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REPORT

RESULTS OF FACT-FINDING ON SITUATION AT CALEDONIA

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MANDATE:

On March 24th, 2006 I was appointed by the Minister of Indian Affairs and Northern Development to undertake a fact-finding initiative in relation to the ongoing Six Nations protest near Caledonia, Ontario. My mandate was as follows:

- to investigate the nature of the grievances;
- to identify the jurisdictional implications; and
- to explore the possibility of mediation.

My role did not involve engaging in an independent analysis of the history of Six Nations' land dealings since 1784, nor was I asked to analyze the merits of the parties' positions with respect to the legal status of the lands that are the subject of the protest. Given the urgency of the situation, I was asked to move quickly to explore the views of the parties involved to permit the Minister to better understand the issues and to promote a peaceful resolution of the situation.

Since March 24th, I have been reporting regularly to Jean-Sébastien Rioux, the Minister's Chief of Staff, and to various other departmental officials working on this file with Mr. Rioux. The following is my formal report.

BACKGROUND:

a) The Occupation of the Caledonia Lands

On February 28th, 2006, a group of members of the Six Nations of the Grand River began a protest on a building site bordering Caledonia, Ontario, claiming that the site is on lands that have never been surrendered and that remain part of Six Nations' territory. The current registered owner of the site in question is Henco Industries. The protesting group have described their action as a "reclamation" of the land rather than an occupation. The protesters appear to have entered the lands, which are close to the current Six Nations reserve, without prior direction from the elected council of Six Nations or from the traditional Confederacy Chiefs of Six Nations.

On March 4th, the Confederacy Chiefs were reported to have decided that they supported the continuing protest on the lands provided that it remained peaceful and that the protesters vacate the site when required to by a court order. Later, at a press conference on March 27th, the Confederacy Chiefs indicated that they continued to support the occupation notwithstanding the court orders described below.

The protesters (described by Six Nations newspapers as the "Six Nations Land Claims Awareness Group") continue to remain on the site. The number of people participating in the protest has varied from time to time since it began, ranging from about a dozen people to (according to newspaper reports) two hundred. The protesters appear to consist mainly of men and women from Six Nations, although it has been reported that some of those present have come from Akwesasne and other native and non-native communities.

Henco Industries, a land development company which has its business office on the site, purchased the property some 15 years ago. The developer is now in the process of building a 72 home sub-division on the site, known as the "Douglas Creek Estates". Construction of homes had begun at the time the protesters entered the site. Since the beginning of the protest the developers have been prevented from entering the site to access their office or to continue construction.

On March 3rd, 2006, Henco obtained an interim civil injunction from a judge of the Ontario Superior Court requiring the protesters to vacate the lands. On

March 9th, the court made the interim injunction permanent.¹ On March 17th, the court issued an order that protesters who remained on the lands after 2 p.m. on March 22nd would be liable to arrest for contempt of court, an order that was essentially confirmed at another hearing held on March 28th. The Ontario Provincial Police have been stationed near the site, monitoring the situation, but they have not yet attempted to enter the site and enforce the court orders.

b) The Current Status of Six Nations Land Claims

Various grievances have been presented to the Crown by Six Nations since the first half of the nineteenth century, regarding land dealings within the area originally allotted to Six Nations by the 1784 Haldimand Grant and the Crown's handling of Six Nations trust accounts. Between 1982 (when the federal government adopted its "Specific Claims Policy") and 1995, Six Nations submitted 28 formal claims to the Department of Indian Affairs and Northern Development.

One of these claims, filed in 1987– the "Hamilton-Port Dover Plank Road" (now known as Highway 6) claim, encompasses the lands that are now the subject of the Caledonia protest. This claim alleged that no lawful surrender exists for lands in the area of Highway 6 and that Six Nations had never been properly compensated for the lands.

By March 1995, none of the 28 claims had reached resolution through the federal Specific Claims process and negotiations were ongoing on only one of the claims.² The elected council of Six Nations then began litigation on its claims against Canada and Ontario. The Statement of Claim sought an accounting by the Crown for all lands and moneys held in trust by the Crown since 1784 and compensation for any improper dealings with those assets. It identified some 14 cases of alleged misdealings by the Crown as examples of the transactions for which the Crown should provide compensation. Among the transactions identified are the Crown's dealings with the Hamilton-Port Dover Plank Road lands.

¹ The order was actually a permanent, *interlocutory* injunction: i.e., an injunction pending a trial of the merits.

² Three others had been accepted for negotiation under the Specific Claims process, although negotiations had not yet begun on these claims.

In their corresponding Statements of Defence, Canada and Ontario denied Six Nations' allegations, both generally and with respect to the Plank Road lands. The litigation proceeded slowly and had not yet reached trial³ in September 2004, when the parties agreed to consider an exploratory process for resolving the claims identified in the lawsuit.

