapter5.html#17>)

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ William Tetley, *Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering* p. 4. (Online: <http://www.mcgill.ca/files/maritimelaw/goodfaith.pdf>)

⁷⁸ Vienna Convention on the Law of Treaties, Part III, Article 26. (Online: <http://www.ilsa.org/jessup/jessup11/basicmats/VCLT.pdf>).

⁷⁹ Tetley p. 5

Nations should be able to expect fair dealing, non-adversarial negotiations and, once an agreement is reached, the responsible party(ies) should perform its/their obligations. This understanding also means that non-fulfillment of the obligations is a breach of the pact and most importantly, that breaches have consequences. In terms of specific claims, issues raised under the Specific Claims Policy are most often resolved through financial settlements and return of lands.⁸⁰ For example, in December 2010, the Bigstone Cree Nation received a land claims settlement of over \$231 million from the federal government and since 1974 the federal government has paid over \$2.6 billion in compensation to settle 343 specific claims.⁸¹ The Crown, and consequently all Canadians, must shoulder the financial consequences of past Crown failures. Crown failures righted under the Specific Claims Policy, the SCT or ad-hoc processes like that characterising the Six Nations' claim, also carry the weight of public acknowledgement of such wrongs and this has intrinsic value to First Nations. However, in light of the current situation, there appears to be no penalty to the Crown when outstanding specific lands claims go on unresolved.

Good faith is an assumed practice that is necessary for the efficacy of the entire negotiation and reconciliation process. Addressing claims of mismanagement of funds, non-fulfillment of treaty obligations and other claims of historical wrongs experienced by First Nations at the hands of the Crown must be negotiated, conditions agreed upon and performed ethically and in good faith by the Crown and its representatives. It is the thesis of this paper that the Crown is obligated to behave ethically and in good faith because the honour of the Crown demands nothing less and

⁸⁰ Aboriginal Affairs and Northern Development Canada, "Specific Land Claims Policy and Process Guide," Last Modified: 2010-09-15. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100030501>).

⁸¹ Mathieu Gobeil and Isabelle Montpetit, "When the government fails to honour its commitments: Specific land claims process offers a remedy," CBC News May 30, 2011. (Online: <http://www.cbc.ca/news/canada/story/2011/05/30/f-mapping-future-specific-claims.html>).

must be the foundation on which all Crown-First Nations relations should be built.

An understanding of good faith is essential to negotiations and honesty, fairness and reasonableness, and it is perhaps best explicated through framing its opposite: bad faith. S.J. Burton described bad faith as something that “occurs precisely when discretion is used to recapture opportunities foregone upon contracting – when the discretion-exercising party refuses to pay the expected cost of performance.”⁸² Bad faith performance by the Crown in land claims negotiations occurs precisely when the Crown uses its position of power to influence the outcome in its favour. The Crown should not be adversarial as it has a fiduciary responsibility towards Aboriginal interests. That is not to say that all claims should be automatically validated or that all claims are valid, however, it is incumbent upon the Crown to genuinely engage any claim, investigate it fully and ethically and, if an outstanding legal obligation emerges, meet that obligation. Further, should no outstanding legal obligation be found, but the claim reflects a real and genuine need or injustice challenging the prosperity or health of the claimant First Nation, there may be an argument to be made that the honour of the Crown behooves the state to work with the claimants to ameliorate that need or injustice. A prime example of this is found in the argument of the Indian Specific Claims Commission in the *Red Earth and Shoal Lake Cree Nations Quality of Reserve Land Inquiry* that, while the “Crown met its lawful obligations to these Bands ... the present conditions on the reserves ... are unjust and should not be tolerated in Canada.”⁸³ In its conclusion, the Commission gave only two recommendations, that the claim not be accepted for negotiation under Canada’s Specific Claims Policy and that “Canada initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the

⁸² Gobeil

⁸³ *Red Earth and Shoal Lake Cree Nations Quality of Reserve Land Inquiry* p. 66

problems resulting from the condition of their reserve lands.”⁸⁴ The latter recommendation was made under the Commission’s supplementary mandate. While the circumstances of the Red Earth case do not give rise to an outstanding lawful obligation, the Commission “relies upon its supplemental mandate to recommend the government recognize, rather than deny,” the other issues at stake.⁸⁵

2.2.3 Fairness

The duty of fairness is a well established concept and is considered the “bedrock of administrative law”.⁸⁶ The Courts have stated that

[T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.⁸⁷

At the heart of the duty of fairness are two requirements which are “modern restatements of venerable natural justice protections: (1) the right to be heard and (2) the right to an independent and impartial hearing.”⁸⁸ This duty is embedded in our social consciousness and codified in the *Canadian Bill of Rights* provision that protects the “right to a fair hearing in accordance with the

⁸⁴ Ibid. p. 69.

⁸⁵ Indian Claims Commission, “Indian Claims Commission Proceedings,” 2000, p. vi. (Online: <http://portal.usask.ca/docs/ICC/ICCP%2013web.pdf>).

⁸⁶ David J. Mullan. *Essential of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) 7.

⁸⁷ Grant Huscroft, The Duty of Fairness: From Nicholson to Baker and Beyond, Quoting *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 23 [*Cardinal*]. (Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159055).

⁸⁸ Ibid.

principles of fundamental justice for the determination of his rights and obligations.”⁸⁹ The *Canadian Charter of Rights and Freedoms* (the Charter) reinforces this safeguard and is the clearest source of constitutional protection for procedural claims in Canada because it enshrines a right to the fundamental principle of justice.⁹⁰ While Section 7 and Section 11 of the Charter are subject to legislative override created by s. 33(1) notwithstanding clause, there must be a justifiable reason in a free and democratic society for not providing the benefit of the “principles of fundamental justice” when “life, liberty and security of the person” is at stake.⁹¹

As stated above, the concept of common law procedural fairness is generally divided into two separate categories. *The right to be heard* finds its origin in the Latin term *audi alteram partem*, meaning “hear the other side” and *the right to an independent and impartial hearing* is derived from the Latin term *nemo iudex in sua propria causa debet esse*, meaning that no one should be a judge in their own case.⁹² In light of specific land claims, it is self-evident by the creation of the Specific Claims and Comprehensive Claims processes and the Specific Claims Tribunal that the Crown agrees that land claims need to be *heard*. However, there has been a lot of consternation around the independence and impartiality of the Crown-administered processes. In the 2001-2002 Indian Claims Commission’s Annual Report, the Chief Commissioner stated that “An independent claims body is urgently needed to bring justice and fairness to the specific land claims system. The creation of such a body would be in the best interest not just of First Nations but of all Canadians.”⁹³ This notion was further supported by claimants’ statements during the

⁸⁹ Canadian Bill of Rights, S.C. 1960, c. 44, 2.(e).

⁹⁰ Constitution Act, 1982 Part 1 Canadian Charter of Rights and Freedoms, section 7.

⁹¹ *Ibid.*

⁹² Mullan, p.232.

⁹³ Indian Claims Commission, *Annual Report 2001-2002*, p.1. (Online: <http://publications.gc.ca/collections/Collection/CP22-48-2002E.pdf>).

proceedings for the Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process. Claimants stated that their “primary concern with the Specific Claims policy is the apparent conflict of interest wherein the Government of Canada is both the causer and the ‘resolver’... [and that] First Nations feel the process is not fair, independent, or impartial.”⁹⁴

Principles of procedural fairness were discussed in detail in *Baker v. Canada*. In Justice L’Heureux-Dubé’s decision, she states that underlying all the factors affecting the content of the duty of fairness is an imperative

to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.⁹⁵

Some of the key considerations that *Baker* discusses includes the nature of: the decision being made and the process followed in making it; “the statutory scheme and the terms of the statute pursuant to which the body operates”; the level of importance of the decision to the individual(s) affected; the reasonable expectation of the individual challenge the decision and the choice of the procedure taken by the agency or government body.⁹⁶ These principles are not meant to be exhaustive; rather they are to aid the Court in determining if the duty of fairness has been respected. Procedural fairness is not a rigid concept and must remain flexible as the circumstances of each case dictate how fairness can be interpreted. That said, the concept of

⁹⁴ Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process, “Negotiation or Confrontation: It’s Canada’s Choice,” December 12, 2006, p. 11. (Online: <http://www.parl.gc.ca/Content/SEN/Committee/391/abor/rep/rep05dec06pdf-e.htm>)

⁹⁵ *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, para. 22.

⁹⁶ *Baker*, para. 24.

fairness and the high standards that should be applied to a case are imperative as the rights of individuals are at stake.

2.3 The Source of Duty

As the Supreme Court of Canada (SCC) has held, the Crown has a general duty to act honourably towards First Nations and in reference to their rights. The SCC refers to this duty as the honour of the Crown. It is a duty that “arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”⁹⁷ The Crown’s assertion of sovereignty in effect created “an obligation to treat Aboriginal people fairly and honourably, and to protect them from exploitation.”⁹⁸ This duty appears to also be first formalized by the *Royal Proclamation of 1763* where the Crown states:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.⁹⁹

This duty has also been constructed and articulated in section 35 of the *Constitution Act, 1982*.

As Chief Justice McLachlin stated in *Haida Nation v. British Columbia*,

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, and “[i]t is always assumed that the Crown intends to fulfil its promises” This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.¹⁰⁰

⁹⁷ Haida, para. 32.

⁹⁸ Mitchell v. M.N.R., [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9.

⁹⁹ Royal Proclamation of 7 October 1763, in Brian Slattery, *Aboriginal Rights and the Honour of the Crown*, Supreme Court of Law Review (2005), No. 29, p. 443.

¹⁰⁰ Haida, para. 20.

Thus, the concept of *honour* is derived from the historical recognition that Canada's Aboriginal peoples were never conquered when Europeans asserted sovereignty over them.¹⁰¹ The surrender of First Nations lands to the Crown has been achieved by treaties and the failure of the Crown to respect the obligations which arose through the treaties, Indian Act, and fiduciary are what gave rise to claims. This is what, in essence, section 35 of the *Constitution Act, 1982* represents – the recognition of Aboriginal and treaty rights. It is a modern manifestation of the promise of rights recognition through a process of honourable negotiation. This implies a duty to consult and, if necessary accommodate Aboriginal interests.

2.4 Why this matters

The Crown and Canadians in general should not be surprised by the events in Caledonia or in other regions where outstanding land claims exist. As John Borrows writes,

Aboriginal peoples have a pre-occupation. It is *of* land. They occupied land in North America prior to others' arrival on its shores. Over the past 250 years Aboriginal peoples have been largely dispossessed of their lands and resources in Canada. This dispossession has led to another Aboriginal pre-occupation. It is *with* land. It is crucial to their survival as peoples. Its loss haunts their dreams. Its continuing occupation and/or reoccupation inspire their visions.¹⁰²

The Six Nations, like so many other First Nations groups, see their lands as sacred, fundamental to their cultural identity and vital to their survival and future. The land claims and the struggle maintain or re-gain control constitutes not only the desire to have the access to the resources but

¹⁰¹ Ken Osborne, Clarifying the Role and Responsibilities for Aboriginal Consultation and Accommodation With the Department of Nation Defense, November 2006, p. 3. (Online: <http://www.cba.org/cba/newsletters/pdf/mil-Aboriginal.pdf>).

¹⁰² John Borrows, *Crown and Aboriginal Occupations of Land: A History and Comparison*, (2005) p. 3. http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf

to protect and preserve their ancestral relationship with their lands. The unlawful loss of lands, Crown mismanagement of Aboriginal title and moneys, and a poor means of reconciling valid claims “strains [Aboriginal] respect for law” and the honour of the Crown.¹⁰³ These conditions result in the escalation of the pre-occupation with land claims resolution into open conflict and confrontation.

The public at large should also not be surprised that First Nations people are engaging in blockades and occupations to assert rights over lands and resources; since contact, First Nations have fought to protect their lands.¹⁰⁴ However, in Canada and until recently, First Nations have fairly peacefully engaged in land claim disputes. The violence and aggression displayed during the Oka and Caledonia are examples of the increased frustration experienced by First Nations by ongoing delays in conventional land claim negotiations, Crown inaction, false promises, and the extraordinary monetary, personal and time costs in seeking judicial remedy. The recent situation in Caledonia, Ontario embodies this dissatisfaction and the conscious decision by First Nations to strategically occupy disputed lands as a last resort to obtain redress for what are perceived as outstanding Crown obligations. Aboriginal groups are using physical occupation and civil disobedience to draw attention to their plight in the hopes of finding reconciliation. Their actions are not random and not without the sincere belief that they have valid claims.

For the last three decades Aboriginal groups have articulated their frustrations with the land claims process and desire to raise awareness to Aboriginal issues through protest.¹⁰⁵

¹⁰³Borrows, *Crown and Aboriginal Occupations of Land*, p.3.

¹⁰⁴*Ibid.*

¹⁰⁵ Dwayne Nashkawa, *Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario*, August 30, 2005, p. 11.

Furthermore, large studies conducted by the Royal Commission on Aboriginal Peoples and the Standing Senate Committee on Aboriginal Peoples have clearly established that First Nations people are justifiably frustrated by the lack of progress on land claims. While historians like John Borrows have illustrated that Aboriginal peoples in Canada have a long history of land struggle and protest, no one should be surprised that the more recent strategies of blockades and occupations might escalate.¹⁰⁷

[This direction action] signals a new approach by leadership, traditional land practitioners and people in general. The government processes that have manipulated the treaty and Aboriginal rights of First Nations have totally exasperated the patience and goodwill of First Nations. The price of doing nothing is too costly to First Nations. The cost to First Nations is to live in continual abject poverty, high mortality rates, declining health status and a hopeless future. The new approach is a wake-up call to governments, [the] private sector and public at large that First Nations will not tolerate marginalization while society continues to experience wealth from their resources.¹⁰⁸

Part of this wake-up call should also be a call of warning as the events of Caledonia are under the proverbial microscope. Protests are a learned behaviour. The results here will have long lasting effects. As Chief Terrance Nelson of the Roseau River First Nation warns,

Let me make this perfectly clear: Caledonia is not an isolated incident. To me, it represents the future of indigenous and immigrant relations in these lands if we cannot settle issues in a timely fashion.¹⁰⁹

The simple truth is that situations like the occupation of the DCE, Ipperwash and Oka stand as lightning rods of Aboriginal frustration that should motivate the Crown to find reconciliation of past wrongs or risk causing further aggravation as the Crown manages to ignore such direct action tactics. Therefore, the penultimate question is how to use the lessons learned from the Caledonia situation to better inform Crown practises and mitigate Aboriginal frustration.

¹⁰⁷ Borrows, *Crown and Aboriginal Occupations* p. 10

¹⁰⁸ Nishnawbe-Aski Police Services Board, "Confrontations over Resources Development" (Inquiry project), p 30.

¹⁰⁹ Chief Terrance Nelson, Proceedings of the Standing Senate Committee on Aboriginal Peoples Issue 11 - Evidence - Meeting of November 22, 2006 (Online: http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/11evb-e.htm?Language=E&Parl=39&Ses=1&comm_id=1)

3. Definitions

3.1 Specific Land Claims

Specific land claims are rooted in “grievances over Canada’s alleged failures to discharge specific obligations to First Nations groups (*Indian Act* “bands”) under a number of headings.”¹¹⁰

As a general rule, these claims “arise from alleged non-fulfilment of treaties or other legal obligations, or from the alleged improper administration of lands and other assets under the *Indian Act* or other formal agreements.”¹¹¹ They have also increasingly been seen to arise from the Crown’s failure to respect its fiduciary obligations to Aboriginal people. The Indian Specific Claims Commission noted in its final report that outside of Treaty obligations, “no other legal issue has dominated the work of the ISCC more than the subject of Canada’s fiduciary relationship with First Nations.”¹¹²

Specific claims are one of two types of outstanding obligation claims that Canada is currently addressing, the second of which are Comprehensive claims. Whether specific or comprehensive, a claim begins with a formal statement of the claim that is submitted to the federal and/or provincial government(s); this, however, is where the similarity between the two types of claims ends. Comprehensive claims involve claims to First Nations’ lands that are not covered by an

¹¹⁰ Emma Butt & Mary C. Hurley, “Specific Claims in Canada” Library of Parliament, Law and Government Division, April 2006, p. 1. (Online: <http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0618-e.htm>)

¹¹¹ Mary C. Hurley, “Settling Comprehensive Land Claims,” Library of Parliament, Social Affairs Division, September 2009, p. 1. (Online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0916-e.htm>).

¹¹² Final Report 1991–2009, Indian Specific Claims Commission “A Unique Contribution to the Resolution of First Nations’ Specific Claims in Canada,” p. 31 (Online: http://www.specific-claims-law.com/images/stories/specific_claims_docs/03-ICC_CRI_Docs/ICC_Final_Report_1991-2009.pdf).

existing treaty and are often referred to as the “unfinished business of treaty making”.¹¹³ Comprehensive claims are “based on unextinguished Aboriginal title” where there has been no treaty agreement to surrender or extinguish title between the First Nation(s) and Canada.¹¹⁴ These claims are the predominant forms of claims originating, for example, in British Columbia, which has no significant treaty history outside a few very small and particular colonial treaties known as the ‘Douglas Treaties’.¹¹⁵ It has been claimed that over 100% of B.C.’s land mass is currently under comprehensive claim. There are also numerous specific claims originating in this and other provinces. Specific claims are discussed below.