In March 2005, Canada, Ontario and the elected council of Six Nations formally agreed not to take fresh steps in the litigation. In the following months, they began exploratory discussions aimed at resolving two of the claims (the "Jarvis" and "Port Maitland" claims). The parties hope that the framework used on these two claims may serve as a model for resolving the other claims referred to in the litigation. In December 2005, counsel for the parties agreed on a joint historical narrative relating to the Jarvis and Port Maitland claims. Since then they have also agreed on a framework for continuing discussions aimed at resolving these claims.

THE PARTIES' VIEWS IN RELATION TO THE CALEDONIA LANDS:

Over the past nine days, I have spoken with the following groups in an effort to understand their perspectives on the protest, the jurisdictional issues involved and the nature of the grievances:
the protesters at the site;

- counsel to the spokesperson for the protesters;
- the Six Nations 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;
- the Ontario Provincial Police.

The views of these parties are briefly summarized below.

Because my mandate was to investigate the nature of the grievances and to explore the possibility of a mediated resolution, I have tried to capture both the stated positions of the parties and also my understanding of the broader

³ In fact, while Six Nations had begun formal discovery of the Crown's case, the parties remained several years away from trial.

interests that underlie those positions. Focusing on the key interests of the parties related to the dispute, as well as on their stated positions, allows for an assessment of the possibility of resolving some or all of the issues through mediation or unassisted negotiation. Reflecting on the parties' interests is often a particularly useful process, where, as here, some of the parties' stated positions appear difficult or impossible to reconcile. It should be noted, however, that at the preliminary stages of a difficult and emotional dispute the parties are often reluctant to speak explicitly about anything other than their positions. I found this to be the case here. Accordingly, it should be understood that my brief description of the interests that appear to underlie the parties' positions represents only the writer's preliminary assessment: in no case have they been stated as such by the party involved.

In alphabetical order:

Canada

In regard to Canada's legal positions, I have communicated with Charlotte Bell, Michael McCulloch and Gary Penner, all of whom act as legal counsel on Six Nations' land issues for the Department of Justice.

Regarding the subject lands, the Department of Justice believes that these lands were the subject of a proper and valid surrender for sale on January 18th, 1841. The Department has documents (including an order in council from October, 1843 and another confirming surrender from 1844) it believes make it clear that the subject lands were intended to be surrendered for sale. Canada's Statement of Defence in the litigation asserts that as a matter of constitutional law the government of Canada could not be liable as a fiduciary to Six Nations for any events that preceded Confederation.

On the more general issue of resolving the ongoing dispute over the validity of the remaining Six Nations' claims, Canada hopes ultimately to discuss the merits of each of the claims referred to in the Statement of Claim, at least on an exploratory basis. Such discussions would be aimed at reaching an out-of-court settlement that would involve financial compensation only. The Department believes that the existing exploratory discussions with the elected council on two of the more straightforward claims have been progressing very well. The Department hopes that the discussions will allow the parties to seek compatible negotiation mandates, to settle the Jarvis and Port Maitland claims, and in doing so set an example for the process that

might be used to resolve the remaining Six Nations' claims, including the Plank Road claim.

Canada's interests in regard to the negotiation of Six Nations' claims appear to include:

- resolving the issues cooperatively through dialogue.
- achieving reasonable settlements in light of Canada's understanding of its legal obligations.
- achieving settlements that have a reasonable chance of being ratified by the Six Nations community as a whole.
- addressing the outstanding grievances as quickly as possible to permit a better relationship to be established between Canada, Six Nations and Six Nations' neighbours.

On the jurisdictional issues raised by the ongoing protest, Canada believes that it has no constitutional authority to intervene directly because the protest is on lands that Canada considers to be private lands within the province. Similarly, policing in the province is outside Canada's jurisdiction and Canada does not wish to be seen as interfering with the operational decisions of the police.

Nevertheless, in order to understand better the nature of the grievances and promote a peaceful resolution of the protest, Canada appointed the writer as an independent fact-finder.

I understand Canada's interests in relation to the current protest to include the following;

- promoting a quick and peaceful resolution of the ongoing protest.
- respecting the jurisdictions of Ontario and the Ontario Provincial Police.
- communicating Canada's understanding of the legal history of the subject lands.

- respecting the elected council as the legitimate representatives of Six Nations under the *Indian Act*.
- ensuring that any response by Canada does not exacerbate divisions within the Six Nations community.
- if possible, reducing tensions and the likelihood of future occupations in the area.
- respecting third parties' interests in the area.
- investigating the possibility of engaging in a dialogue to address the underlying land disputes between Six Nations and Canada.

The Haudenosaunee Six Nations Confederacy Council

The Six Nations Confederacy is the traditional government of the Six Nations, comprising hereditary chiefs and clan mothers. In 1924, they were forcibly replaced with the current form of elected government under the *Indian Act*. The events of 1924, including the role of the RCMP in the removal of the Confederacy as the government Canada recognized, have led to profound and lasting divisions within the Six Nations community as to who is the legitimate government of Six Nations. At the same time, the controversy has resulted in continuing anger directed by a significant portion of the community at Canada and the elected council whom they believe Canada controls financially.