3.2 Specific Land Claim Resolution

Specific land claim resolution is in essence, righting a wrong. As set out in the Specific Claims policy, there are “lawful obligations” and “beyond lawful obligations” that if breached, provide grounds for a valid claim and the reasonable expectation that a settlement should be made. Under the 1982 ‘Outstanding Business - A Native Claims Policy’ there is a clear articulation of such an obligation:

1) Lawful Obligation

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government. A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.

¹¹³ Aboriginal Affairs and Northern Development Canada, “Fact Sheet: Comprehensive Land Claims,” Last Modified: 2010-09-15. (Online: <http://www.aainc-inac.gc.ca/ai/mr/is/lnd-clms-eng.asp>).

¹¹⁴ Denielle Boissoneau-Thunderchild, “The Expectation of Justice,” *Indigenous Law Journal* Vol. 5 (2006), p. 8.

¹¹⁵ Aboriginal Affairs and Northern Development Canada, “Treaty Guides: Douglas Treaties - Conveyance of Land to Hudson’s Bay Company by Indian Tribes,” Last Modified 2010-09-15. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100029052>).

- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

2) Beyond Lawful Obligation

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

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.¹¹⁶

Under this federal policy, breaches of these obligations or “specific claims” give rise to negotiation and compensation.

4. A Short History of Land Claims and Rights in Canada

The concept of reconciliation is a powerful tool both in theory and practice. It invokes notions of peaceful settlement following negotiations and conflict. Reconciliation however, is a multidimensional concept and, with respect to land claims settlement in Canada, has proven to be a largely fruitless journey along turbulent and uncertain course. Aboriginal peoples were the direct recipients of European expansion, exploration, evangelization, colonization. They were given only two options, “to try to expel the newcomers or to accept them” and adapt as best they could.¹¹⁷ “Europeans generally [held] a sense of absolute superiority over Native Americans that expressed itself more usually as contempt than outright hatred.”¹¹⁸ All across the Americas,

¹¹⁶ Patricia Sawchuk, Specific Claims, excerpts of the “Outstanding Business: A Native Claims,” p. 350. (Online: <http://www2.brandonus.ca/library/cjns/2.2/Outstanding.pdf>).

¹¹⁷ Francis Jennings, The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its beginning to the Lancaster Treaty of 1744, (New York: Norton & Company, 1984) p. 4.

¹¹⁸ Jennings, p. 4

the Aboriginal-European relationship was carved out of a long history of meetings, treaties, invasion, conflict, death, military alliances, truces and trade. The relationships were as diverse as the participants – First Nations¹¹⁹ were no more homogenous than the Europeans.¹²⁰ Likewise, the experiences were totally dependent on the needs of the parties at a particular time – commercial expansion, military aid for the Europeans and/or First Nations, expansion and settlement, evangelism, politics and the like. The frontier was a place of flux and while there were periods of war, there were also periods of peace and friendship agreements between First Nations and settler communities; as such, historic covenants were struck:

They say, we have been here before and made an alliance. The Dutch, indeed, say we are brothers and are joined together with chains, but that lasts only as long as we have beavers. After that we are no longer thought of, but much will depend upon it when we shall need each other.

Mohawk treaty propositions, 6 September 1659¹²¹

In the 17th and 18th centuries, treaties and land cessions were conducted between First Nations and the colonial authorities which *de facto* recognized both Aboriginal title and sovereignty.¹²² This fact has been amply recognized by Canadian courts and acknowledged in historical fact. When first encountered by the colonial powers of Great Britain and France, Aboriginal societies were regarded as nations with sufficient self-governing ability to warrant respect for, and retention of, their political independence and the power to treat with newcomer states.¹²³ This situation was encouraged both by practical necessity and political expedience – newcomer nations relied for their survival on Aboriginal knowledge of the so-called ‘new world’, and

¹¹⁹ Around the Great Lakes alone there were the Ojibwa, Nipissing, Algonquin, Huron, Iroquoians, Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Wenro to name a few. Jennings, p. 26.

¹²⁰ The European involved in the early colonization and trade in the Americas include: the Spanish, French, Dutch, English, and Swedish. Jennings p. 5

¹²¹ Jennings, p. 47

¹²² James A. O’Rielly, “Aboriginal Self Government,” *Aboriginal Law Since Delgamuukw* ed. Maria Morellate (Aurora, Ontario: Cartwright Group Ltd, 2009), p. 377.

¹²³ O’Rielly, 378.

colonial supremacy demanded solid Aboriginal trade and military alliances.¹²⁴ All opportunities to seal relationships were exploited; newcomers married into Aboriginal clans, inserted themselves into Indian politics, and sought to confirm friendships through formal treaties.¹²⁵ As noted by Justice Lamer in *R. v. Sioui*, [1990], “the mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides.”¹²⁶ First Nations were perceived and treated as autonomous political units and, despite pretensions to juridical control mouthed by the French at Quebec in particular; Aboriginal peoples remained, for the most part, beyond the reach of British or French laws.¹²⁷

The first landmark change in the formal legal relationship between Aboriginals and the European nations was the *Royal Proclamation of 1763* which formalized the process by which Aboriginal nations could cede lands to the British. The accord was a public declaration that confirmed that the British Crown was solely responsible for treaty-making and asserted British sovereignty over all lands. At the same time, the *Proclamation* established the important precedent in British rule that the First Nations had certain rights to the lands they occupied.¹²⁸ This signalled a great departure from the typical ruler-take-all logic that was commonly applied in most European colonial endeavours. The *Proclamation* did not assert *terra nullius* (land belonging to no one) and complete Crown ownership over the lands. Instead, the *Proclamation* recognized the

¹²⁴ Jennings, p. 49

¹²⁵ Jennings, p. 50

¹²⁶ *R. v. Sioui*, [1990] 1 S.C.R. 1025, at pp. 1052.

¹²⁷ RCAP, Volume 1 - Looking Forward Looking Back, Part One: The Relationship in Historical Perspective, p 107-8

¹²⁸ Graham Darling, “Land Claims and the Six Nations in Caledonia Ontario,” undated. (Online: <http://www.law.ualberta.ca/centres/ccs/issues/landclaimsandthesixnationsincaledoniaontario.php>).

existence of some form of Aboriginal title.¹²⁹ For example, The Treaty of Niagara, 1764 expanded the recognition of Aboriginal rights to include the distinct sovereignty of Aboriginal people.¹³⁰ The irony is that for Aboriginal peoples, the *Proclamation* did not create their “rights” or relationship with the land, rather, this document is regarded as recognizing a pre-existing set of rights. As Justice McLachlin wrote in *R. v. Mitchell*:

European settlement did not terminate the interests of Aboriginal peoples arising from their historical occupation and use of the land. To the contrary, Aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.¹³¹

The *Proclamation* formalized the Crown treaty process and provided guidelines for the Crown-First Nations relationship. To this day, the *Proclamation* remains relevant as it instructs Canada's special relationship with First Nations and sets out the basis in law for Aboriginal interests in land and other rights¹³² and recognized the primacy of treaties and alliances between nations.¹³³ More than a hundred years later, Section 91(24) of the *Constitution Act*, 1867 granted the federal government powers over “Indians, and land reserved for the Indian” but, like the *Proclamation*, did not provide absolute right or power over “lands reserved for Indians”.¹³⁴ The *Proclamation* created the formalized the rule that First Nations can only surrender lands to the federal Crown; a law that was re-enforced by the *Indian Act*. The lands can then be passed down to the provincial government in which the lands physically reside.

¹²⁹ Sheryl R. Lightfoot, *Emerging International Indigenous Rights Norms and ‘Over-Compliance’ in New Zealand and Canada*. Political Science, 2010, No. 62: 84, p. 92. (Online: <http://pnz.sagepub.com.proxy.library.carleton.ca/content/62/1/84.full.pdf>).

¹³⁰ Jennifer E. Dalton, “Constitutional Reconciliation and Land Negotiations: Improving the Relationship between Aboriginal Peoples and the Ontario Government,” (2008), p. 2.

¹³¹ Mitchell, at para. 8

¹³² Aboriginal Affairs and Northern Development Canada, “The Royal Proclamation of 1763,” Last Modified: 2010-09-15. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100026103>).

¹³³ O’Reilly, 377.

¹³⁴ Constitution Act, 1867, s. 91(24).

While these landmark statements would eventually form the basis of future land negotiations, there is the argument that the agreements were used as tools to “placate Aboriginal concerns over potential infringement of Aboriginal territorial and governing sovereignty.”¹³⁵ As ‘Canada’ was settled, the legitimacy and original intent of these agreements waned as the Aboriginal-Crown relationship disintegrated with the rise of power and control of the Crown and ever-decreasing Aboriginal populations due to disease and war. The virtual abandonment of the Crown’s recognition of Aboriginal sovereignty was dramatically elevated with the *St. Catherine’s Milling* ruling in 1888. The Judicial Committee of the Privy Council in this case held that the Proclamation was the original source of Aboriginal title but that it was nothing more than “a personal and usufructuary right”.¹³⁶ In simple terms this meant that Aboriginal title constituted a burden on Crown interest in the land.

Thus, the rights and the framed nation-to-nation relationship articulated in the *Proclamation* dissolved over the course of history and hit a low point with state sanctioned annihilation and forced assimilation. The clearest example of this disintegration is the famous 1920’s quote by the Deputy Superintendent-General of the Department of Indian Affairs, Duncan Campbell Scott.¹³⁷ “I want to get rid of the Indian problem. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian Question and no Indian Department.”¹³⁸ Scott served “for over 50 inglorious years as an

¹³⁵ Dalton, p. 2.

¹³⁶ *St. Catherine’s Milling & Lumber Co. V. The Queen* (1888), 14 App. Cas. 46 (P.C.) [*St. Catherine’s Milling*].

¹³⁷ Shauna Troniak, *Addressing the Legacy of Residential Schools*, Library of Parliament
<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-76-e.htm>

¹³⁸ Dr. Joseph Gosnell quoting Duncan Campbell Scott before the Standing Committee on Aboriginal Affairs and Northern Development, “Publications” November 4, 1999. (Online:
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1039765&Language=E&Mode=1&Parl=36&Ses=2>)

administrator” and headed the department from 1913 to 1932.¹³⁹ Scott’s legacy was the targeted destruction of First Nations culture and the administration a federal policy – the Indian Act – that has endeavoured to control the lives of First Nations to tragic results.¹⁴⁰ Brian Titley, Duncan Scott’s biographer, stated that Scott’s opinion of First Nations was not unique, “it was a fair characterization of Canadian society” at that time.¹⁴¹ Cultural suppression of First Nations continued as Canada developed as a nation. The Crown “asserted ever-increasing sovereignty, dismantling the precepts on which the *Proclamation* and Treaty of Niagara were built” through the Indian Act.¹⁴²

Prior to 1950s, the calls from Aboriginal people for the Crown to respect its outstanding commitments to First Nations remained largely disregarded by governments. This reality was supported by structural limitations including provisions under the *Indian Act*, such as those from 1927 to 1951, that prohibited First Nations from the use of band funds to take legal action against the Crown.¹⁴³ That the Crown should ignore Aboriginal requests for redress of their rights is hardly surprising, given that the Government of Canada admittedly refers to Crown-Aboriginal relationship during 1800-1946 as one of “decline and assimilation” where the government made repeated and sustained attempts to assimilate Aboriginal people into mainstream society.¹⁴⁴

¹³⁹ Gosnell.

¹⁴⁰ Andrea Lucille Catapano, *The Rising of the Ongwehònwe: Sovereignty, Identity, and Representation on the Six Nations Reserve*, p. 576

¹⁴¹ *Ibid.*

¹⁴² Dalton , p. 2.

¹⁴³ Specific Claims Tribunal, “A Brief History of Specific claims Prior to the Passage of Bill C-30: *The Specific Claims Tribunal Act*,” Last Modified: 2011-12-05. (Online: http://www.sct-trp.ca/hist/hist_e.htm).

¹⁴⁴ Aboriginal Affairs and Northern Development Canada, “Resolving Aboriginal Claims - A Practical Guide to Canadian Experiences,” 2003. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100014174>).

The specific land claims problem was officially recognized in 1946 when the government established a joint committee of the House of Commons and Senate “to investigate the administration of Indian Affairs in the Maritime Provinces and Eastern Quebec”, and charged the Committee to enquire into the unlawful alienation of reserve land and Canada’s failure to meet its treaty obligations.”¹⁴⁵ The Committee’s 1948 Final Report made a number of recommendations including the creation of an independent administrative tribunal to review and decide upon Aboriginal claims and grievances that would

inquire into the terms of all Indian treaties in order to discover and determine, definitely and finally, such rights and obligations as are therein involved and, further, to assess and settle finally and in a just and equitable manner all claims and grievances.¹⁴⁶

Despite the Committee’s recommendation, the Canadian government did not create a tribunal to settle longstanding First Nations claims and, for most of the twentieth century, “specific claims were dealt with in an ad hoc fashion by the Canadian government.”¹⁴⁷

The notion of addressing First Nations’ claims was revisited in 1959 with resurrection of the Joint Committee by Prime Minister John Diefenbaker, which led to Bill C-130, *An Act to Provide for the Disposition of Indian Claims*.¹⁴⁸ However, due to an election this bill was never introduced in Parliament. The new Pearson government amended the bill and introduced “federal legislation proposing the creation of an independent tribunal to adjudicate the resolution of Indian claims” in 1963.¹⁴⁹ The legislation was amended again after first reading and

¹⁴⁵ Indian Specific Claims Commission, “Final Report 1991-2009,” quoting Order in Council P.C. 3797, October 11, 1946. p. 5. (Online: http://publications.gc.ca/collections/collection_2010/indianclaims/RC31-90-2009-eng.pdf)

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid., p. 6.

consultation with First Nations, and then reintroduced in 1965 as an *Act to Provide for the Disposition of Indian Claims*.¹⁵⁰

The 1965 Bill was ground breaking for many reasons, including its provision for the establishment of a five-member Commission with the power to make binding decisions over five broad classes of claims, to award compensation – without a prescribed limit – and fund the research of claims by claimants.¹⁵¹ The Commission was to include at least one member who was an Indian within the meaning of the *Indian Act*, and the legislation provided that claimant First Nations would be provided funding to pursue its claim; the Commission had no limit on the financial award it could grant.¹⁵² Another impressive feature of the Bill was the five broad categories of claims that would be considered by the Commission. The categories included claims based upon unextinguished Aboriginal title, known today as Comprehensive Claims; claims for the disposition of reserve lands without proper compensation, mismanagement of Band funds, and/or the failure of the Crown to honour its obligations to First Nations with treaties. Finally, claims would also be entertained wherein the Crown failed to act “fairly or honourably” towards Indians, thereby causing them injury.¹⁵³ The Bill also allowed for use oral history as evidence, though limited this through specifying the need for collaborating non-oral evidence. Sadly like the previous iterations the Bill, it died on the Order Paper, however, it may be argued that this bill provided much of the conceptual basis for the future approach to claims.

¹⁵⁰ ISCC Final Report, p. 6.

¹⁵¹ Hurley, *Specific Claims in Canada*.

¹⁵² Mary C. Hurley, *Bill C-30: The Specific Claims Tribunal Act*, Law and Government Division, Library of Parliament, January 14, 2008, p. 2. (Online: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=c30&Parl=39&Ses=2&source=library_prb)

¹⁵³ *Ibid.*

The next major undertaking by the government on the relationship between the Crown and First Nations was the 1969 introduction of the White Paper by Prime Minister Pierre Trudeau and his Minister of Indian Affairs, Jean Chrétien. This policy paper proposed the dismantling of the *India Act* in effort to achieve equality among all Canadians through the elimination of First Nations' distinct legal status. The "just society" vision was to regard Aboriginal peoples simply as citizens with the same rights, opportunities and responsibilities as all other Canadians.¹⁵⁴ The goal was to "enable the Indian people to be free—free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians."¹⁵⁵ Among the many items the paper proposed was the appointment of a commissioner to address outstanding land claims as a mechanism for ameliorating the socio-economic disparities First Nations face. The policy proposal was met with fierce opposition from First Nations and their advocates. In the context of claims resolution, the policy contained "no provisions to recognize and honour First Nations' special rights, or to recognize and deal with historical grievances such as title to the land and Aboriginal and treaty rights, or to facilitate meaningful Indigenous participation in Canadian policy making."¹⁵⁶ The White Paper became a political and public relations disaster for the Liberal government, who ultimately retracted the proposals it contained and apologized to First Nations.

Without substantive legislative change or policy reforms, the *St. Catherine's Milling* decision stood until the Supreme Court of Canada's 1973 ruling in *Calder v. Attorney-General of British*

¹⁵⁴ Aboriginal Affairs and Northern Development, "First Nations in Canada," Last Modified: 2011-06-07. (Online: <http://www.aadnc-aandc.gc.ca/eng/1307460755710>).

¹⁵⁵ Aboriginal Affairs and Northern Development, "Statement of the Government of Canada on Indian Policy (The White Paper 1969)". (Online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/cp1969_1100100010190_eng.pdf).

¹⁵⁶ Indigenous Foundations, "The White Paper 1969," 2009. (Online: <http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-white-paper-1969.html>).