It is difficult to determine how many in the community support the Confederacy government, but it appears to be at least a significant minority. It is likely that still others within the community feel some level of support for both sets of leaders. Voter turnout in band council elections has typically amounted to only a small minority of the eligible voters.

The Confederacy continues to meet regularly in their traditional manner at the longhouse to deliberate over issues of importance to the community. They appear to be particularly relevant in relation to the ongoing protest because the protestors' spokespersons have described themselves as drawing direction from the Confederacy and some of the clan mothers.

To learn the Confederacy's views, I attended a formal council meeting of the Confederacy on March 24th. I was permitted to describe my mandate and to ask for their views on how a peaceful resolution could be achieved. I was questioned about my mandate; about the intentions of Canada in relation to my appointment; and about whether the police were prepared to allow time for me to continue my work. On March 27th, I was invited to attend a press conference called by the Confederacy, at which traditional chiefs and clan mothers were present. There I received a letter outlining the Confederacy position. I forwarded this March 27th letter to the Minister's office on the same day.

Notwithstanding some media reports to the contrary, neither the Chiefs or the clan mothers present at the press conference indicated that I should cease my discussions with them or with others involved. In fact, I subsequently attended a further meeting involving the Confederacy Chiefs who had spoken at the press conference. At that meeting I sought to clarify the expectations of the Chiefs and to explore whether they wished to share additional options for resolving the issues. Throughout my meetings with the Confederacy I was treated with courtesy and respect. In the end, the Chiefs confirmed that the letter of March 27th best describes their views on how the parties should move forward.

The views of the Confederacy, as expressed in the March 27 letter and press conference, may be summarized as follows:

- development on lands in Caledonia should cease until there is a broader resolution of Six Nations' claims.
- the Confederacy supports the actions of the protesters and will ensure, through the clan mothers, that the protest remains peaceful.
- Canada should appoint someone with a stronger mandate to address Six Nations' claims and respect the honour of the Crown.
- Canada could correct perceptions of "self-dealing" by removing the elected council from all discussions about Six Nations' lands.
- the current protest should not be addressed through the criminal courts.

- the Confederacy invites Canada to “enter into ongoing activities” that clarify and renew the relationship between the Crown and Six Nations. Such activities should follow the spirit of the “Silver Covenant Chain” and the Two-Row Wampum, symbols once used by the Crown to reflect a relationship of respect and equality.

On the parties’ rights in relation to the building site, the Confederacy has not discussed with me their position on the surrender documents referred to by Canada. They take the general position that the site remains Six Nations’ land. Although the Confederacy is clearly very concerned about Six Nations’ claims generally, believing that addressing those claims is necessary before further “encroachments” on their territory, I have not attempted to engage the Confederacy Chiefs in a discussion of the basis of Six Nations’ claims under *Canadian* law.

Based on my discussions, the general interests underlying the concerns expressed by the Confederacy seem to include the following:

- achieving a fair, timely and comprehensive negotiated resolution of the dispute over Six Nations’ land rights.
- protecting the ability of Six Nations to recover lands that once formed part of their territory.
- obtaining a safe and peaceful resolution of the Caledonia protest.
- renewing and improving the relationship between Six Nations and the Crown.
- being recognized by Canada for their role as the traditional leadership of Six Nations, and as the appropriate body with whom Canada should engage in discussions aimed at renewing the historic treaty relationship.
- being recognized as the sole legitimate Six Nations’ participant in negotiations to resolve Six Nations’ claims.

Henco

I have met with John and Don Henning, the owners of Henco. On March 27th I faxed to Canada a two-page letter drafted by the Hennings that summarizes their views on the current dispute and the validity of their title to the building site.

In brief, the Hennings believe that they have good title to the building site. They did the usual title searches when they bought the property and have complied with applicable approval requirements in connection with the development. Their plan of subdivision was approved through a public process three years ago and the Six Nations elected council and community were aware of their plans. They believe that Henco is an innocent party, being made to suffer significant financial losses as a result of grievances over which they have no control.

On resolving the occupation, the Hennings believe that the police should enforce the existing injunctions immediately. They see this fact-finding process as a positive, but late step, and would like to see INAC move more quickly to assist in such situations, given INAC's understanding of and involvement in the issues. The Hennings believe that any negotiations should focus on a finding an expedited claims process to ensure that occupations do not recur in the area.

Henco's interests include moving quickly to protect their financial investments in the development, being able to use their business office, and achieving greater certainty for the financial prospects of future developments in Caledonia.

Ontario

For Ontario's views on the issues, I have been in contact with Doug Carr, Assistant Deputy Minister and Secretary for Aboriginal Affairs.

In relation to the ongoing protest, Ontario indicates that it supports a peaceful and timely resolution of the issues. The provincial Minister Responsible for Aboriginal Affairs has issued a press release supporting Canada's present fact-finding initiative. At the same time, the OPP have exclusive authority to conduct policing operations at the building site. Ontario will not interfere, and does not wish to be seen as interfering, in the

work of the police. Ontario urges Six Nations members to work within established processes for resolving land claims and to comply with the injunction.

Based on what the protesters have asserted and its own view of the law, Ontario believes that Canada has the primary role in achieving a resolution of the underlying issues. In its Statement of Defence to Six Nations' litigation, Ontario generally supported Canada's interpretation of the validity of the surrenders of the subject lands. Nevertheless, Ontario is prepared to play a supportive role in discussions relating to the issues underlying the protest if the court order is complied with and Canada is involved.

In relation to Six Nations' land claims generally, Ontario's view is that if there is any Crown liability associated with Six Nations' claims it rests with Canada. This view, as expressed in the Statement of Defence, relies on Ontario's interpretation of the effect of the Constitution Act, 1867 in relation to land claims that arose before Confederation. Nevertheless, as indicated by its involvement in the current exploratory talks with Six Nations, Ontario is prepared to continue discussions with Canada and Six Nations aimed at an out-of-court financial settlement of Six Nations' claims.

My understanding of Ontario's views suggests that the following are Ontario's main interests in relation to the issues:

- achieving a timely and peaceful resolution of the protest.
- supporting discussions aimed at a fair and timely resolution of Six Nations' land claims.
- ensuring that Ontario's contribution to any such settlements reflects in general terms its own legal responsibility for the claims.
- promoting a climate in which similar protests are less likely to occur in the future.
- respecting the independence of the OPP.

The Ontario Provincial Police

Since March 24th, I have been in regular communication with Ron George, an OPP Aboriginal Liaison Officer present at the site. **My initial contact was prompted by a request at the Confederacy Council that I attempt to ascertain whether the police would refrain from arresting the protesters while I undertook my investigation.** All of our discussions have avoided the issue of police intentions in regard to enforcing the injunctions. While the police have understandably sought to keep informed as to whether my discussions have led to an imminent opportunity for peaceful resolution of the protest, we have not discussed the contents of my private discussions with the parties.

As I understand them, the views of the OPP in connection with the protest are as follows:

- the police seek a peaceful and timely resolution of the protest.
- **they are required to honour the orders of the court.**
- they will not discuss their operational plans with third parties.
- they have sought to maintain open lines of communication with the protesters and Six Nations members.

The Protesters

As noted earlier, the protesters appear to be an *ad hoc* group of persons concerned about Six Nations' land rights. Their main spokesperson to date has been Janie Jamieson, a member of Six Nations. I had a brief and cordial meeting with Ms. Jamieson at the building site on March 24th in which I described my mandate and invited the group to share their views. Ms. Jamieson suggested that we might hold further discussions after the Confederacy council meeting scheduled for the next day. Nevertheless, when I returned to the site on March 26th, Ms. Jamieson was not at the site and those present indicated to me that she should be involved in any such discussions. Ms. Jamieson has declined to respond to subsequent invitations to share her views.

Last weekend, I was contacted by Steven Reynolds, a lawyer recently retained by Ms Jamieson. Mr. Reynolds indicated that he is in the process of gathering instructions and wishes to remain in communication with me.

In the result, I cannot directly report on the views of the protesters. Local media coverage indicates the following:

- Ms Jamieson and other protesters believe that the building site remains unsurrendered Six Nations land.
- at least some of the protesters believe that no chiefs have ever had authority to sell Six Nations land.
- Ms Jamieson and other protesters believe that their actions in entering the building site are consistent with directions of the traditional Great Code of the Iroquois.
- Ms Jamieson and other protesters believe that they are acting in accordance with the direction of the traditional clan mothers.

Reporting at this point on the protesters' underlying interests would be a speculative exercise, given their failure to communicate with me.

Six Nations Elected Chief and Council

On March 24th I met briefly with the elected council as a whole for the sole purpose of describing my mandate. Council welcomed my involvement. Since then, I have had a number of discussions with the elected chief, David General, and with their legal counsel, Kathleen Lickers.

The elected council has not formally supported or opposed the continuing protest. My understanding is that the elected council is divided on the issue, although they clearly seek a peaceful resolution of the protest through dialogue.

On the merits of Six Nations' claim in relation to the building site, their legal position has been set out above in the discussion of the Statement of Claim. They assert that the Crown acted unlawfully in its dealings with Plank Road in the Crown failed to obtain a proper surrender of the lands for sale. The

Statement of Claim seeks compensation for breach of fiduciary duty rather than the return of lands.

In relation to the surrender documents relied upon by the Crown in connection with the building site, counsel advises that these documents and the circumstances in which they were signed need to be the subject of discussion among the parties.

On Six Nations' claims generally, the elected council would like to continue discussions with the Crown to resolve the issues as quickly as possible. Chief General is pleased with the pace and progress of the current exploratory discussions on the Jarvis/Port Maitland claims. At the same time, he is very concerned that unless there is an expeditious resolution of the claims, land developments within the Haldimand Tract will outpace the ability of Six Nations to strengthen their land base after a just settlement of their claims.