Columbia, which asserted that Aboriginal title existed and gave weight to historical treaties.¹⁵⁷ The Supreme Court ruled that Aboriginal title did in fact exist at the time of the *Proclamation*. This decision was the first time that Supreme Court and the Canadian legal system acknowledged the existence of Aboriginal title to land and, perhaps more profoundly, that such title existed outside of, and not derived from, colonial law.¹⁵⁸ The implications of the *Calder* decision forced the Crown to reassess its position on First Nations land rights and lead to the creation of a claims policy that recognized specific and comprehensive claims.¹⁵⁹ *Calder* is recognized as a pivotal moment in the history of Aboriginal land negotiations and title rights in Canada.

Ostensibly it was not until the early 1970s that Canada began to institute policies to address Aboriginal land claims. In 1974, the Federal Government established the Office of Native Claims (ONC).¹⁶⁰ The ONC was assigned the responsibility to review claims to determine whether the Crown had fulfilled its lawful obligation(s) and to create policies related to claims negotiation.¹⁶¹ In the Indian Claims Commission's (ICC) Final Report, it stated that while the ONC "review and policy formulation were, on their surface, unproblematic, significant concerns were expressed that, while the ONC was empowered to make decisions on claim validation, it was not independent."¹⁶² The ONC was not independent because it was established within the Department of Indian Affairs and Northern Development, and had the dual role of reviewing claims against the government and representing the government in negotiations with First

¹⁵⁷ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. P. 315 (Online: <http://scc.lexum.org/en/1973/1973scr0-313/1973scr0-313.html>).

¹⁵⁸ Report of the Aboriginal Justice Inquiry of Manitoba, Chapter 5.

¹⁵⁹ *Ibid.*

¹⁶⁰ Boissoneau-Thunderchild, 8.

¹⁶¹ ISCC Final Report p. 17

¹⁶² ISCC Final Report p. 17

Nations groups.¹⁶³ In fact, Justice Gerard V. LaForest, in his 1979 *Report on Administrative Processes for the Resolution of Specific Indian Claims*, he stated that the ONC operated in a

familiar situation where a government agency has conflicting duties in relation to Indian claims,” and concluded that “[t]he need for impartiality and the appearance of impartiality as well as finality . . . strongly argue [*sic*]for the establishment of an independent body separate from departmental structures for the settlement of specific claims.¹⁶⁴

In 1982, the federal government responded to the complaints of inadequate Crown response to claims, unclear claims policy and insufficient research funding with a publication titled *Outstanding Business: A Native Claims Policy*.¹⁶⁵ This policy set the guidelines for assessment and negotiations for specific claims. One of the key elements of this policy was the requirement of claimants to

establish the existence of one of four outstanding lawful obligations: [1] non-fulfilment of a treaty or agreement; [2] breach of an obligation under the *Indian Act* or another statute related to Indians; [3] breach of an obligation in administration of Indian funds or other assets; and [4] unlawful disposition of reserve land; [5] or of two reserve-related circumstances: failure to provide compensation for reserve lands damaged or taken by the government; and clear cases of fraud in acquiring or disposing of reserve land by federal employees or agents.¹⁶⁶

Upon review, the requirement for claimants to establish one of four outstanding “lawful obligations” or of two reserve-related circumstances is interesting because all of the elements appear to speak to the Crown’s fiduciary duty.¹⁶⁷ The ICC in its rulings and reports seems to support this position and holding that each of the policies’ required elements generally speaks to breaches of fiduciary duty. In its Final Report, the ICC stated that outside of treaty obligations

¹⁶³ Hurley, *Specific Claims in Canada*, p. 3.

¹⁶⁴ Gérard La Forest, *Report on Administrative Processes for the Resolution of Specific Indian Claims* (Ottawa: DIAND, 1979), unpublished, p. 17, 64. Found in Bill C-6: The Specific Claims Resolution Act, Mary C. Hurley, Law and Government Division, 10 October 2002, Revised 29 March 2003, (Online: http://publications.gc.ca/collections/collection_2008/lop-bdp/lp/372-431E.pdf).

¹⁶⁵ Sawchuk, p. 348.

¹⁶⁶ Butt, p. 3.

¹⁶⁷ *Ibid.*, p. 4.

no other issue dominated its work more than Canada's fiduciary relationship with First Nations.¹⁶⁸ The ICC grappled with the meaning and boundaries of the Crown's fiduciary duties because the Specific Claims Policy is silent on what constitutes a valid claim of outstanding lawful obligation.¹⁶⁹ This struggle to understand the extent of the Crown's fiduciary responsibilities is a shared experience – by the Courts, the Commission, First Nations, the Crown and stakeholders – and over the last 30 plus years we have witnessed the evolution of the legal explanation and policy that establishes the Crown's duty in breaches of fiduciary obligation.¹⁷⁰ However, the Crown contends that the principles of an 'outstanding lawful obligation' has not changed since it was first put into policy in 1982 and that "outstanding lawful obligation must be confirmed, valid claims will be compensated in accordance with legal principles and any settlement reached must represent the final resolution of the grievance".¹⁷¹

In addition to the struggle to understand and articulate the 1982 claims policy, there was accompanying sharp criticism from First Nations groups because the evaluation process was considered to not be independent. Under this 'new' policy, the Office of Native Claims not only had the responsibility to review these claims, but also to "represent the Minister and the Government of Canada in claims assessment and negotiation with Native groups"¹⁷²; something which certainly vindicates Aboriginal concerns over a Crown conflict of interest. It was clear to First Nations and critics alike that this dual role was an inherent conflict of interest as the government was both the defendant to the claim and the judge. Furthermore, the process was

¹⁶⁸ ISCC Final Report, p. 31

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Specific Claims Policy and Process Guide.

¹⁷² Indian and Northern Affairs Canada, "Related Material on Specific Claims," 1982, p. 176 . (Online: [http://www.specific-claims-law.com/images/stories/specific_claims_docs/05-Fed_Govt_Docs_INAC_etc/INAC_\(IAND\)_AINC/inac-a_native_claims_policySC.pdf](http://www.specific-claims-law.com/images/stories/specific_claims_docs/05-Fed_Govt_Docs_INAC_etc/INAC_(IAND)_AINC/inac-a_native_claims_policySC.pdf)).

marred by the government making its decisions based on the legal advice it obtains from its own lawyers who may be argued to have been other than impartial in their approach to claims validation or outstanding obligations. Finally, the frustration with the policy was exacerbated by the Crown's refusal to share its legal opinions with First Nations claimants under the guise of the solicitor-client privilege.¹⁷³

The dissatisfaction with the Crown's 'new' claims policy was not limited to First Nations. Rather, a wide range of stakeholders – including some in the federal government - voiced concerns over the failures of the claims policy to deliver an independent process. Some of the reports that were critical of the claims policy included the 1983 Report of the House of Commons Special Committee on Indian Self-Government (Penner Report), the 1990 Report of the House of Commons Standing Committee on Aboriginal Affairs, the 1990 study by the Assembly of First Nations (AFN) Chiefs Committee on Claims (Chiefs Committee), numerous reports by the ICC, the 1996 RCAP Final Report, and in the 2006 Canadian Bar Association Examination of Canada's Specific Claims Policy, to name a few. These reports, collectively written over a span of 23-plus years, all echoed a similar message: substantial changes needed to occur to make the specific claims resolution process fair. The Penner Report, for example, stated that it was "imperative that the new process be shielded from political intervention," and proposed that new legislation was needed that would empower a neutral party to facilitate negotiated settlements, and create a quasi-judicial process in cases where negotiations failed.¹⁷⁴

The 1990 House of Commons Standing Committee on Aboriginal Affairs Report stated that First

¹⁷³ Kathleen Lickers, "Looking Forward, Looking Back: Canada's Response to Land Claims, May 7, 2010. <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/canada/looking-forward-looking-back-canadas-response-land-c>

¹⁷⁴ *Report of the House of Commons Special Committee on Indian Self-Government*, Minutes of Proceedings, Issue No. 40, 12 and 20 October 1983, p. 115.

Nations were experiencing a very “high level of dissatisfaction” with claims policies, and stressed that the “very slow rate” of processing vindicated the “recurring suggestion [that the process] should be managed or monitored by a body or bodies independent of [DIAND and the DOJ].”¹⁷⁵ Yet, despite the high-profile reports and criticisms of First Nations of the then-current claims process, no remedial action was taken, and the processing of specific claims continued to proceed at a meagre pace.

Fast on the heels of 1990 report of the Standing Committee on Aboriginal Affairs, one of the most pivotal land claim disputes erupted on July 11, 1990 in Oka Quebec. The Oka Crisis was to become a game-changer in First Nations land claims. The violent standoff, barricades, protests and fire-fights between Mohawks and Sûreté du Québec (SQ) (police) leading to the death of Corporal Marcel Lemay, spawned a recognition that First Nations’ frustrations with the specific claims policy and process could no longer be ignored.¹⁷⁶ The Oka Crisis forced governments to act and eventually precipitated the creation of the ICC, the Royal Commission on Aboriginal People and a national First Nations Policing Policy.¹⁷⁷

The ICC’s mandate was to conduct inquiries into specific claims and make recommendations and to report on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister”.¹⁷⁸ While the

¹⁷⁵ *Unfinished Business: An Agenda for All Canadians in the 1990's*, Minutes of Proceedings and Evidence, Issue No. 20, 31 January – 21 February 1990, p. 3.

¹⁷⁶ Honourable Sidney B. Linden, Report of the Ipperwash Inquiry Vol. 2 p. 23. (Online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_Full.pdf).

¹⁷⁷ While very important, I will not be addressing the First Nations Policing Policy as it is not the focus of this paper.

¹⁷⁸ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

importance of the ICC in resolving specific land claims cannot be understated, it can be easily argued that the creation of a commission with powers only to recommend, rather than require, ethical redress of claims by the Crown, reflected the federal government's ambivalent attitude toward claims and their resolution. The ICC had no power to make legally binding decisions and its reports and therefore recommendations were not always adopted by Canada; the backlog of claims continued to grow.¹⁷⁹

The 1990's also saw the creation of the Royal Commission on Aboriginal Peoples (RCAP), 1991, that was asked to examine the relationship between Canada and First Nations people. This research project visited some 96 communities, held 178 days of hearings and completed over 350 research projects over 4 years.¹⁸⁰ The result was the 1996 Final Report that made over 400 recommendations including the redistribution of political authority, economic resources and an overhaul of the claims process.¹⁸¹ The government responded by shelving the \$58 million report for two years.¹⁸²

As stated earlier, over the years a number of studies have been conducted and proposed the creation of a specialized body that is provided with the power to make legally binding decisions on specific claims. The first was the 1963 Bill C-130 *An Act to Provide for the Disposition of*

¹⁷⁹ Bryan Schwartz, Indian Claims Commission, undated. (Online: <http://www.specific-claims-law.com/icc--cri>)

¹⁸⁰ Aboriginal Affairs and Northern Development Canada, "Address for the Launch of the Report of the Royal Commission on Aboriginal Peoples," Last Modified 2010-09-15. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100014639>).

¹⁸¹ Ibid.

¹⁸² Union of BC Indian Chiefs, *Stolen Lands, Broken Promises: Dispossession and Resistance in British Columbia*, 2005, p. 34. (Online: http://www.ubcic.bc.ca/files/PDF/RILQ2005/CH1_Dispossession_and_Resistance_in_British_Columbia.pdf).

Indian Claims.¹⁸³ The idea was revisited with the 1998 joint task force of the Assembly of First Nations and Canada recommending a model bill for a claims commission.¹⁸⁴ In 2003, Parliament enacted the Specific Claims Resolution Act, but it was never brought into force largely because of the remarkable controversy and criticism that surrounded the Bill.¹⁸⁵ First Nations regarded the Bill as missing the mark on the key recommendations made by Joint Task Force Report. The complaints included echo the longstanding complaints against earlier iterations of claims resolution policies, including most notably that the proposed system was sufficiently independent and that Canada still had many opportunities to delay the processing of claims.¹⁸⁶ Following the failure of the *Specific Claims Resolution Act*, the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process conducted and released their report, entitled “Negotiation or Confrontation: It’s Canada’s Choice,” in 2006. Like its contemporaries, this report made a very clear statement about the failings of the current system’s ability to resolve claims effectively and expeditiously and on need for real and ethical change in the management and resolution of specific claims.

In 2007, the federal government attempted to address the call for change with its report *Justice At Last*. This report regurgitated many of the standard lines: a call for independent adjudicative body, and a joint task force comprised members from the Assembly of First Nations (AFN) and the federal government which would be tasked to produce a comprehensive proposal for

¹⁸³ Bill C-130: An Act to provide for the Disposition of Indian Claims, December 14, 1963 http://www.specific-claims-law.com/images/stories/specific_claims_docs/07-legislation/Bill_C-130/BillC-130FirstReadingDecember14-1963.pdf

¹⁸⁴ Butt, *Specific Claims in Canada*, p. 7

¹⁸⁵ *Ibid.*, p.8.

¹⁸⁶ *Ibid.*

legislation.¹⁸⁷ The fruit of the task force's labours was the Specific Claims Tribunal Act, which came into force with much fan-fair - and in the face of much First Nation resistance - on October 16, 2008.¹⁸⁸ However, the creation and implementation of the Tribunal was incredibly slow and the Tribunal did not open and start accepting claims until the summer of 2011.¹⁸⁹ The government's *Justice At Last* report also promised that the ICC would be transformed into a neutral dispute resolution body – which made sense considering its 18 years of experience in addressing specific claims that have been rejected by the government.¹⁹⁰ However, this promise was broken and in “keeping with an Order in Council dated November 22, 2007, the Commission ceased its operations and closed its doors on March 31, 2009”.¹⁹¹ This act left First Nations whose claims were rejected without a recourse mechanism outside of litigation available until the Tribunal opened – and even then, given the limitations which restricted the range of claims open to the Tribunal, left some First Nations with no options whatsoever.¹⁹² Given that the assessment of the validity of those claims, and thus the question of whether redress would be had or not, continued to resist with the Crown, the age-old fact of the Crown as both judge and party to the claims process persists -as does the ongoing concern about fairness and independence in the claims resolution process.

Since taking office, Prime Minister Stephen Harper and the Conservative government have made several statements, announcements and promises about resolving land claims. This includes the

¹⁸⁷ Indian and Northern Affairs Canada, “Specific Claims: Justice at Last,” 2007, p. 9. (Online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/jal_1100100030459_eng.pdf).

¹⁸⁸ Aboriginal Affairs and Northern Development Canada, “Fact Sheet – At a Glance: The Specific Claims Tribunal Act,” Last Modified 2011-11-24. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100030306>).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Justice At Last*, p. 10.

¹⁹¹ Government of Canada Publications, “Indian Claims Commission – Annual Report,” Last Modified 2012-02-02. (Online: <http://publications.gc.ca/site/eng/362340/publication.html>).

¹⁹² Indian Specific Claims Commission, Aboriginal Affairs and Northern Development Canada, Last Modified: 2010-09-15 <http://www.aadnc-aandc.gc.ca/eng/1100100011078>

June 2007 statement where the Prime Minister stated that “[i]nstead of letting disputes over land claims and compensation drag on forever, fuelling frustration and uncertainty, they will be solved once and for all by impartial judges on a new Specific Claims Tribunal”.¹⁹³ This statement and others like it have only created false hopes. For over two years there was no body to mediate disagreements with the Specific Claims Branch of the Department of Aboriginal Affairs and Northern Development Canada. There has been no push for or announcement made on the tension to create a process for specific land claims like the Six Nations that exceed the SCT’s limit of \$150 million. Furthermore, there are structural problems with the Specific Claims policy as it is uncertain who decides if a claim is worth more than \$150 million, and the Minister of Aboriginal Affairs must seek Cabinet Approval to negotiate claims over \$150 million. So while the Crown has called their latest step ‘Justice At Last’ First Nations and the Six Nations in particular have serious doubts about the authenticity of the Crown’s claims.

The SCT at face value appears to be a step in the right direction. However, as of February, 2012, of the 15 claims filed with the Tribunal,¹⁹⁴ no decisions have been rendered.¹⁹⁵ The Specific Claims Tribunal remains unproven as a means to resolve claims, and this fact, combined with the ongoing absence of independence in claims review, continues to challenge the Crown’s stated commitment to claims resolution. But, even with the SCT running, when the Crown dissolved the ICC, Canada lost an effective and, in the hearts and minds of First Nations, legitimate dispute resolution body to mediate and facilitate claims resolution. The transformation and maintenance

¹⁹³ Prime Minister Stephen Harper, “Prime Minister Harper announces major reforms to address the backlog of Aboriginal treaty claims” (12 June 2007). (Online: <http://pm.gc.ca/eng/media.asp?id=1695>).

¹⁹⁴ Specific Claims Tribunal, “Current Claims,” Last Modified: 2011-10-18. (Online: http://www.sct-trp.ca/curre/index_e.htm).

¹⁹⁵ Specific Claims Tribunal, “Decisions,” Last Modified: 2011-10-18. (Online: http://www.sct-trp.ca/judg/index_e.htm).

of the ICC was a promise in the *Justice At Last* report and now it is just another in a long line of broken promises. There is a sad irony to the message that was delivered with the Crown's announcement of the 'new' 1982 *Native Claims Policy*: "outstanding business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay."¹⁹⁶ Thirty years later we are having the same conversation leading to same false promises.