The Chief believes that more communication is necessary within the community regarding Six Nations' claims and has scheduled a community meeting for tomorrow, April 5th, to discuss the claims process and progress to date in the exploratory discussions.

On the issue of the role of the Confederacy in future discussions with Canada, the Chief indicates that the elected council is the appropriate party to conduct claims discussions, on the basis of the Supreme Court decision in *Isaac v. Davey*. He is interested, however, in exploring the possibility of establishing internal mechanisms for broader community and Confederacy participation in informing claims discussions.

On the other hand, Chief General is comfortable with the Confederacy proposal that Canada meet with the Confederacy to explore ways of renewing and "polishing" the historic Covenant Chain relationship between Six Nations and the Crown. He indicates that it would not be appropriate for the elected council to participate in such discussions.

The interests of the elected council in relation to the ongoing protest and the outstanding claims appear to include the following:

- achieving a fair and timely resolution of Six Nations' claims, including the claim to the lands surrounding the building site.

- continuing to engage Canada and Ontario in dialogue as the preferred method of resolving the claims.
- to support the existing exploratory discussions on the Port Maitland/Jarvis claims.
- to enhance community understanding of the claims.
- to increase public awareness of the history and details of Six Nations' claims.
- to build bridges within the community so as to increase the unity of Six Nations members in support of resolution discussions.
- to address the impact of continuing development in the Haldimand Tract on the future options of Six Nations for increasing the size of their reserve.

JURISDICTIONAL IMPLICATIONS:

I have been asked to describe the jurisdictional implications of the issues raised by the ongoing protest. These can be divided into two areas: issues directly related to dealing with the protest itself, and issues related to resolving the underlying claims. In relation to the protest, Ontario has sole constitutional authority over policing in the province and the regulation of private lands in the province. Thus, from the Crown's perspective,⁴ direct responsibility for addressing the realities of the situation on the ground appears to rest with Ontario.

In relation to the subject of the grievances, i.e., the need to address Six Nations' land claims, for at least a decade Canada and Ontario have disputed their respective share of any financial liability on behalf of the Crown. Each argued in their Statements of Defence, based on different interpretations of the *Canada Act, 1867*, that the other is solely liable for any valid claims that

⁴ The views expressed by the Confederacy and the spokespersons for the protesters arguably lead to the perspective that, as unsurrendered lands, the property remains under Canada's jurisdiction over "Indians and lands reserved for the Indians." As my discussions with the Confederacy and the protesters have not included analysis of Canadian law, the writer will not speculate on how this argument might be constructed in light of the *Sarnia* case or other Canadian caselaw.

arose before Confederation. Thus, each takes the position that it is confident that if the Crown is liable for wrongdoing in relation to Six Nations' land claims it is the other government that is legally responsible. The writer is not in a position to judge the merits of these positions, not having heard the arguments. The positions of Canada and Ontario in this regard have not changed since they filed their Statements of Defence ten years ago.

Technically, this issue does not need to be resolved until Six Nations and the Crown reach the settlement stage of negotiations. Still, the issues are obviously complex and it is difficult to see how the Crown will be able to reach a settlement of Six Nations' land claims unless Canada and Ontario can agree on a reasonable sharing between them of the Crown's contribution to any settlement. There is no reason why Ontario and Canada could not begin to clarify the issue of liability immediately, either through assisted negotiation, or through private arbitration (binding or non-binding) or through an expedited reference to the courts. It seems equally urgent to resolve this dispute, internal to the Crown, as it is to resolve any internal disputes within the Six Nations community about how to proceed with the claims.

In the meantime, both Canada and Ontario clearly have the capacity to contribute to any financial settlements and they may be able to agree on their respective contributions by taking into account as well their other, non-legal, interests in achieving a lasting resolution of the claims. (This appears to the writer to be the approach that the Crown has used in settling several recent First Nations' claims in Ontario.)

Finally, if it turns out that a settlement may include the ability of Six Nations to acquire lands, each party will likely have a separate responsibility to fulfil: Ontario, if Ontario Crown lands are available to be acquired; and Canada, if it is agreed that acquired lands may be added to the existing Six Nations reserve.

SUMMARY:

This review of the parties' current stated positions regarding the protest, Six Nations' claims and Six Nations' governance makes clear that it would be difficult to find solutions that can reconcile all of the positions. This is perhaps unsurprising given the length of time that disputes over Six Nations' land rights and governance have remained outstanding. Failure to resolve the issues in the past has also produced particularly strong emotional responses

to the current situation. Nevertheless, many of the parties' underlying interests in relation to the issues appear compatible. All of the parties with whom I have spoken wish to resolve the current situation and Six Nations' claims generally, through dialogue. Thus, the conflict appears difficult to address, not hopeless.

The next portion of this report will describe possible first steps that Canada might pursue to lay the groundwork for productive dialogue.

NEXT STEPS

Maintaining the Status Quo:

The government of Canada could continue to urge the protesters and the Six Nations' community to end the occupation peacefully, and it could rely on the existing two exploratory processes as the appropriate response at this time for addressing all of Six Nations' land grievances.

This approach might be embraced by those who believe that the government should not be seen to reward those involved in unlawful actions. Such a concern is understandable, but offering no response to the continuing occupation means that the police may soon have no choice but to intervene. **As two recent enforcement actions in relation to native occupations show, police intervention poses a risk to human lives, both for the occupiers and the police. If the occupation ends in police intervention without any prior constructive response to Six Nations' concerns from Canada, the atmosphere for future discussions and community consideration of settlement proposals could be jeopardized.**

Finally, pursuing such an approach would not directly address the underlying grievance, either in connection with the Plank Road lands or Six Nations' claims generally. This is the third significant occupation involving Six Nations' members on municipal lands in the past eight years.⁵ Failure to

⁵ An occupation in the late 1990s preventing the construction of a sewer line to a new industrial park in Brantford was one catalyst for the Grand River Notification Agreement among Six Nations, Brantford, the Missisaugas of New Credit, the Grand River Conservation Authority, Canada, Ontario, Dunnville and a number of other local municipalities. The Agreement can be found at: http://www.ainc-inac.gc.ca/on/grndrvr_e.html. A subsequent occupation of lands in the path of the construction of Hamilton's Red Hill Valley Expressway led to a series of agreements between Hamilton and the Confederacy, on issues ranging from archaeology and burial sites, to joint stewardship on future land uses in the valley, and economic development for the Six Nations community. See City of Hamilton, "Project

quickly address Six Nations' land grievances leaves the likelihood of future occupations near Six Nations. Equally important, disputes over Six Nations' land rights have festered unresolved for a very long time. Neither litigation nor the Specific Claims process has proved capable thus far of resolving any of the claims, much less resolve them quickly. The exploratory discussions appear positive, but under this route alone the bulk of Six Nations' claims will remain unresolved for a further decade or more. The present situation offers the opportunity to adopt fresh approaches.

Commitment to Enhanced Dialogue

Given the existing tensions at Six Nations, the complexity of the issues and the level of distrust among a number of the parties, any dialogue will be delicate and difficult. Any first steps aimed at reconciling the parties' interests will have to be carefully thought out to ensure that the parties' stated positions and political constraints do not prevent them from moving forward. It is possible to identify a number of options for Canada's next steps in addressing the issues. All of the options could be combined in various ways to provide Canada's response to the situation.

Given the importance of the Minister being able to provide a quick response, and given the complexity of the issues, all of the following options describe first steps that the Minister might adopt immediately. All can be justified on their merits and, equally, all could offer a "golden bridge" for the parties to travel across without losing face.

a) Expand the Exploratory Discussions to Add the Plank Road Claim

Given that the parties involved have developed a discussion model on the Jarvis/Port Maitland claims that all involved in those discussions consider effective, the Minister could commit to begin a similar process immediately on the Plank Road claim.

The wisdom of making such a commitment would depend on the advice the Minister receives from the Department of Justice as to the prospects of achieving a resolution of this claim that would be satisfactory to all parties.

Updates" <http://city.hamilton.on.ca/public-works/capital-planning/red-hill-valley-program/Red-Hill-Valley-Project/direct-links.asp#Project%20Updates>. The writer mediated the discussions leading to these agreements. The Red Hill Valley agreements are particularly interesting as examples of the kind of language that bridges the gap between Western legal drafting and Haudenosaunee values.

From Canada's perspective, a disadvantage of this option may be that it could be interpreted as a message that future occupations on municipal lands will lead to Canada adding those lands to the existing discussion tables. A further significant disadvantage is that agreeing to immediate discussions on the Plank Road claim would not provide a process response for the other outstanding land claims that remain outside the current discussions.

b) The Minister Commits to Explore the Possibility of Addressing All of Six Nations' Claims Comprehensively

The Minister could announce that he is prepared to explore a comprehensive process for addressing the land rights disputes between Six Nations and the Crown. A respected senior person, perhaps external to the government, could be appointed to explore with Six Nations possible frameworks for creating a negotiation process capable of addressing all of Six Nations' claims in a timely way.

Establishing a process aimed at developing a comprehensive settlement of the outstanding claims could simplify the nature of the discussions and speed up their resolution. The parties would not have to agree on each of the claims' validity and whether compensation is owing on each. Instead, in confidential discussions, the parties would discuss their overall assessments of the Crown's liability and the strength of the various claims. If all parties are committed to finding a reasonable settlement in a timely way, it should be possible to reach such a settlement without attempting to resolve every historical disagreement about dozens of transactions in the past.