5. The Six Nations of the Grand River's Specific claim

5.1 Summary of the Six Nations Land Claims History

The Six Nations claim and occupation of the DCE is just the modern incarnation of a long standing conflict with the state that is rooted in treaties that were established long before Canada was Canada. The Six Nations' history begins – for the purposes of this paper - at some point pre-1600s when the Five Nations Iroquois formed their confederacy (as the exact date is debatable).¹⁹⁷ The important consideration is that the Confederacy was formed and under the agreement of the Great Law of Peace, a Grand Council was established, which created the governing body for the Confederacy that still exists today. The Five Nations Iroquois Confederacy was formed by the Seneca, the Mohawk, the Cayuga, the Onondaga and the Oneida.¹⁹⁸ The sixth nation, the Iroquoian Tuscarora joined the Five Nations sometime between 1712 and 1722 following conflicts with colonialists in their home territory in what is now known

¹⁹⁶ Department of Indian Affairs and Northern Development, "Outstanding Business: A Native Claims Policy, Specific Claims (Ottawa: Ministry of Supply and Services Canada 1982), p. 3.

¹⁹⁷ Jennings p. 3

¹⁹⁸ Jennings p. 27.

as North Carolina.¹⁹⁹ The principle homeland for the Six Nations was south of Lake Ontario in the Mohawk valley and Finger Lakes region of what is now upper New York State, U.S.A.²⁰⁰ This is significant piece of background information because the land in question in the current Six Nations' claim is along the Grand River in Ontario and not the ancestral lands of any of the Six Nations bands. Rather, this territory is the ancestral lands of the Neutral tribe. Thus, the history of the people involved, Neutral, Six Nations, Dutch, French, British and the various other tribes that had ties to the lands in question and the territory that is now at the center of the present Six Nations land, have had a long and interesting story.²⁰¹ For the purposes of this paper, I will trace briefly those important historic details that relate specifically to the current Six Nations' land claim.

The consequential Six Nations-European relationship began in the 1600s when the Five Nations allied themselves with the Dutch and British. In 1613 this relationship was formalized through a peace and friendship alliance called the Two Row Wampum agreement, which was struck with the Dutch colony of New Netherland in what is now New York State.²⁰² This agreement basically stated that First Nations and the Dutch colonists would share the land but live apart and rule their people separately. The metaphor that was used to describe this relationship was that of two canoes proceeding alongside each other down the river of life; each boat contains one people with all their cultures and practices – as they proceed down the waterway, they are separate but equal. Those inhabiting the canoes are expected to stay within their own people and culture; a key element of the metaphor is that a person cannot straddle two canoes – two cultures – and

¹⁹⁹ Jennings. p. 258

²⁰⁰ Ibid., p. 258.

²⁰¹ Ibid., p. 27

²⁰² Ibid., p. 98.

safely navigate a life path: Each person must choose a canoe and remain within it, or risk falling between the cultures and losing themselves. The importance of this concept cannot be understated as it continues to hold importance for many Iroquois people who also use it to describe their desired relationship with Canada and the United States.

Around 1677, the Five Nations began to negotiate peace and friendship alliances with the British which became known as the Covenant Chain agreements.²⁰³ These agreements were based on the same principles of the Two Row Wampum agreement, whereby Iroquois and the British would be allies and share the land, and like the previous agreement with the Dutch, the parties were to live apart and rule their people separately. The agreements however, were not solidified until 1755 when the British were fighting the French during the French and Indian War.²⁰⁴

As for the history of the land in question, this begins during the mid-1600s when the Five Nations Iroquois - in an effort to secure greater access to and control of the fur trade - began a conquest for territory. They fought and defeated the Mohican Indians to the east, the Susquehanna Indians to the south and the Erie, the Miami, the Illinois and other Indian bands to the west to conquer a large area south of the Great Lakes as far west as what is now Chicago, Illinois.²⁰⁵ The Five Nations Iroquois also entered into what is now known as southwestern Ontario in to kill, conquer and disperse the indigenous Neutral, Petun (Tionontati) and Huron (Wendat or Wyandot) Indians who were Iroquoian people but not part of the Confederacy.²⁰⁶ In

²⁰³ Jennings, p. 8.

²⁰⁴ Ibid.

²⁰⁵ Garry Horsnell, A Short History of the Six Nations of the Grand River 6th Edition, April 10, 2011. (Online: <http://www.numberswatchdog.com/numbers%20docs/A%20SHORT%20HISTORY%20OF%20THE%20SIX%20NATIONS%20EDITION%206.pdf>).

²⁰⁶ Michael Johnson, North American Indian Tribes of the Great Lakes Osprey Publishing. p. 6. (Online: http://issuu.com/jsonjudah/docs/north_american_indian_tribes_of_the_great_lakes).

the late 1690s, the Five Nations were driven out of the Southern Ontario territory by a united force of Ottawa, Potawatomis and Ojibwa (mainly Mississauga).²⁰⁷

In 1701, the British entered into the *Nanfan Treaty* or *A Deed from the Five Nations to the King, of their Beaver Hunting Ground* with the Five Nations.²⁰⁸ Through this agreement the Iroquois surrendered lands to the north and northwest of Lake Erie, which were the same lands they had conquered some eighty years previously from the Neutral, Petun and Huron bands. The *Nanfan Treaty* deeded these lands to the British Crown but also provided that “We (the five nations) are to have free hunting for us and heirs and descendants from the Five Nations forever and that free of all disturbances expecting to be protected therein by the Crown of England.”²⁰⁹ This agreement was the beginning of the formalized relationship between the Five Nations and the British Crown over the lands that would become Caledonia. From 1701 to 1763, First Nations groups participated to varying degrees in the contests between the French and the British for control of North America that culminated with *French and Indian War* (1754-1763) and the *Seven Years War*.²¹⁰ The Nations, during this period of history, displayed skillful machination as they played with allegiances with both the French and English to their benefit.²¹¹ It was not until the decisive defeat of the French, the Confederacy realized it had no choice but to ally themselves with the victors, the British. In April of 1762 Sir William Johnson, the British Superintendent of Indian Affairs, held a meeting with the Six Nations at Johnson Hall.²¹² At this congress, the Superintendent presented the Haudenosaunee with a large belt of wampum that was

²⁰⁷ ICC 2003 Report p.9.

²⁰⁸ Hornsell, p. 2.

²⁰⁹ The Nanfan Treaty, 1702 <http://www.sixnations.ca/ScheduleANanFan.pdf>

²¹⁰ Michael J, Mullin, Personal Politics: William Johnson and the Mohawks, *American Indian Quarterly*, Summer 1003 Vol 17(3).

²¹¹ *Ibid.*

²¹² *Ibid.*

meant to reaffirm "the Ancient (sic) Covenant Chain" and promised that the English would keep it "entire and unbroken" so long as the Iroquois remained faithful allies of the King.²¹³

Following the wars and the British gaining majority control over the New France, First Nations began to protest their loss of lands and colonial expansion. In an effort to stay Aboriginal rebellions and to maintain order, King George III of Britain issued a Royal Proclamation on October 7, 1763 in which the Crown defined Indian Territory in North America and reserved "Sovereignty, Protection and Dominion" over that Indian Territory.²¹⁴ The Proclamation also set aside huge tracts of land, reserving them as Aboriginal hunting grounds, and prohibited grants or purchases of this land, or settlement on it, without a licence.²¹⁵ Then in 1774, the British Parliament passed the *Quebec Act* to appease the French colonists and prevent them siding with the Americans and extended the British Province of Quebec through what is now Ontario into the Ohio River valley including the territory know as the *Beaver Hunting Ground*.²¹⁶ The Quebec Act further angered American colonists who were already upset with the Royal Proclamation, thus encouraging the eventual outbreak of the American Revolution in 1775.

Following the enactment of the *Royal Proclamation* the Confederacy enjoyed relative autonomy; so much so that even during the initial stages of American Revolution, they remained neutral.²¹⁷

When they were drawn into the war the Six Nations did not fight with the British as a united

²¹³ S. W. Johnson, "Sir William Johnson Papers," vol. III at 670-717, p. 18. (Online: <http://summit.sfu.ca/system/files/iritems1/8828/etd0467.pdf>).

²¹⁴ Six Nations Lands and Resources, Pre-Confederal Documents : Royal Proclamation. (Online : <http://www.sixnations.ca/LandsResources/HistoricalDates.htm>).

²¹⁵ Ibid

²¹⁶ Ibid.

²¹⁷ Barbra Graymont, *The Iroquois in the American Revolution*, Syracuse University Press, 1975 supra note 23 at 33-47.

front. The Seneca, Mohawk, Cayuga and Onondaga for the most part sided with the British and the Oneida and Tuscarora sided with the Americans.²¹⁹ The Mohawks had a longstanding relationship with the British and were staunch allies in battle.²²⁰ Yet being pragmatic, the Mohawks also sought guarantees from the British, and in particular, from Sir Guy Carlton, Commander of the British forces, that any losses, including land would be compensated.²²¹ In a proactive and forward thinking effort, Joseph Brant traveled to Britain in 1775 to appeal to the British Crown for land and protection for the Six Nations people as he feared retaliation should the Americans win the war.²²² However, when the Preliminary Articles of Peace were concluded between Great Britain and the United States in 1792, any protection of Iroquois land was conspicuously absent; in an act of breathtaking duplicity, the British transferred ownership of those lands to the United States as far west as the Mississippi River to the United States. Not surprisingly, the Mohawks were furious.²²³ Speaking through Captain Aaron Hill, the Mohawks told General Maclean, commander at Niagara, that they

... were a free People subject to no Power upon Earth and that they were the faithful allies of the King of England, but not his subjects. Accordingly the King had no right whatever to grant away to the States of America, their rights or properties without a manifest breach of all justice and Equity, and they would not submit to it.²²⁴

In 1783, the Americans won their revolution and, with the signing of the Treaty of Paris, the borders between the United States and British territory were established.²²⁵ Realizing the implications of the British losing, the Confederacy attempted to negotiate with the victors. Under the Treaty of Fort Stanwix, the provisions regarding the return of prisoners of war, land

²¹⁹ Graymont, p. 34.

²²⁰ Ibid.

²²¹ F. Jennings, W.N. Fenton, M.A. Druke & D.R. Miller, *The History and Culture of Iroquois Diplomacy* (Syracuse: Syracuse University Press, 1985) at 73.

²²² Jennings and Fenton, p. 73.

²²³ Ibid.

²²⁴ Graymont, supra note 23 at 260

²²⁵ Ibid.

cessions, and the delivery of 'goods' for the 'comfort' of the Six Nations were raised.²²⁶ However, the terms of the Treaty with the United States were unacceptable to the Confederacy. The Confederacy then sought to ensure that the guarantees granted by Sir Guy Carlton were maintained under the leadership of Chief Joseph Brant.²²⁷ Brant petitioned Sir Frederick Haldimand, the Governor-in-Chief of Quebec and British North America, to keep the Crown's promise of land for Six Nations people. Governor Haldimand agreed and arranged to purchase lands from the Mississauga Indians. On May 22, 1784, the Ojibwa Mississauga Indians agreed to "*grant, bargain, sell, alien, release, and confirm*" to the British Crown "*forever*", for the sum of "*1,180 pounds, seven shillings and fourpence of lawful money of Great Britain*", a huge tract of land, including land along the Grand River, in what was then a part of the British Province of Quebec, now southwestern Ontario.²²⁸ Later that year, on October 25 1784, Governor Haldimand invited Brant and his Six Nations followers to move from the "*American States*" to the "*British*" and "*to take possession of*" (occupy) part of the Mississauga purchase six miles wide on each side of the Grand River from mouth to source, which would become known as the Haldimand Grant.²²⁹ For the Six Nations, the Haldimand Grant was a formal recognition of their support of British Crown during the American war of Independence, a place of refuge from the Americans they fought against and a new homeland that was granted to them "to enjoy forever."²³⁰

"Forever" for the Six Nations did not last. From almost the earliest of days the size of the Haldimand tract was incrementally reduced through European settlers' squatting, parcels of land

²²⁶ Graymont, *supra* note 23 at 260

²²⁷ *Ibid.*, 24.

²²⁸ Horsnell, p. 5.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

leased by the Six Nations and in the unilateral announcement of the Simcoe Patent in 1793 by John Graves Simcoe, the first Lieutenant Governor of Upper Canada. Out of this reality two distinct narratives formed: Six Nations operating under the impression that they had title in fee simple, and the Crown believing that the Haldimand grant extended beyond the land purchased from the Mississauga Indians on May 22, 1784 (therefore the original grant needed to be reduced) and that the Haldimand grant was no more than a “mere license of occupation”.²³¹ In fact, in the 1835 *Jackson v. Wilkes* case, King’s Bench Justice Robinson rejected the authenticity of the grant itself and stated that

We have ascertained that there was a great seal in use in the Province of Quebec in 1784, when the instrument of General Haldimand bears date; that grants of land, of which few were made by the British Government before the year 1795, were made by letters patent under the great seal, and that it has been uniformly held in the courts of Lower Canada that grants of the waste lands of the Crown could not be made in any other manner.²³²

For the Crown it appears that the land transfer was to occupy but not own out right. The Six Nations leadership flatly rejected the Simcoe Patent.²³³ Chief Brant and the Six Nations chiefs continued to act as if they had legal title and began an active campaign of leasing and selling land as exhibited through the “Brant Leases” to John Smith and John Thomas in 1785 and the 1798 sale of approximately 350,000 acres north of Brantford to European settlers.²³⁴ For the next forty years the Crown was unable to enforce the Simcoe Patent or effectively stop the Six Nations from selling and leasing lands, thus reinforcing the Six Nations’ position that they had full title rights to the granted lands.

²³¹ Horsnell, p. 6.

²³² Doe Ex Dem, *Jackson v. Wilkes* (1835), 4 U.C.K.B (O.S.) 142.

²³³ Catapano, p. 98

²³⁴ *Ibid.*

In light of the continued land management problems and disputes, the Crown in 1841 recommended that the Six Nations surrender much of its land and move to a smaller reserve. In this proposal the Crown agreed to manage any of the lands that the Six Nations had not already relinquished and hold it in trust. This proposal, like the *Proclamation* and Haldimand Grant established that the Crown had a fiduciary responsibility to Six Nations. Within months of the 1841 surrender and agreement, a group of Six Nations' chiefs petitioned and protested the surrender.²³⁵ It was not until 1844 that David Thorburn, the Commissioner of Indian Affairs, was able to obtain a signed agreement – by 45 of the 50 chiefs - they would accept a reserve south of Brantford and that the Crown could sell land outside of the reserve.²³⁶ From the 1844 agreement to 1953, the Six Nations, the Crown and third parties engaged in a series of leases, surrenders, attempts to regain territory and transfers of monies.²³⁷ However, it was not until the 1980s that the Six Nations Elected Band Council was able to submit its claims against the Crown under the Specific Claims Policy. From 1980 to 1995, the Band Council submitted 29 claims to Canada for review and since these dates only one claim has been settled.²³⁸

5.2 Background to the Six Nations Occupation of the DCE

On February 28, 2006, the Six Nations Land Claims Awareness Group organized the protest of a residential building site called Douglas Creek Estates (DCE) in Caledonia, Ontario.²³⁹ The

²³⁵ Catapano, p. 98

²³⁶ 1844 Agreement (surrender): Library and Archives Canada, RG 10, Reel C-1149, Volume 44, pages 83269 – 83279. A hand written copy and a printed version can be viewed online at <http://www.numberswatchdog.com/> under Useful Information, Historical Research.

²³⁷ Six Nations Land Right: Summary.

²³⁸ Ibid.

²³⁹ Laura DeVries, *Conflict in Caledonia: Aboriginal Land Rights and the Rule of Law*. 2011, p. 18. (Online: <http://www.ubcpres.ca/books/pdf/chapters/2011/ConflictInCaledonia.pdf>).

group claims that the land on which the DCE is being developed belongs to the Six Nations despite the fact that this particular plot of land is not part of the Six Nations litigation claims. Oddly, this group was purported to have approached the Six Nations elected council in January of 2006 for support of for the occupation and was denied. The group had also sought the support of Six Nations Confederacy Council but it is unknown to what degree support was offered.

The die was not cast for the 2006 occupation of the DCE upon a single Crown action or event. Rather, this is a multi-dimensional issue. The decision by a group of protesters – not the Six Nations Elected Council - to occupy the DCE is most directly linked to the cumulative impact and shared frustrations felt by the Six Nations community because of the excessive delays and lack of progress made under the Specific Claim Process and litigation. Yet, there are also factors including the rapid growth and development in Southern Ontario, the immediate development of the DCE, and the overarching poor the Crown-First Nation relationship caused by centuries of unfair dealings and the Crown’s failure to honour its obligations to Aboriginal people. The bottom line is that while there are numerous factors that lead to the protest, the protesters, as stated by Mohawk Hazel Hill “are not going anywhere.”²⁴⁰ The protesters have a high level of conviction and

have no intention of leaving our reclaimed lands. We will not abandon our position, or walk away. We know how deeply the situation at Grand River affects all of our brothers and sisters in all Onkwhonweh Territories. We will not jeopardize the position of all of us. All Onkwehonweh Nations who stand in solidarity with us have as much at stake as we do.²⁴¹

As previously mentioned, the Six Nations have submitted 29 claims all but one of which the Canadian National Railway Right-of-Way, Oneida Township (CNR Settlement) claim have been

²⁴⁰ Bob Kennedy, Second Anniversary of Kanehstanton, But it’s been more than two years in the making, February 28, 2008. (Online: <http://www.turtleisland.org/news/news-sixnations.htm>).