The complexity of the claims need not be an obstacle to this process: arguably it favours a more general approach. To be successful, the discussions would have to be forward-looking and creative. This will require that the discussions be privileged and without prejudice to the parties' positions if they are forced to return to court. The process would be further strengthened if the parties are able to agree at the outset on dispute resolution mechanisms that will be used if the parties reach an impasse. Using a mediator is one option, as discussed below. Agreeing that the parties will seek a neutral independent opinion to address impasses is another possibility. Finally, the parties could agree to obtain the binding view of a jointly-acceptable neutral in case of impasse (e.g. on Canada and Ontario's share of any liability). My views on the usefulness of establishing fair and independent mechanisms of this sort are well known. In the end, the parties

know from experience that it is possible they will not be able to resolve all key issues through unassisted discussion. All have indicated they wish to avoid future confrontations. The role of dispute resolution mechanisms in the context of resolving these complex claims may be well be critical to achieving this goal. The precise mechanisms need not be decided now: the this is an issue the parties will need to discuss and agree upon.

If Canada is to adopt this comprehensive approach to resolving Six Nations' claims, it would presumably need to implemented outside the current Specific Claims Policy. Canada has created special mandates in the past outside this policy –the negotiations in relation to Camp Ipperwash are one example. Here, the negotiator's mandate would presumably call for an assessment of Canada's overall legal responsibility for Six Nations' claims and provide some flexibility to ensure that Canada is able to reach a settlement that Canada considers fair and justifiable in all the circumstances.

One challenge to any dialogue will be the significant disagreements that currently exist about the historical record. Here, the parties might adopt their current approach of jointly developing an acceptable historical narrative. Or, given the deeply-held views of many at Six Nations about the history of their lands, the parties might jointly engage a respected, neutral historian to develop a succinct summary of the history of Six Nations' land dealings, the evidence of Six Nations' intent to dispose of particular lands in the past, and the evidence as to the reasonableness of the compensation provided for those lands. Such a report could inform the negotiations and, just as importantly, assist the parties in public consultations about a proposed settlement. Using a joint fact-finder has proved effective in the past in helping to resolve other claims, such as the Mississauga No. 8 boundary dispute.

Finally, the parties involved would need to address the concern among many at Six Nations that a settlement must include land. This issue is discussed under d) below.

c) Mediation

The potential benefits of mediation to assist dialogue are well known and will not be repeated here. Several factors in relation to Six Nations' land claims suggest that using a senior, respected and strong mediator may be helpful: the fact that positions are entrenched, the need to improve the parties' relationship, the need to find effective ways of avoiding impasse, the

level of distrust among some of those involved, the risk of tensions being increased by statements made by members of a community that will be watching progress carefully, and the degree of emotional investment by many in the outcome. In 16 years of mediating land claims (including at Ipperwash), the writer has never witnessed such a high level of sensitivity and commitment to stated positions.

Mediation is an option that could be added to strengthen any of the processes described above. As a voluntary process, mediation can only be adopted if all parties agree. Mediation is an option the Minister could advise he is prepared to support, but ultimately all parties' views would need to be heard and discussed before it could be used.

All of the processes described above would exclude representatives of the protesters from the discussions, as the discussions would involve an effort to resolve Six Nations' claims – something that presumably all would agree is a process that must involve governments on all sides. It is also possible, however, for a mediator to be appointed for the short term, with a mandate to explore whether the parties can agree to a process for the long-term negotiation or mediation of the claims. In this case alone, it is conceivable that the mediator be mandated to canvass the views of the protesters as well, in the hope that they would directly agree to end the protest if a discussion process can be agreed upon. **At this stage, unfortunately, the protesters have shown no interest in mediation and it is difficult to be optimistic that they would commit to mediation.** If desired, the writer would be prepared to pose this question directly to counsel for the protesters.

d) Addressing Six Nations' Land Base Concerns

The current exploratory discussions among Canada, Ontario and the elected council are aimed at financial settlements. As noted, Canada has no jurisdiction over private lands in the province. Given the views of the Confederacy, the protesters and others in the community that Six Nations' rights are rights to land, and given the view of the Chief that settlements must be able to assist Six Nations in recovering land, any dialogue or ratification process will eventually need to address the issue of remedy. Given the difference in positions on direct Six Nations' entitlement to unsurrendered lands, if the Six Nations community insist on pursuing this issue it will likely have to be resolved by the courts.

There are other options that the parties may ultimately be able to consider that may satisfy the interests of all. Canada's existing Additions to Reserve Policy makes it difficult for a First Nation to add lands not immediately adjacent to an existing reserve. This policy is a major concern for many of those I have spoken to from Six Nations. The writer understands the thinking behind this policy in general but it is possible for the parties in the end to agree on a special mechanism that would facilitate the addition of purchased lands from any settlement proceeds. It is unclear to the writer how much federal or provincial Crown land might be available for this purpose: it is likely that Canada has very little. Given the amount of private settlement in the area, it may be necessary or desirable for Six Nations to acquire significant blocks of land that are not contiguous to the existing reserve. If any financial settlement is based on agreement that lands were taken from Six Nations unlawfully, it seems reasonable to permit Six Nations to recover lands today.