²⁴¹ Ibid.

left unsettled. Yet it is not this fact alone that lead to the occupation, although one probably cannot underestimate the effects of this excessive delay on the resolve of the Six Nations to draw a line to protect what is perceived as the last of their land. Instead, the frustrations have been cultivated by a series of events that I believe exhibit how poorly the Crown has managed the claims and explicit examples of the Crown not honouring its commitments to First Nations.

The events that contributed to the Six Nation's frustration most likely began with the 1995 refusal by Canada to accept two additional Six Nations claims for review under their Specific Claims Policy. Both the claims for *Compensation for Lands Patented to Nathan Gage on February 25, 1840 Re: Brantford Town Plot*, and the *Compensation for Lands Included in Letters Patent No. 910 - dated July 12, 1852 Re: Brantford Town Plot* were rejected by Canada.²⁴² Then, as of January 31, 1995 all of the Six Nations claims were 'closed' by INAC – it is important to recognize that the claims were not formally rejected, the files were simply closed and the claims removed from the process.²⁴⁴ As such, it appears that INAC used an administrative tool to systematically prevent Six Nations from referring these claims to the Indian Claims Commission (ICC). Had the Crown rejected the Six Nations claims they could have asked the ICC to review the decision and act as an alternative forum to pursue negotiated settlements.²⁴⁵ In the same year, Canada then stopped providing all research funding to the Six Nations Lands and Resources Office.²⁴⁶ In response to the closures and lack of action, the Six Nations, in 1995, filed litigation against the Government of Canada and the Province of Ontario (the parties) calling “for an accounting of all the lands and moneys they had, or ought to have

²⁴² Six Nations Land Rights, p. 30.

²⁴⁴ Ibid. p. 8.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

had, from 1784 to date” and alleging “14 examples of the Crown's alleged mismanagement of their money and land.”²⁴⁷ In 1999, 2000 and 2001, the parties agreed to stop active litigation and attempt to find common ground on which to find an out-of-court resolution.²⁴⁸ In 2000, the Crown invited the Six Nations to discuss a “Political Protocol” with Canada’s appointed Special Representative, Gerry Kerr.²⁴⁹ However, these talks failed once it became apparent to the Six Nations representatives that Mr. Kerr did not have a mandate to pursue settlement options. The situation became exacerbated when Canada failed to explain the lack of a serious mandate and did not offer to place the litigation “on hold” during discussions.²⁵⁰

An out-of-court settlement approach was suggested by Kathleen Lickers, counsel for the Chiefs of Ontario in 2003 and on August 1, 2004 exploration began.²⁵¹ From 2004 to 2005 a number of meetings were held. In an act of good faith, Canada and Ontario agreed to exploratory meetings on a without prejudice basis, thus allowing the Six Nations the right to continue with the court case if the exploratory discussions failed.²⁵² Throughout the next year the parties determined the methodology for the exploratory resolution process, placed the litigation into indefinite abeyance, established the framework and timetable for the stages in the exploratory resolution process, selected the two claims for the process and drafted the joint narrative.²⁵³ By January 18, 2006 the parties were ready to discuss the framework for moving forward with the exploratory

²⁴⁷ Aboriginal Affairs and Northern Development Canada, “General Briefing Note on Canada's Self-Government and Land Claims Policies and the Status of Negotiations,” January 2012. (Online: <http://www.aadnc-aandc.gc.ca/eng/1100100031774>).

²⁴⁸ *Ibid.*

²⁴⁹ General Briefing Note on Canada's Self-Government

²⁵⁰ *Ibid.*

²⁵¹ Lickers

²⁵² *Ibid.*

²⁵³ From Six Nations Lands and Resources, “Litigation/Exploration,” undated. (Online: <http://www.numberswatchdog.com/numbers%20docs/sn%20e.pdf>).

resolution process.²⁵⁴ While the parties agreed to proceed with the exploratory process on the Port Maitland and Jarvis claims²⁵⁵ even after the occupation of the DCE began, the Elected Council mandate to act on behalf of the Six Nations in seeking resolution of the two claims was allowed to elapse on June 15, 2006.²⁵⁶

Concurrently as the Elected Council was negotiating with Canada and the Province of Ontario, Ontario passed the *Places to Grow Act* that provided the legal framework for the provincial government to designate any area of land (including unceded First Nations land) as a “growth plan area” and decide on its development.²⁵⁷ A subsequent regulation was also passed that identified the “Greater Golden Horseshoe area” as the first area for which a growth plan would be prepared. The Six Nations are directly affected by this Act and Regulation as much of the proposed growth areas and within the disputed Haldimand Tract. At the same time, though unconnected to the *Places to Grow Act*, the subdivision plan for the DCE was registered with the title to the property being guarantee free from encumbrances by the Province of Ontario.²⁵⁸

The Crown actions which lead to the February 28, 2006 occupation of the DCE began with the longstanding frustration over the contested lands that have been described in the Six Nations 29 claims. While progress was being made by the elected Band Council, Canada and the Province of Ontario on the exploratory resolution process, individuals in the Six Nations saw the

²⁵⁴ Litigation/Exploration

²⁵⁵ The Port Maitland and Jarvis claims are two of the 28 outstanding Six Nations specific land claims. These two claims were chosen as candidates for exploratory discussions because the negotiating teams reached agreement on the narratives in December 2005 and Six Nations Council approved proceeding with the resolution discussions.

²⁵⁶ *Ibid.*

²⁵⁷ Six Nations Solidarity, “Background: Six Nations Claim,” Last Modified 2006-04-15. (Online: <http://sisis.nativeweb.org/actionalert/background.html>).

²⁵⁸ *Ibid.*

development of the DCE as another injustice against a well established land claim. As the Haudenosaunee Confederacy Land Rights Statement, November 4, 2006 states,

Our faith in the Canadian people is strong, as we feel that the majority of Canadians also want to see justice on these matters. However, their elected representatives and public servants have failed to act effectively to address and resolve these matters. It is time to lift the cloud of denial and to wipe away the politics that darken the vision of the future. It is time we are heard clearly, and our cases should be addressed with utmost good faith and respect. We firmly believe that if we have respect and trust, we will find mutually agreeable solutions that will reflect our long-standing friendship.²⁵⁹

5.3 The Six Nations Claims

The Six Nations have long held that they have valid specific land claims. In order to better pursue these claims, the Six Nations Land Claims Research Office was established in 1974.²⁶⁰

The mandate of the office is to “investigate and report to the Six Nations Council on the Crown's management of Six Nations lands and monies.”²⁶¹ The four main areas of investigation are:

- I) Were the terms of the October 25, 1784 Haldimand Proclamation and other treaties fulfilled and honoured;
- II) Were the alienation of portions of the Six Nations tract undertaken lawfully;
- III) Were the terms and conditions of the alienation fulfilled; and
- IV) Were the financial assets derived from the land alienations properly accounted for and maximized to benefit the Six Nations of the Grand River Indians?²⁶²

The findings of the Office formed much of the basis of twenty-nine land claims that were filed against the Crown, between 1980 and 1995, that include charges of mismanagement by the government and false surrender of lands. The claims largely span from approximately 1796 to the 1950s with the majority of charges speaking to incidents that occurred before Canada was an

²⁵⁹ Kennedy.

²⁶⁰ Six Nations Land Rights p. 36

²⁶¹ Six Nations of the Grand River, “Outstanding Financial and Land Issues,” undated, p. 1. (Online: <http://gsdl.ubcic.bc.ca/collect/specific/archives/HASH1f22.dir/doc.pdf>).

²⁶² Ibid.

independent nation.²⁶³ In their claims, Six Nations are seeking “comprehensive general accounting for all money, real property or other assets belonging to the Six Nations of the Grand River” which they believe was or ought to have been received or held by the Crown for the benefit of the Six Nations, and they are requesting to know “the manner in which the Crown managed or disposed of such assets.”²⁶⁴

From the Six Nations’ perspective the Crown has a duty to protect their lands for their sole use as set out in the Haldimand Proclamation. It is their belief that the Crown not only failed to do so but actively encouraged settlement on their lands and that, as a result of this intrusion, the lands became unsuitable as hunting grounds and Six Nations people were forced to find alternate means to support their community. Evidence of the Crown’s active encouragement of development, settlement and rendering lands unusable for hunting include the creation of roads, flooding of lands, Crown refusal to remove white settlers from Six Nations’ lands consistent with the Indian Act prohibitions on non-Indians residing on reserve lands, and the illicit surrender of lands for the creation of the City of Brantford. The 1834, *An Act to authorise the construction of a Road from Hamilton, in the Gore District, to Port Dover in the London District* opened up the Six Nations’ land for further development and created Crown ownership to the extent of half a mile in depth on either side of the Hamilton-Port Dover Plank Road. This land was subsequently subdivided into tiered lots.²⁶⁵ The Welland Canal and Dunnville Dam is another example of Crown-caused destruction of property, as this project lead to the flooding of 2,415.60 acres of Six Nations territory.²⁶⁶

²⁶³ Six Nations Land Rights, p. 36

²⁶⁴ *Ibid.*, p. 37

²⁶⁵ *Ibid.*, p. 11.

²⁶⁶ *Ibid.* p. 12.

The evidence of the Crown's refusal to remove white settlers can be found in an 1841 letter from Samuel P. Jarvis, Superintendent General of Indian Affairs to the Mohawk Chiefs stating that "he would not recommend, nor would the Government approve, the removal of upwards of 2,000 white settlers from Six Nations lands."²⁶⁷ Finally, in the Letters Patent No. 708 dated November 5, 1851 took 807 acres from the Six Nations to create the Town Plot for Brantford which is a clear indication that the Crown had every intention in to encourage settlement in the Six Nations territory.

There are also historical examples of how the Crown has failed to provide proper fiscal management of the monies held in trust for the Six Nations. The Crown has admitted in the 1844 agreement that it held/holds reserve land along the Grand River in trust for the Six Nations and that money from the lease or sale of the land would be held for them. However, an audit of the trust in December 2007 revealed that the trust only held \$2.3 million, a remarkably modest amount of money considering more than 900,000 acres of prime real estate has been lost since 1784, and a significant amount of the lands were either never surrendered or were leased.²⁶⁸ The Six Nations believe that the

proceeds from the disposal of these lands together with other Six Nations property, and a proper return on the investment of those proceeds, should have yielded a substantially larger sum of money in the trust accounts administered by the Crown than the amount referred to above. This demonstrates that the trust property has been substantially depleted.²⁶⁹

As the trustee, the Crown has an obligation to produce a full accounting of the sales, their proceeds and the resulting accounts. Directly linked to this charge of financial mismanagement

²⁶⁷ Six Nations Land Rights, p. 16.

²⁶⁸ *Ibid.*, p. 16.

²⁶⁹ *Ibid.*, p. 2.

is the Six Nations' claim that the government borrowed money from their trust fund to help finance the building of the Queen Elizabeth Way highway, parts of McGill University in Montreal and Osgoode Hall Law School at the University of Toronto.²⁷⁰ According to the Six Nations, those loans have never been repaid along with the interest.

As per the Six Nations of the Grand River' *Land Rights, Financial Justice, Creative Solutions* they based their claims on the following breaches:

- i. The non-fulfillment of a treaty or agreement between Indians and the Crown;
- ii. A breach of an Indian Act or other statutory responsibility;
- iii. A breach of an obligation arising out of Government Administration of Indian funds or other assets;
- iv. An illegal sale or other disposition of Indian land by government under historic treaties or its administration of First Nation lands or other assets under the Indian Act; and
- v. Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the Federal Government, in cases where the fraud can be clearly demonstrated.²⁷¹

6. Analysis and Arguments

The events at Caledonia and the Crown's response implicate three broad streams of argument and analysis: failure to demonstrate leadership in its response to the Six Nations protest and occupation of the DCE; failure to negotiate in good faith, and the manipulation of both the medium and the message throughout the resolution process. It is to the elaboration and critique of these arguments that I now turn my attention, combining this in a final analysis of how these arguments vindicate or challenge this thesis' conceptual framework and definition of the honour of the Crown. Have the actions and attitudes of the Crown in the "Caledonia Crisis" vindicated the thesis statement of this paper? That is, is the honour of the Crown an evident and defining

²⁷⁰ Horsnell, p. 20

²⁷¹ Outstanding Financial and Land Issues, p. 2.

feature of the federal government's response to the land claim & crisis at Caledonia, or has the Crown failed to uphold this fundamental principle in its management of this issue?

6.1 The Crown's Response

This paper is largely focused on the political aspects of this land claims process.²⁷² When I say political, I am speaking of the overlapping space where the Crown's legal obligations merge with the politicised response of both government and First Nations. Simply put, the Six Nations moved their claims outside of a strictly legal process by abandoning litigation and as a response to the utter lack of progress made within the traditional Department process; they chose to shift their claim out of the legal realm and into a political one by way of the protest and occupation. In turn, the Crown appeared to have both accepted and legitimized is shifted by the Six Nations when it created an ad-hoc negotiation process. As a result, the negotiations exist outside of the courts, the traditional Department of Aboriginal Affairs and Northern Development, Canada's Specific Land Claims process and have not been brought before the Specific Claims Tribunal (SCT). The structure of the negotiations process is unique: Discussion occurs at a main Table and four side tables: Lands Resolution, Consultation Issues, Archaeology and Appearance, and Public Awareness and Education.²⁷³ While this process gives the appearance of being Mohawk-generated and defined, and thus responsive primarily to the interests of this First Nation, this ad-hoc process also offers considerable potential benefits to the Crown. The 'ad hoc' process

²⁷² I recognize that there are many additional issues including: health issues, local economic impacts, and that many non-Aboriginal stakeholders are affected.

²⁷³ Ontario Ministry of Aboriginal Affairs, "Structure of Negotiations 2009," June 28, 2011. (Online: <http://www.Abandonallaffairs.gov.on.ca/english/negotiate/sixnations/structure.asp>).

affords considerable latitude to the state in crafting not only its responses to the different issues, but also a good deal of influence in managing the process at the various tables. In that space created by the new process, tensions between what is required by law and what is politically advantageous (for either party) abound, with the latter appearing to trump the former on many occasions. For example, if the Six Nations claim was broken down into smaller individual claims which were then submitted to the SCT, the resolution process would be governed by the *Specific Claims Tribunal Act* (SCTA), with all the benefits this implies.²⁷⁵ For example, the SCTA provides for an independent tribunal and judicially overseen process²⁷⁶ instead of the ad-hoc current state lead negotiations; the hearings are public²⁷⁷ instead of being *in camera* discussions; there is a guarantee of written reasons and the publication of judgement²⁷⁸ instead of an unknown outcome; documents are filed publically²⁷⁹ instead of unknown handling of records; and the overarching benefits of negotiations governed by an enacted law instead of an unscripted process. Each of these aforementioned safe guards are absent from the ad-hoc Six Nations specific claims resolution process and begs the question why and how transparent the process can be without them. As Wayne Garnons-Williams, the tribunal's former deputy head and registrar noted during a recent interview about the SCT, "[j]ustice must be done, but it must also be seen to be done," as Canada's history of treaty negotiations has been characterized by "broken promises, false starts and mistrust."²⁸⁰

²⁷⁵ Claims cannot exceed a total payment of \$150 million as per s. 20(1)(b) of the *Specific Claims Tribunal Act*.

²⁷⁶ *Specific Claims Tribunal Act* (SCTA), 2008 Preamble.

²⁷⁷ SCTA s. 27(1)

²⁷⁸ SCTA s. 33

²⁷⁹ SCTA s. 38(1)

²⁸⁰ Maria Cook, Aboriginal-inspired courtroom for treaty disputes ready to open its doors, January 23, 2012. (Online:<http://www.ottawacitizen.com/news/Aboriginal+inspired+courtroom+treaty+disputes+ready+open+doors/6034806/story.html>).

6.2 Questions of leadership and responsibility

The question of Crown exhibiting leadership in response to the Six Nations protest is one that resonates with Six Nations protesters, citizens of Caledonia and the surrounding area, municipal and provincial politicians, and federal opposition members alike. In the House of Commons opposition Members of Parliament have asked on multiple occasions when the government would take “leadership” of the Six Nations negotiations.²⁸¹ Some residents of Haldimand-Norfolk (the federal riding that encompasses the DCE) have even gone so far as to display their frustration with the local MP and sitting Minister Diane Finley’s handling of the dispute by mounting lawn signs that ask, "Has anyone seen Diane Finley? Leadership?"²⁸² While the signs and questions in the House of Common might be anecdotal, the sentiment is very real; the Crown has a duty to take the leadership role in specific land claim disputes. The question of leadership is interesting, as for some it may mean sending in the police to shut down the protests. For others, leadership is not about reactionary actions. Instead, leadership is breaking new ground on a problem, working through a solution during challenging times and then setting the foundation for the path to be followed again. This brings us to the fundamental question: Has the Crown shown leadership in its response to the Six Nations protest and occupation? Answering this question requires attention to the jurisdiction of the federal and provincial governments, consideration of the actions taken by the Crown and the actions and incidents of political leadership.

²⁸¹ Official Report (Hansard) Vol.: 141, No.: 041-076, 1st Session, 39 Parliament: Jean Crowder MP for Nanaimo-Cowichan, April 4, 2006; Lloyd St. Amand MP for Brant, June 6, 2006; Jack Layton MP for Toronto-Danforth, June 13, 2006; and Anita Neville MP for Winnipeg South Centre, June 15/2006.

²⁸² Daniel Nolan, “MP under fire for low profile on native issues” September 2008, Hamilton Spectator. (Online: <http://www.caledoniawakeupcall.com/updates/080922spectator.html>).

6.2.1 Jurisdiction - Division of Federal and Provincial Responsibilities

From the beginning of the crisis in Caledonia, the federal government characterised the situation as a policing issue and argued that the Province of Ontario was responsible for the dispute. In fact, the Honourable Jim Prentice Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians (and former Commissioner of the ICC) said in the House of Commons on April 7, 2006, the “federal Crown has been involved in these negotiations. [But] the constitutional reality in our country is that the federal Crown is not responsible for policing issues nor for issues relating to provincial Crown land.”²⁸³ However, Six Nations protesters, citizens of Caledonia and their elected officials, provincial politicians and numerous other stakeholders all have argued that this is not enough and that the federal government does have a role to play.

In most land transactions the Province has the constitutional authority. The *Constitution Act, 1867* clearly provides provincial jurisdiction with respect to lands.²⁸⁴ However, the Courts have determined that certain Aboriginal interests in land, like specific land claims, form an encumbrance that is "an interest other than that of the province" in provincial Crown land, which would appear to directly implicate the federal Crown in the management of such claims.²⁸⁵ The Six Nations specific land claim falls into this category and is not a simple land transaction. Thus, land claims that involve First Nations people or lands have the potential to engage both the

²⁸³Oral Questions, Hon. Jim Prentice (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, CPC):39:1 Hansard – 33 (2006/6/5)

²⁸⁴Ontario Native Affairs Secretariat, *The Resolution of Land Claims in Ontario: A Background Paper*, April 27, 2005, p. 7. Provincial jurisdiction includes: section 92(5) management and sale of provincial lands; section 92(13) "Generally all Matters of a merely local or private Nature in the Province"; section 92(14) administration of justice; section 109 that grants the provinces ownership of the lands and natural resources within the boundaries of the province.

²⁸⁵ *St. Catherines Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (J.C.P.C).

provincial constitutional powers over property and the federal constitutional powers concerning Aboriginal people. Therefore, it is import to look to Section 91 (24) of the Constitution Act, 1867 as it gives the Parliament of Canada the power to legislate concerning “Indian, and Lands reserved for the Indians”.²⁸⁶

When it comes to the question of jurisdiction, the majority of First Nations’ land claims negotiations involve the federal government. The federal government has the primary responsibility for resolution of Aboriginal claims because of the unique legal and constitutional position of First Nations within Canada. This position stems from the *Royal Proclamation of 1763* and is reinforced by the *Constitution* and subsequently, the *Indian Act*. The *Indian Act* has become “the principal vehicle for the exercise of federal jurisdiction over “status Indians” since 1876, [and] reflect[s] the “protective” provisions of the *Royal Proclamation*” including the designation and surrenders of reserve lands.²⁸⁷ Moreover, section 35 of the *Constitution Act, 1982* recognizes and affirms “existing aboriginal and treaty rights” of Canada’s Aboriginal peoples, and therefore federal responsibility therein.²⁸⁸

In practice, the federal government acknowledges it “is accountable for legally-binding treaties and agreements signed by previous governments between the Crown and First Nations, and has a duty to honour past commitments made with First Nations.”²⁸⁹ As such, the department of Aboriginal Affairs and Northern Development Canada (AANDC)²⁹⁰ has an entire branch devoted to the resolution of specific land claims and a Specific Claims Policy. Furthermore the

²⁸⁶ St. Catherines Milling

²⁸⁷ Ibid.

²⁸⁸ Constitution

²⁸⁹ Justice at Last, p. 2.

²⁹⁰ The department of Indian and Northern Affairs Canada was renamed AANDC.

federal government has passed the *Specific Claims Tribunal Act, 2008* and established the Specific Claims Tribunal (SCT).

The federal government has also publicly acknowledged its obligation to address and resolve specific claims. For example, on June 12, 2007, Prime Minister Stephen Harper made an announcement acknowledging and promising “a decisive new approach that will fundamentally change the way specific claims are handled in Canada ...[and] address the huge backlog of unresolved treaty claims” to First Nations and all Canadians alike.²⁹¹ Following the Standing Senate Committee’s report on specific land claims, the government stated that the “current backlog of more than 800 claims is simply unacceptable.”²⁹² The Prime Minister stated that the Senate report gave “clear direction on the way forward” and that the government was “pleased to announce a comprehensive package of reforms that will revolutionize the claims resolution process.”²⁹³ In this announcement, the government promised that the reforms would include three key parts: the creation of a fully independent claims tribunal, the transformation of the Indian Specific Claims Commission into a neutral dispute resolution body, and the introduction of practical measures to expedite the resolution of small claims (under \$3 million).²⁹⁴ The goal was simple: to break through the “intractable logjam of specific claims”.²⁹⁵

The bottom line is that both in theory and practice, pre and post-Confederation, the federal government has been and is centrally involved in land negotiations. Provinces on the other hand,

²⁹¹ Prime Minister Stephen Harper, “St. Catherine’s Milling to Address the Backlog of Aboriginal Treaty Claims,” June 12, 2007. (Online: <http://pm.gc.ca/eng/media.asp?id=1705>).

²⁹² Ibid.

²⁹³ Justice at Last, p. 1.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

become involved in First Nations' land claims because of particular historical events giving rise to the claims, and/or "because many claims involve the assertion of rights with respect to Crown lands, natural resources and private property."²⁹⁶ It is also the provincial government's responsibility to police and restore order.²⁹⁷ Therefore, often, both federal and provincial governments have a legal responsibility to engage and take leadership roles within their particular jurisdictions.

It is also important to note from the lessons learned through the Ipperwash Inquiry that "Aboriginal protests and occupations must be considered a separate and unique form of protest."²⁹⁸ The context in which this type of protest (specific land claim) exists is so fundamentally different from other protests and occupations that they should not be dealt with in a strictly law and order context. The reason being, that First Nations have a unique relationship with the land, and protests of this nature, have a particular interest and rights to *specific lands* and is not comparable to other types of protests. The policing strategy must be equally cognisant of the First Nations history, law and customs as the current dynamics of the claim in order to better defuse the potentially violent confrontation. At the same time, and dependent on the dynamics of the land claim and protest, engagement and intervention by the federal and provincial governments may be appropriate. Aboriginal protests and occupations often raise public policy and legal issues that are outside of the authority of police services and public order.²⁹⁹ Governments must undertake their constitutional obligations to First Nations and, while the role of the police is to restore order, the Crown must work in collaboration with the police and

²⁹⁶ Ministry of Aboriginal Affairs, "Backgrounder: Aboriginal Land Claims," May 31, 2007. (Online: http://www.aboriginalaffairs.gov.on.ca/english/news/2007/may31bg2_07.asp).

²⁹⁷ Ipperwash vol. 2 p 181

²⁹⁸ Ibid., p. 179

²⁹⁹ Ibid.

wherever possible First Nations leadership to solve the problem and not just restore order. Clearly, then, the jurisdictional issues raised by Canada when it says it has “no constitutional authority to intervene” because the lands involved may be “within the province” are disingenuous and designed to avoid involvement in potentially politically-disastrous land conflicts and ‘Indian protests’.³⁰⁰ Canada has been engaged with the Six Nations’ claims since 1980s, and the protest and occupation of the DCE are directly linked to the glacier nature of the claims resolution – which is entirely within the federal government’s jurisdiction. Moreover, the federal government has both a constitutional and customary duty to intervene in a conflict involving its fiduciaries.

As noted, there has been significant criticism of the federal-elected official representation throughout the Six Nation occupation. The local Member of Parliament and Federal Cabinet Minister, Diane Finley, has been repeatedly accused of invisibility and lack of leadership in the Caledonia Crisis. However, my condemnation of Minister Finley centers on her statements that the police should be sent into the DCE to remove the protesters and bring “normalcy” back to the region.³⁰¹ I am not sure which is more insensitive, the fact that in this statement Minister Finley has completely dismissed with the validity of Six Nations claim or that she has ignored the fact that the police require the assistance of both the federal and provincial governments to defuse this situation. All of this constitutes an overarching failure of the federal government to display leadership in its response to the Caledonia crisis.

³⁰⁰ Michael Coyle, Report: Results of Fact-Finding on Situation at Caledonia, April 7, 2006 p. 6. (Online: <http://www.caledoniawakeupcall.com/documents/CoyleReport-apr7-06.pdf>).

³⁰¹ Daniel Nolan, “MP wants Caledonia returned to 'normalcy'” Hamilton Spectator, June 9, 2006. (Online: <http://sisis.nativeweb.org/actionalert/updates/060609spectator-a.html>).

6.2.2 Political Leadership

To be fair, the federal government has not been entirely inactive with regard to the Six Nations protest and occupation. In 2006, the Government of Canada entered into negotiations with the Confederacy Chiefs Council and Clan Mothers to settle the Six Nations' land claim. When the land claims dispute erupted on Six Nations territory, some of the Haudenosaunee people called upon the Confederacy and the Clan Mothers to represent their rights and play an active role in the dispute. As the occupation proceeded and pressures mounted for negotiations, many insisted that the Confederacy negotiate for the Six Nations, not the Band Council. The Band Council supported this position and notified the government that the Confederacy was supported in representing Six Nations at the negotiating table. For the first time in 82 years, the Crown has recognized the traditional Haudenosaunee leadership.³⁰² While this is a remarkable recognition of traditional leadership and a positive step forward, it must be noted that the Six Nations reserve now has two distinct groups representing separate positions at the negotiating table, creating an added complexity to the negotiation process.

The Crown has also shown leadership in its proactive establishment of a fact finding mission to report on the situation in Caledonia. Within a month of the initiation of the occupation, the federal government appointed the Professor Michael Coyle to “undertake a fact-finding initiative related to the ongoing situation involving members of the Six Nations of the Grand River near Caledonia, Ontario.”³⁰³ The March 24th appointment by the Minister of Indian Affairs and Northern Development (now Aboriginal Affairs and Northern Development Canada) was timely

³⁰² In 1924, the Chiefs of the governing Confederacy were forcibly replaced by an elected band council under the Indian Act. The Band Council has been and continues to be in place however the Six Nations still rely on their traditional structures as a source of moral authority, languages and spirituality

³⁰³ Michael Coyle, Results of Fact-finding on Situation in Caledonia, April 2006. (Online: <http://www.caledoniawakeupcall.com/documents/CoyleReport-apr7-06.pdf>).

and the mandate succinct: “to investigate the nature of the grievances; to identify the jurisdictional implications; and to explore the possibility of mediation.”³⁰⁴ The mandate was limited however to the exploration of the view points of the involved parties in order to brief the Minister. Notwithstanding these limitations, the investigation was a positive step because although the Crown has been in carriage of the Six Nations’ specific land claim submissions since the 1980s and has been in on-again-off-again litigation and discussion since 1995, the creation of an investigatory body suggests that the Crown was interested in a more universal understanding of the conflict. At the same time, it must also be acknowledged that this endeavour does not seem to have expedited resolution of the conflict, nor has it prompted additional Crown action with regard to the relevant claims.

In a letter to Professor Coyle dated March 27 2006, the Haudenosaunee Six Nations Confederacy Council explained their position on Professor Coyle’s appointment by stating that they “acknowledge and express appreciation for [his] involvement” but that his work was unnecessary as “all of the information required to address this situation is in the hands of Canada”.³⁰⁵ Then in a press conference on March 28, 2006, Leroy Hill, a sub chief of the Cayuga Bear Clan continued by stating that “[t]he federal government’s runner is a positive first step but the federal government needs to take further steps and send a delegate with a stronger mandate.”³⁰⁶ A more important step, in the mind of the Council, would have included the appointment of a negotiator sufficiently empowered to resolve the claim and the conflict, and thereby “rescue the *Honour of*

³⁰⁴ Coyle, Results of Fact-finding on Situation in Caledonia.

³⁰⁵ Haudenosaunee Six Nations Confederacy Council, “Letter to Michael Coyle,” March 27, 2006. (Online: <http://www.numberswatchdog.com/numbers%20docs/1%202006-0327%20Six%20Nations%20letter%20to%20Michael%20Coyle.pdf>).

³⁰⁶ Michael-Allan Marion, “Confederacy chiefs call for talks on land claims,” The Brantford Expositor, Tuesday, March 28, 2006. (Online: <http://media.knet.ca/node/1940>).

the Crown.”³⁰⁷ The Confederacy’s letter was clear: “broader resolution” was needed, and some recognition that the protests must “not be viewed in the context of criminal activity”.³⁰⁸ The Six Nations were unsatisfied with the limited scope of Coyle’s mandate as they wanted a representative that could address the claims of outstanding leases, illegal land sales and loss of money that they feel was held in trust by the federal government. Chief Allen MacNaughton of the Mohawk Turtle Clan stated that “We, the chiefs, support this [government’s first step]. We believe the federal government has the power to end this dispute today. We believe there is a solution that is in Canada’s power to iron out.”³⁰⁹ In the end, the Chiefs wanted Professor Coyle’s message to Indian Affairs Minister Jim Prentice to be clear: the protest would end if the government put in writing a moratorium on construction and freezes further development of disputed lands while “meaningful talks” are held. Should the state take this position, “the people would leave” Caledonia.³¹⁰ For the Six Nations, resolution would transpire when all parties would come together to “work toward resolution so that the good commitments symbolized by the Two Row Wampum and the Silver Covenant Chain are honoured.”³¹¹

On April 7, 2006, Professor Coyle presented his report. The *Results of Fact-Finding on Situation at Caledonia* detailed the occupation of the Caledonia lands, the current status of the Six Nations land claims, the parties view with respect to the claims, jurisdictional implications and provided next steps.³¹² All-in-all, the report was comprehensive and shed unique light into the perspectives of: the counsel to the spokesperson for the protesters; the Six Nations

³⁰⁷ Letter to Coyle

³⁰⁸ *Ibid.*

³⁰⁹ Marion.

³¹⁰ *Ibid.*

³¹¹ Marion

³¹² Coyle Report, p. 4.

Confederacy Chiefs and clan mothers; the owners of Henco; the elected council of Six Nations and their counsel; Canada’s litigation counsel; the Ontario Secretariat for Aboriginal Affairs; and the Ontario Provincial Police.³¹³ The Crown uses this as an example of a proactive measure taken by the federal government to better understand the complex nature of the protest and occupation, and the interests of all the players involved. However, it is also a great way to look like you are doing something without actually doing anything – and this interpretation is certainly more consistent with overall Crown conduct in this case. Therefore, if the government, as the Confederacy Council stated in its letter to Professor Coyle, had in its possession all the information necessary to resolve the land claims themselves, the government now also had a robust understanding of the player’s perspectives.

The Coyle Report also revealed two of the key findings: there has been a longstanding debate between the federal and provincial governments over jurisdictional responsibility of the Six Nations’ claims; and that according to Canada and Ontario’s Statements of Defence, both “denied Six Nations’ allegations, both generally and with respect to the Plank Road lands.”³¹⁴ This revelation has serious implications over the question of whether the Crown is negotiating in good faith.

6.3 Negotiating in Good Faith

The federal and provincial governments have remained intransigent in their position that “we are negotiating”, notwithstanding the indictment of that position evident in the passing of the sixth anniversary of the outbreak of the protest and the questions it raises about the level of the state’s

³¹³ Coyle Report, p. 4.

³¹⁴ Ibid.

committed engagement to resolving the matter and the underestimation of the problem and what is required to address this volatile situation.³¹⁵ For some observers at least, this anniversary highlights not only the failure of progress and leadership in addressing both the land claims themselves and the occupation of the DCE but also begs the question whether the Crown is negotiating in good faith. What is clear is that after 6 years the Six Nations protesters are committed to pushing forward their agenda and that sadly, an issue which once dominated the news media and occupied both the federal and Ontario governments “has utterly dropped off the political and public radar.”³¹⁶ Yet, for those who are still directly affected by this dispute – the residents and businesses of Caledonia and the protesters – this problem remains unresolved.

In light of the failure of the tripartite to resolve a single claim in six years and the revelations made in Michael Coyle’s report regarding the Crowns’ position on the validity of Six Nations’ claims, it is fair to question why the Crown has entertained negotiations at all. Why negotiate a claim which both levels of government have publicly denied as invalid? What is to be gained by appearing to negotiate such a claim, save perhaps an opportunity to do nothing whilst appearing, at least for a time, to be doing something? If this is, in fact, what the Crown hoped to achieve by engaging with the Caledonia conflict, their position is, at best, disingenuous and, at worst, a flagrant violation of the Crown’s requirement to negotiate in good faith.