A further option that might ultimately be considered here is an agreement that lands purchased by Six Nations from settlement proceeds would be recognized as s. 91 (24) lands – protected from provincial jurisdiction, but not an *Indian Act* reserve.⁶ In the end, the specific mechanism, if any, that might be used to facilitate land acquisitions by Six Nations need not be determined now. However, given the views expressed by Six Nations' representatives, it would be helpful for Canada and Ontario to investigate whether creative options exist that could reconcile the land interests of Six Nations and those of the surrounding community.

e) Dialogue – General Considerations

In pursuing any of the above options for dialogue, **Canada must confront the conflicting views of the elected council and the Confederacy as to who should participate in any negotiations on behalf of Six Nations. This will pose a serious challenge both at the beginning of any discussions and at the end, when the community will be asked to ratify any proposed settlements. The Confederacy position is clear that they expect to be the only party negotiating for Six Nations. Equally, the elected council believes that it is the legitimate government of Six Nations and should be involved. Canada**

⁶ This is an option that the writer understands Canada has exercised with another Haudenosaunee that is community largely surrounded by municipal land. It has not, so far as the writer is aware, been raised by Six Nations' representatives as a way of addressing their own land concerns.

cannot respond in the near future in a way that will fully satisfy both positions. In this regard, the Minister might urge that any negotiation structure ultimately established within Six Nations be broadly acceptable to the community. This would leave Six Nations with the responsibility for establishing such a structure. Possibilities here might include the establishment of an independent body, reporting to the elected council, the Confederacy and the community, with a mandate to inform or oversee Six Nations' participation in the negotiations; and Six Nations choosing a legal team supported by both the Confederacy, the elected council and the community at large.

In the end, the issue of leadership is one that the Six Nations community will have to resolve internally. I understand that there has been considerable dialogue in the past about creating such independent structures accountable to both councils and to the community at large. Indeed, there already exists one body, the Grand River Education and Training Centre, which is implementing the economic benefits for Six Nations from the recent Red Hill Valley agreements negotiated by the City of Hamilton and the Confederacy.⁷ In the short term, it is open to Canada and Ontario to provide Six Nations with the resources required to pursue the creation and implementation of such a structure to support Six Nations' participation in claims negotiations.

It is in all parties' interest, regardless of the discussion option pursued, to facilitate ongoing internal community consultations within Six Nations about the nature and progress of the negotiations. This too would increase the likelihood of community support for any negotiated settlement. Again, this is an activity that Canada and Ontario could support by providing financial assistance.

If Canada commits to enhancing the dialogue on Six Nations' claims, when it negotiates the structure of the process Canada may also wish to seek a commitment from all parties that they will support the use of agreed dispute resolution processes.

⁷ For more information on these agreements, see note 3 above.

d) Renewal of the Relationship

A particularly interesting development is the Confederacy's invitation to the federal government to engage in activities that can clarify and renew the relationship between Six Nations and the Crown. As noted, the elected Chief appears open to the idea that such discussions would involve only the Confederacy. The Confederacy invitation refers to the symbols of the Covenant Chain and the Two Row Wampum. These are symbols used historically by the Crown and Six Nations to represent the alliance between the Crown and Six Nations, denoting mutual respect for the laws and customs of each. They are symbols, therefore, that raise issues relating to the historic relationship of the parties, including the question of sovereignty. In particular, the Two Row Wampum and its possible significance in Canada today has been the subject of discussion by Justice Binnie of the Supreme Court of Canada.⁸

The writer is aware that Canada will likely have concerns about the implications intended by these historic symbols. Still, the underlying point raised by the Confederacy is that they would like to clarify and renew the relationship between the Crown and Six Nations. It is open to the Minister to take up this invitation and offer discussions intended to renew relationships with Six Nations. His response could acknowledge the historic importance of the long-standing relationship with Six Nations and the need to strengthen that relationship today.

CONCLUSION

This report has described the nature of the parties' concerns about the situation near Caledonia. It has presented the following process options that might constructively address key interests of the parties:

- adding the Plank Road Claim to the current discussions;
- exploring the possibility of creating one table for comprehensive settlement of all Six Nations' claims;
- using an independent historical fact-finder;

⁸ See *Mitchell v. Canada (M.N.R.)*, [2001] 1 S.C.R. 911. Justice Binnie's own ideas about how the Wampum could be interpreted would not be acceptable to most Haudenosaunee leaders, but his attempt to make the Two Row Wampum relevant today offers an interesting example of an effort to move forward in defining the historic relationship.

- adding mediation and other dispute resolution mechanisms to assist in impasses;
- using mediation to address the ongoing protest itself;
- facilitating the addition of lands to Six Nations' reserve; and
- accepting the Confederacy invitation to renew the relationship between Six Nations and the Crown.

All of these options build on the stated desire of the parties to use dialogue to resolve this dispute. All could be the subject of an announcement by the Minister as a constructive step toward reducing the current tensions and settling long-outstanding grievances. In the end, of course, the success of any dialogue will depend on the ability of all parties to listen with respect and work to become “at one mind” – a concept familiar to the traditions of all parties