³¹⁵ ATI, Communications Report, May 24, 2006, p. 000147.

³¹⁶ Christie Blatchford, “Caledonia, the issues that dare not speak its name,” National Post, September 29, 2011. (Online: <http://fullcomment.nationalpost.com/2011/09/29/christie-blatchford-caledonia-the-issue-that-dare-not-speak-its-name/>).

6.4 The Question of a Two-Tier Justice System

Thus far, the critique of the Crown's response to the crisis in Caledonia has centered on the First Nations experience. However, the First Nations are not alone in the criticism of the Crown's response to the conflict. The residents of Caledonia and the surrounding area have argued that the Crown has failed to uphold the law, apply it equally and as a result the protesters have been rewarded. Non-Aboriginals feel that First Nations protesters have been allowed to act without consequence and that as Conservative MPP, Toby Barrett, Haldimand-Norfolk-Brant stated that, "[t]here does appear to be a double standard. People see a different application of the law, depending on which side of the barricade you stand."³¹⁷ Therefore, the questions that I ask are was the rule of law has been disregarded by the Crown and if so, was it justified.

Before delving into the circumstance of the conflict, it is important to establish an understanding of the rule of law. The rule of law is, at the core of it "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws [as] publically administered in the courts."³¹⁸ However, as admitted by the eminent Lord Bingham and by the *Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council et al.* (*Henco*), trial judge, Justice Marshall, the rule of law is not well understood. Marshall stated that the rule of law is a legal reality that we are all "equally subject to and must obey", and one which is "woven into every part of our social contract"; it is something for which are all responsible.³¹⁹ But, as the appeals judge Justice Laskin provided, the rule of law has many dimensions and is "highly textured." In the Appeal Decision, the judge went on to say that due to the complexities

³¹⁷ CBC News, "Dozens of police contain Caledonia rally," CBC News, October 15, 2006. (Online: <http://www.cbc.ca/news/canada/story/2006/10/15/caledonia.html>).

³¹⁸ Lord Thomas Bingham. "The Sixth Sir David Williams Lecture: The Rule of Law," 2006, p. 4. (Online: <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>).

³¹⁹ *Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council et. al* (2006/12/14), para 41.

of this dispute the other dimensions of the rule of law that need to be taken into account including the

respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.³²⁰

Thus the rule of law is not a static thing, while it should be predictable, it also must be reflective of the issues and dimensions of the situation it is being applied to. So, to the question of that Non-aboriginal protesters have argued, that the First Nations and in this case the Mohawks, have been allowed to disregard the rule of law or, more specifically that the Crown has failed to enforce the rule of law and that the because of the melee, they have been victimized.

Non-Aboriginal protesters have argued that the rule of law has been abandoned by the Crown and Six Nations protesters have been allowed to engage in unlawful protests and have been rewarded with the use of the DCE. The 'evidence' that non-Aboriginal protesters use to support their claim includes property destruction, threats of violence, barricading of the DCE and roads around Caledonia, the burning of a Sterling Street bridge³²¹, the destruction of a hydro station and breaches of the injunction and Contempt Orders.³²² The evidence of wrong-doing was so strong that one Caledonian family, Dave Brown and Dana Chatwell, sued the Ontario Provincial Police and the Ontario government for the mishandling of the occupation for \$7 million dollars which was settled out of court.³²³ The couple claimed, and seemingly successfully, that the

³²⁰ Henco, Para 42

³²¹ CBC Chronology

³²² Henco, Para. 18.

³²³ CBC News, "Caledonia Couple Settle Lawsuit Against OPP," December 30, 2009. (Online: <http://www.cbc.ca/news/canada/toronto/story/2009/12/30/tor-caledonia-lawuit-settled.html>).

police and Ontario “failed to fulfil their duty to protect the family”.³²⁴ While the terms of the settlement are confidential, it is said that the agreement includes no admission of liability by the defendants. However, the couple’s lawyer Michael Bordin stated that “[t]hey are satisfied that this complex matter has been resolved”.³²⁵ Following this case, other Caledonia residents have launched a class-action lawsuit against the OPP and province for damages the results of which were a \$20 million payment to residents of Caledonia.³²⁶ All of which to say, while the Crown has not explicitly accepted fault, the harm done to non-Aboriginal peoples in the community has been recognized and compensated for.

The non-Aboriginal residents of Caledonia were not alone with their criticisms of the Crown or the accusations that the rule of law had not been respected. Justice Marshall, the trial judge in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council et. Al* (Henco v. Six Nations) grappled with this concept when he was asked by the ‘owner’ and developer of the DCE, Henco Industries Ltd. (Henco) to provide an injunction against Mohawk protesters who were disrupting construction.³²⁷ Justice Marshall’s concerns around the enforcement of the rule of law became even more exasperated following the Crown’s purchase of the DCE and subsequent request to dissolve the injunction against First Nations protesters.

The case began in March 2006 when Henco submitted an application against the Six Nations protesters with the Court to prevent both identified and unidentified protesters from disrupting

³²⁴ Caledonia Couple Settle Lawsuit Against OPP.

³²⁵ Ibid.

³²⁶ Christie Blatchford, “Settlement Reached in Caledonia Class Action Suit,” July 8, 2011. (Online: <http://news.nationalpost.com/2011/07/08/settlement-reached-in-caledonia-class-action-suit/>).

³²⁷ CBC timeline

the development of the DCE.³²⁸ The application for an injunction order was brought before Justice Matheson and accepted. The *Exparte* Order provided that Haudenosaunee Six Nations Confederacy Council and other unknown persons are barred from “interfering with [Henco’s]...use of roadways ... from hindering, interfering with, intimidating, physically obstructing or otherwise impeding the operations of [Henco] ...in the performance of work relating to the construction of the Douglas Creek Estate subdivision”.³²⁹ The Court Order also required the respondents to

remove any vehicles and to tear down and remove any barricades owned, placed, or maintained by them, constructed across Thistlemoor Drive and Surry Street, the public highway and/or roadway, or any other obstruction on the public highway and/or roadway, owned and maintained by the...[County].³³⁰

The *Exparte* Order was served on March 4, 2006³³¹ and on March 9, 2006 the Court fixed the date for hearing the motion to continue the *Exparte* Order and granted Henco a *permanent* injunction to prevent further disruption on the construction site.³³²

Non-Aboriginal protesters and Henco have argued that the Court Orders were ignored by the Six Nations protesters and on March 17, 2006, Henco brought a motion before the Court that found the protesters in contempt of the Injunction Order.³³³ The Court found certain known persons in contempt and sentenced to 30 day imprisonment, but with a suspended sentence conditional on being fingerprinted, photographed and that the respondents agreed to keep the peace.³³⁴ The Court then issued Warrants of Committal should the respondents not vacate the DCE prior to

³²⁸ CBC timeline.

³²⁹ Henco, para 20.

³³⁰ Ibid.

³³¹ Ibid, para 21.

³³² Ibid.

³³³ Ibid., para 25.

³³⁴ Ibid.

March 22, 2006.³³⁵ As per the usual protocol, the Order was read and posted at the barricade sites and copies were delivered to the protesters. The Warrant of Committal Order read that the “Respondents, including unknown persons identified in the [Henco Application] as John Doe and Jane Doe, being persons present at the barricades and blocking access to Douglas Creek Estates ... are in *criminal and civil* contempt of the [*Exparte* Order]...”.³³⁶ This new Order came with much more severe penalties in order to entice compliance. Stating that “THIS COURT FURTHER ORDERS THAT any persons present at Douglas Creek Estates, as of and after Wednesday, March 22, 2006, at 2:00pm *in contravention of the [Exparte Order]* are subject to arrest pursuant to the Warrants of Arrest issued...”.³³⁷

The enforcement of the Contempt Orders was followed up by the OPP on April 20, 2006 when the police entered the DCE and made 21 arrests.³³⁸ The response from the protesters was an increase in the protester numbers, the expansion of the occupation to include Argyle Street, 6th Line, the Highway 6 bypass at Argyle, and the former Sterling Street bridge.³³⁹ The situation escalated to having an OPP office hit with a bag of rocks, the Sterling Street bridge burnt down, fires set near the 6th line rail tracks and a complete breach of the Contempt Orders.³⁴⁰ Following the enflamed protest, 53 charges were laid against 28 individuals.³⁴¹ The Attorney General of Ontario Michael Bryant stated that these arrests were an example that “the OPP remain[ing] actively engaged in keeping the peace and upholding the law in Caledonia.”³⁴²

³³⁵ Henco, para 25.

³³⁶ *Ibid.*, para 27.

³³⁷ *Ibid.*

³³⁸ CBC Chronology

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ Henco, para 30.

³⁴² Attorney General, Written Submission on July 20, 2006 p. 17. (Online: <http://www.caledoniawakeupcall.com/canace/Myths.pdf>).

On May 29, 2006, Justice Marshall ordered *ex mero motu* (of his own accord) a “Status” Hearing on the enforcement of the Contempt Order and requested that the following parties appear: the Commissioner of the Ontario Provincial Police; the Attorney General for Ontario; Counsel for the Henning brothers (Henco) who initiated the first injunction in this matter; the firm of Borden Ladner in Ottawa (*amicus curiae*); the Six Nations elected council and the Confederacy or their counsel²; and Railink Canada Ltd. (Southern Ontario Railway).³⁴³ At the hearing on June 1, 2006, the representative delivered oral status reports on the events in Caledonia and this created a debate on the OPP enforcing the Orders. The counsel for the Law Association stated that the “All [the OPP are] doing so far is trying to keep the peace... They're forgetting about their duty to execute warrants and to clearly enforce your order.”³⁴⁴ Followed by Daryl Doxtdator, acting as agent and political advisor to Chief General of Six Nations, making an interesting statment:

So, Your Honour, I think that the whole proceeding has to be directed towards compelling the OPP to discharge its responsibility. Now this may seem like a harsh thing to say. It may require the use of force. And we don't want to have that if we don't have to, but at some point a line has to be drawn. At some point a stand has to be taken for the rule of law. And we've been fooling around now since the 28th of February and nothing's been happening. So at some point, Your Honour, something very significant has to happen here to bring this thing to an end ...³⁴⁵

The hearing was adjourned until June 16, 2006 with an invitation to the federal Minister of Indian Affairs and the Attorney General of Canada to attend. Following the June 16 meeting, Justice Marshall ordered an additional stakeholder meeting to get an update on the status of the enforcement of the Contempt Orders. It was brought to the attention of the Court that these “Status” hearings were having a demonstrable effect on the Main Table negotiations and were

³⁴³ Henco, para 31.

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*, para 33.

undermining the efforts of the OPP to maintain the fragile peace achieved to date.³⁴⁶ As of the July 5, 2006 hearing date the Orders still stood without opposition.

In an effort to alleviate the standoff in Caledonia, Ontario, with financial support from the federal government, decided to purchase the DCE from Henco Industries and let the protesters remain on the property.³⁴⁷ On July 5, 2006, the day after the purchase, Ontario and Henco jointly requested the Court to dissolve the outstanding injunction. On August 8, 2006, the trial judge ruled that the injunction granted in favour of Henco would stand and bind the Crown “until the criminal contempt has been disposed of.”³⁴⁸ In response to the judgement the Attorney General of Ontario and the OPP appealed this outcome, arguing that the judge’s orders were inherently flawed. This argument was supported by the *amicus curiae* for the First Nations and the Six Nations Council. The *amicus curiae* for perspectives of the residents of Caledonia and Haldimand County however, came out against the Crown’s appeal.

In the end, the appeal judge ruled in favour of the Crown’s appeal to lift the injunction. The judge stated that the motions judge’s “contempt proceedings to date has been seriously flawed”.³⁴⁹ With Ontario purchasing the DCE lands there “have not been, and indeed cannot be, any breaches of the injunction” because of the new owner’s (Ontario) consent to allow the occupation.³⁵⁰ In the judge’s concluding statements he stated that

I emphasize that the legal issues on this appeal are narrow. The two broader questions that surround the standoff – the validity of the Six Nations land claim, which gave rise to the protest, and the wisdom of permitting the protestors to remain

³⁴⁶ Henco, para 36.

³⁴⁷ Frequently Asked Questions, Ontario

³⁴⁸ Henco, para 6.

³⁴⁹ *Ibid.*, para 9.

³⁵⁰ *Ibid.*, para 10.

on the property while the land claim negotiations continue – are not before this court. The first question will, preferably, be resolved at the negotiating table. The decision on the second question rests with the Ontario government.³⁵¹

Thus, the appeals judge raised the most interesting point which was, that it was the Crown and not the Court's responsibility to determine what is in the best public interest. It is not the "court's role to question the wisdom of the Government's actions ... [and the injunction] will only escalate tensions in the community, put public safety at increased risk, and adversely affect the land claim negotiations."³⁵²

So what remains is the question of whether the rule of law was ignored by the Crown or was it correctly interpreted to be flexible enough to address the complex nature of the situation. Throughout the motions judge's statements and rulings, he emphasized both the importance of the rule of law and his view that "the rule of law is not functioning in Caledonia" and "the law has not been enforced."³⁵³ But, as the appeals judge provided, the rule of law has many dimensions and is "highly textured." The motions judge attempted to maintain the court's authority with the holding of the injunction order, seeing to its enforcement and therefore upholding the rule of law. Whereas the appeals judge ruled that the motions judge missed the other significant dimensions of the rule of law. The appeals judge described these important features as to include:

respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the

³⁵¹ Henco, para 13.

³⁵² Ibid., para 23.

³⁵³ Ibid., para 141.

executive, legislative and judicial branches of government and respect for Crown property rights.³⁵⁴

Thus it can be argued that the motions judge was too focused on “vindicating the court’s authority through the use of the contempt power” without consideration of the greater features at play in this dispute and the goal of resolving the specific land claim that led to the protest.³⁵⁵

The federal and provincial governments’ decision to purchase the DCE and request that the Court annul the previous unsuccessful injunctions requested by Henco Industries to prevent protesters from disrupting the development of the lands, did a number of things. First and foremost, this action removed the private third party interest in the DCE and created space and time for the protest to exist while the federal and provincial government attempted to resolve the situation or at minimum better contain the protest and the non-aboriginal reaction to it. This action also exposed the Crowns to criticism that the rule of law had been abandoned in favour of an approach which, in the eyes of at least some commentators, appeared to reward the Six Nations’ politics of confrontation and violence. The question of rewarding violence and abrogation of the rule of law are two of the more significant criticisms of federal and provincial government’s response to the protest and occupation of the DCE, and the purchase of the DCE served only to exacerbate such allegations. In fact “the major opposition to Aboriginal rights in the last ten years has been fuelled by an emotional and non-Aboriginal racist backlash in response to blockades in local situations.”³⁵⁶ The Crown’s actions and responses to the Six Nations’ land claim suggested to many onlookers that a dangerous precedent had been set, raising allegations that a two-tier justice system existed in the realm of claims and protest.

³⁵⁴ Henco, para 142.

³⁵⁵ Ibid., para 143.

³⁵⁶ Lischke, p.3.

6.5 What Does the Failure of the Negotiations Tell Us?

One of the predominant features of the Six Nations land claims and protest that best illustrate the fissures in the honour of the Crown is the Crown's failure to resolve even one of the 28 outstanding claims. I have chosen to focus on Caledonia because while the media is no longer capturing images of blockades, armed militia, protesters at odds with the police, the mere continuance of the protest stands as stark evidence of Aboriginal frustration with the excessive delays characterizing the land claims settlement process. It appears that the years of claims submissions, litigation, negotiations and soliciting remedy from the Crown had availed the people little, and motivated the Caledonian protesters to remain steadfast in their resolve to hold onto a small portion of what they consider to be their lands. The effectiveness of this protest is clear: The construction of the DCE has been stopped and the Six Nations effectively has control over the lands at Caledonia but, it is questionable if the Six Nations community is any closer to the resolution of their claims. Their success in this regard implicates the absence of the honour of the Crown in meeting its obligations to Aboriginal people not only to achieve the speedy resolution of claims, but also to non-Aboriginal Canadians whose rights and interests have been deleteriously impacted by the claim, the protest and the Crown's apparent inability to effectively address either of these.

Thus, it is fairly obvious and understandable that some Aboriginal groups, pushed to the limit by Crown inaction on claims, are willing to use physical occupation and civil disobedience to expedite their claims to lands and resources – the apparent ambivalence of governments have left them little other alternative. The reality is that occupations and protests are a manifestation of

the Crown's inability – or unwillingness - to efficiently and effectively resolve claims. The frustration of Aboriginal people was nicely captured in the words of Chief Terrance Nelson of the Roseau River First Nation when he stated before the Standing Senate Committee on Aboriginal Peoples, “Let me make this perfectly clear: Caledonia is not an isolated incident. To me, it represents the future of indigenous and immigrant relations in these lands if we cannot settle issues in a timely fashion.”³⁵⁷ Chief Nelson's sentiments are echoed in the position of the Nishnawbe-Aski Police Services that the use of prolonged land occupation and direct action;

...signals a new approach by leadership, traditional land practitioners and people in general. The government processes that have manipulated the treaty and aboriginal rights of First Nations have totally exasperated the patience and goodwill of First Nations. The price of doing nothing is too costly to First Nations. The cost to First Nations is to live in continual abject poverty, [with] high mortality rate[s], declining health status and a hopeless future. The new approach is a wake-up call to governments, [the] private sector and public at large that First Nations will not tolerate marginalization while society continues to experience wealth from their resources.³⁵⁸

The matter is aptly framed by the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process report's title, “Negotiation or Confrontation: It's Canada's Choice”.

6.6 Manipulation of the Message

The Crown's behaviour both beyond and within the public eye implicates them in manipulation of the press and in ‘massaging the messages’ sent to the public about the Crown's handling of the Six Nations' protest and occupation of the DCE. Almost from the very beginning of the

³⁵⁷ Chief Terrance Nelson, Proceedings of the Standing Senate Committee on Aboriginal Peoples Issue 11 - Evidence - Meeting of November 22, 2006. (Online: http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/11evb-e.htm?Language=E&Parl=39&Ses=1&comm_id=1).

³⁵⁸ Nishnawbe-Aski Police Services Board, “Confrontations over Resources Development” (Inquiry project), p 30. (Online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/NAPS_ConfrontationsOverResourcesDevelopment.pdf).

confrontation the federal message to the public was clear “progress is being made”³⁵⁹ that Canada “believes in negotiations”³⁶⁰ and that “Canada’s New Government is working with Six Nations and the Province of Ontario to find lasting solutions”.³⁶¹ At the same time, the Aboriginal Affairs Minister continued to deflect responsibility for the crisis in Caledonia and vindicate his government by asserting that the, “federal Crown is not responsible for policing issues nor for issues relating to provincial Crown land... [but] We are doing everything we can and we continue to make progress.”³⁶²

When the Conservative government was challenged on its leadership record on claims in the House of Commons, its Members took to the offensive and blamed the previous Liberal government. On one such incident Minister Prentice called the Liberal Indian Affairs Critic the Honourable Anita Neville’s criticism “sanctimony”.³⁶³ Later, the Parliamentary Secretary to the Minister of Indian and Northern Development stated that “unresolved issues ... were inherited by this government from the previous Liberal administration... We are committed to the communities involved... [and] we have seen progress.”³⁶⁴ In fact, not once in the six years that the conflict has been carrying has the Conservative government taken any responsibility in the House of Commons.

³⁵⁹ Aboriginal Affairs and Northern Development Canada, “Michael Coyle Appointed to Undertake a Fact-Finding Initiative in Relations to the Situation in Caledonia,” March 24, 2006. (Online: <http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/j-a2006/2-02758-eng.asp>)

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Oral Questions, Hon. Jim Prentice (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, CPC):39:1 Hansard – 33 (2006/6/5)

³⁶³ Oral Questions, Hon. Jim Prentice (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, CPC):39:1 Hansard – 41 (2006/6/15)

³⁶⁴ Oral Questions, Rod Bruinooge (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians):39:1 Hansard - 42 (2006/6/16)

Yet, what is of particular interest in all of this political interchange, is that while the Conservative government adamantly denied responsibility for the dispute or its management and resolution, the Crown ended up providing funding for the extraordinary costs that were incurred as a result of the occupation of the DCE. In 2007 the Crown provided Ontario \$26.4 million in *ex gratia* payment: \$15.8 million for the purchase of the DCE land and \$10.6 million for the policing costs.³⁶⁵ In a January 25, 2010 *Decision by Minister* memorandum, the Department refers to this action as a part of a “three prong strategy” that was designed to “1) Depoliticize federal and provincial tensions by making a federal payment to the Province for the cost of acquiring the Douglas Creek Estates (site of the original protest) and to reimburse them for extraordinary policing costs.”³⁶⁶ Does ‘depoliticization’ actually cost \$10.6 million or is this an admission of the Crown that it did in fact have a responsibility to engage in the dispute beyond “negotiations”?

The Conservative government has also proven to be very adept at framing the Six Nations’ expectations as unreasonable. “Six Nations’ media and their negotiators have increased community expectation by reporting that the Welland claim is worth up to \$1.15 billion, which is well beyond Canada’s negotiation mandate.”³⁶⁷ While it is most likely true that the Six Nations’ estimated value of their claim is beyond the government’s current mandate, if a First Nation’s claim is actually worth \$1.15 billion, for example, it is up to the Crown to increase its mandate or explain that while valid, it cannot afford to pay that amount and attempt to work out another deal. The value of the claim should not render it valid or invalid, that determination should be left up to the facts and evidence of the claim, and be a matter for negotiation.

³⁶⁵ News Release, Announces Efforts to Advance Negotiations

³⁶⁶ ATI, *Decision by Minister*, Minister of Indian Affairs and Northern Development, January 25, 2010.

³⁶⁷ ATI, Memo for Information, Minister of Indian Affairs and Northern Development, April 2008.

A big part of message control and spin includes understanding what your intended audience wants to hear, is willing to accept or has an appetite for. The Conservative government has been active in conducting media analysis to gage the temperature of the public. In a May 26, 2006 Memorandum, it was noted that “the emphasis of reporting is beginning to shift to longer-term discussions on claims and the federal government’s role in these.”³⁶⁸ Polling found that “a real strong sense of land grievance that continues among Aboriginal communities that won’t go away that readily.” The Crown also has a “Strategic Communication Plan: Negotiating with Six Nations and Community Relations” that details all of the objectives and approach, the current environment, strategic considerations, messages, tactics and target audiences.³⁶⁹ The bottom line is that the Crown has an entire Communications, Public Affairs and Media Relations team that work at the behest of the Minister to craft messaging to ensure that the government is always held in the most favourable light. Examples of this work includes a May 24, 2006 Communications report that noted that editorialists and columnists in major newspapers were calling for action to more quickly address outstanding claims across the country and that failure to do so could result in similar blockades elsewhere in the country.³⁷⁰ There is also the advice that a continued responsive approach to communications is recommended at this time. “Messaging [should] focus on how the Government of Canada has always maintained we are negotiating with the Six Nations of the Grand River community, and that it is the community of Six Nations that will decide who represents their interests in negotiations.”³⁷¹ What makes this last example even more interesting is that the direction recommended to the Associate Deputy

³⁶⁸ ATI, Memo for Information, Minister of Indian Affairs and Northern Development, May 26, 2006.

³⁶⁹ ATI, Communication Plan: Negotiating with Six Nations and Community Relations, September 18, 2007

³⁷⁰ ATI, Communications Report, May 24, 2006

³⁷¹ ATI, Information for Associate Deputy Minister, September 9, 2010

Minister was for the Department to continue to focus media responses on the Crown engagement in “negotiations” when fully a year earlier a briefing note to the Minister acknowledge that the negotiations were broken off and the Six Nations were pursuing litigation.³⁷² This is a prime example of the Crown using message control and standard responses to mislead the public.

It has been often said that the Conservative government and Prime Minister Stephen Harper in particular has a penchant for secrecy and message control. The Prime Minister’s Office (PMO) is well known to vet requests for public events and micromanage a range of issues including press releases, speeches and talking points. The PMO, combined with strict control of the Privy Council Office (PCO) – often referred to as the central nerve of the bureaucracy, —ensures that only approved messaging is used. The obvious question that stems from this statement is why is strict control of messaging so important? In the case of conflicts such as the protests and occupations at Caledonia, public perception and support are critical. Volatile situations or contentious issues present public relations challenges and the Crown – like most large organizations – have a vested interest in ensuring that their position is framed in the most favourable manner possible. The simple truth is that controlling the message – defining and framing it - is critical to controlling a political problem.

The Crown has effectively controlled public perceptions of the Caledonia crisis as a unique and unusual situation. It is referred to as “Special Claim” that is outside of the Specific Claims and Comprehensive claims processes, but one on which the Government is *making progress*, is

³⁷² ATI, Information for Associate Deputy Minister, September 9, 2010

actively negotiating with the Province and Six Nations and negotiations are the best option.³⁷³

As for the violence, protest and occupation of the DCE the “federal government is not responsible for policing matters and would not want to interference in the provincial jurisdiction.”³⁷⁴ Media manipulation is telling the public what you want them to believe and, in too many instances, masking a lack of progress and a questionable commitment to engaging genuine negotiations. When in doubt, compare yourself to past governments “Our government has developed a decisive package that includes all the elements essential for the fair, respectful and final resolution of specific claims.”³⁷⁵ Or blame the previous government, “Mr. Speaker, let me start by summarizing the action of the Liberal Party of Canada on Caledonia. I am finished now, but let me just continue with what we have done.”³⁷⁶ The Crown, currently represented by the Conservative government of Stephen Harper has made a huge effort to conceal the obvious failure to resolve the Six Nations claims and create the impression to the public that it is active in negotiations and care about the results. The simple fact is that the Crown’s actions and statements do not match. In 2007, Prime Minister Harper announced that a ‘decisive new approach’ would “address the huge backlog of unresolved treaty claims” however, one of the most prominent specific land claims and protests in Canada’s history remains unresolved and the participants questioning how committed the Crown is.³⁷⁷

³⁷³ Aboriginal Affairs and Northern Development Canada, “Statement from Canada’s Representatives in Six Nations Talks”, December 12, 2007. (Online: <http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/s-d2007/2-2980-eng.asp>).

³⁷⁴ ATI, Memo for Information, May 26, 2006.

³⁷⁵ Aboriginal Affairs and Northern Development Canada, “To the Ontario All Chiefs Meeting”, June 14 2007. (Online: <http://www.aadnc-aandc.gc.ca/aiarch/mr/spch/2007/jun1407-oacm-eng.asp>)

³⁷⁶ Oral Questions, Hon. Chuck Strahl (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, CPC), 39:2 Hansard - 101 (2008/5/29)

³⁷⁷ Harper Announces

7. Conclusion

As previously stated, in 2007, the Prime Minister conceded that “Canada has not always honoured its legal obligations arising from the historic treaties, the Indian Act and other formal agreements between First Nations and the Crown”, the sum of this thesis is that the Crown continues to not honour its duties and responsibilities to the Six Nations.³⁷⁸ As of today the occupation of the DCE continues and the current status of the resolution process is under review. Canada, Ontario and the Six Nations are not currently in ‘negotiations’- they are back at square one and involved in “discussions ... to explore alternatives to the current negotiation process”³⁷⁹ None of the Six Nations claims have been settled through the ad-hoc process and only a hand full of offers were made since the conflict began and all were flatly rejected.

At face-value, the Crown has failed to resolve this specific land claims dispute or produce tangible results in a timely manner. At a more nuance level, Canada has failed to display the willingness to engage in claims resolution with the intent to resolve as opposed to engage sufficiently enough to appear committed. Where the Crown has succeeded, is that it has shown that its panacea-style approach to resolving large land claims – by inflating an already complex situation - that lack of progress seems to go unnoticed. Proof of this is that on February 28, 2012, the 6th anniversary of the DCE occupation, not a single mention of the ongoing dispute was mentioned in the House of Commons. Therefore, if we can use Question Period and the debates in the House of Commons as a barometer of how active a file is, sadly, this issue is not on the government or the opposition’s radar.

³⁷⁸ Prime Minister Stephen Harper “Specific Claims in Canada” June 12, 2007. (Online: <http://pm.gc.ca/eng/media.asp?id=1696>)

³⁷⁹ FAQ

While the results of this could be used by the government to show how well the Crown has managed the ‘Caledonian file’, I would say that this constitutes the dishonour of the Crown and how poorly managed the situation is. As discussed in this paper, one of the key missing pieces in the Crown’s response and one that is necessary to fulfill its obligations is leadership. The Crown, instead of taking on a leadership role in the Caledonia crisis has defined its involvement by impotence and capricious responses. The Crown’s first response to the conflict was a game of jurisdictional “finger pointing” with Ontario over who’s responsibility it was to address the protesters concerns.³⁸⁰ Next, the Crown “strategically pursued a settlement of the Welland Canal flooding claim to assess Six Nations’ capacity to reach a settlement [and this] litmus test ... illustrated that reaching a settlement with Six Nations in the current environment is highly unlikely.”³⁸¹ Which at first seems logical but then the Crown – knowing that the Caledonia negotiations were tenuous at best as the first settlement offer had just been made³⁸² - used Caledonia as a “reference point” in the federal government’s 2007 announcements to “improve” the specific claims process.³⁸³ Then, the Crown continued to espouse the virtues of the current negotiations and that it was “in negotiations” with Six Nations long after the ad-hoc process had all but dissolved. All told, the Crown has not displayed honour and leadership in its dealing with Six Nations. Instead, it used and manipulated its media messaging to appear like it was resolving the dispute. As discussed, the honour of the Crown obligates it to engage in negotiations that

³⁸⁰ Strategic Communications Plan, p. 6.

³⁸¹ ATI, Update on Six Nations Negotiations (Information for the Senior Assistant Deputy Minister), September 16 2008.

³⁸² The Crown gave its \$125 million settlement offer in May 2007 and the Prime Minister made his *Justice at Last* announcement in June 2007.

³⁸³ Strategic Communications Plan, p. 6.

are done so in good faith and with fairness, and concatenated with this is the notion that negotiations should be geared toward resolution not inaction.

It is this pivotal point - the Crown's management of the conflict - which persists and demands attention. The events in Caledonia garnered substantial and sustained media coverage in the local and national (Aboriginal and non-Aboriginal) media. The regional news coverage saw numerous editorials that demanded that the Crown take action and resolve the situation and impose *rule of law*. The criticism continued over the perceived *two-tier justice* and the allowance of the protest and occupation to continue. The citizens of Caledonia called upon the federal government to take a leadership role and instead of doing so, the federal has engaged in an out-of-court system that has failed to deliver results.

What we do know is that the Six Nations does have at minimum four valid claims (Grand River Navigation Company investment, Block 5 (Moulton Township), Welland Canal flooding and Burch Tract) as per the 2007 Crown settlement offer. Yet, the parties have been unable to resolve the large gap in understanding what each of these claims are worth. There are also the Port Maitland and Jarvis claims that appear to be valid as the Crown has agreed to move forward with them. These two claims were chosen as candidates for exploratory discussions because the negotiating teams reached agreement on the narratives in December 2005 and Six Nations Council approved proceeding with the resolution discussions. However, the Crown has failed to explain what the process will be for moving forward on the Port Maitland and Jarvis claims or how or when it will revisit the claims included in the failed 2007 settlement offer. As expressed in this paper, for far too long the Crown has shielded itself from scrutiny by stating that it is

‘negotiating’ and that it believes that ‘negotiations are the best option for resolution’. Six Nations and Canadians alike should be informed of how the government is going to handle these outstanding specific land claims.

There were two essential questions that this paper engaged: did the Crown do what it said it would do and did the Crown do what it was obligated to do? The simplest answer to these questions is no, the Crown, with respect to its obligations and declarations, has not fulfilled its commitments to the Six Nations of the Grand River and their specific land claim. Through careful analysis of the largely reactionary public announcements made by the federal government against the progress made, it is clear that the Crown is more interested in containing the problem and controlling the message than it is in resolving the root cause – the specific land claim. What has also become apparent is that while the Six Nations protesters have proved that radical protests and occupations get the media’s attention and raise awareness of Aboriginal issues, protests/occupations do not necessarily lead to an expedited claims resolution. The Crown is compelled to act because of the politics of the occupation but as the government has proven, thus far, ‘negotiating’ is action even if the negotiations are not fruitful. Furthermore, this case has proven that if the issue is also presented as sufficiently large, with time, the production of relatively few tangible results seems explicable. Yet, it is at this point that I feel that it is paramount to inject the honour of the Crown into the discussion. The Crown should not be compelled to act because of the politics of an armed occupation of disputed land and frustration ongoing claims resolution delays. The Crown should be compelled to respond to the specific land claims simply because they have been submitted and accepted for resolution. The mere fact that the Six Nations claim have languished for up to 30 years is enough to call the honour of the

Crown into disrepute. While successive governments and the transfer of the challenges from the specific claims process to and from litigation are also to blame for the delays, the current administration has been in power throughout the entire duration of the protest and occupation of the DCE.

My final thoughts upon reflection of the Crown's handling of the Six Nations conflict and resolution process are dismay and disbelief that after six years and no tangible results, there has not been a call for a report on the status of the process and claims. From what I can gather, the costs as of March 2010 total \$23.3 million (\$2.2 million transferred to the Six Nations for their negotiations, \$15.8 million paid to Ontario for the purchase of the DCE, and \$10.6 million to Ontario to help cover the extra policing costs) not including the bulk of the actual federal negotiation cost been "covered by normal operating budgets".³⁸⁴ It is clear that the Crown has been able to hide behind the blanket statement that it is 'negotiating' and used this as a shield to shroud its lack of progress and, arguably, lack of commitment to resolving the claim. There can be little doubt that the Six Nations claims are complicated, but the Crown's behaviour should not be a primary contributor to that complexity or the difficulty in resolving the issues which underlie it. Honour demands transparency and ethical management of all claims. Regrettably, much about the Caledonia Crisis speaks to an absence of all these things, and throws into profound doubt whether Canadians – both Aboriginal and non-Aboriginal – can rely on their government to provide leadership and ethical management of land claims.

³⁸⁴ ATI, Update on Six Nations Negotiations (Information for the Senior Assistant Deputy Minister), September 2010.

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Access to Information Requests

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