

Land Claims and The Six Nations in Caledonia Ontario

What is a Land Claim?

To begin a recount of the recent events in Caledonia, Ontario, it is helpful to start with some basic definitions. "A land claim is a formal statement submitted to the federal and/or provincial government in which an Aboriginal community most often asserts that the Crown has not lived up to its commitments or obligations with respect to Aboriginal or [treaty rights](#) pertaining to land." [1] There are two types of claims that are referred to as land claims; comprehensive and specific claims. Comprehensive claims arise where aboriginal land claims and [aboriginal rights](#) have not been covered by a treaty or other legal means. [2] "Comprehensive claims deal with the unfinished business of treaty making in Canada." [3] A Specific claim is a grievance that relates to an existing treaty or government obligation. [4] Twenty modern treaties have been negotiated in Canada since 1973. [5] Specific claims arise when First Nations people believe the government has not held up its end of the bargain. More than 460 specific claims have been concluded across Canada. [6]

The Federal Government's Constitutional Powers Concerning Aboriginals

The Royal Proclamation of 1763 established that treaty-making with Aboriginal peoples was the sole responsibility of the Crown. Section 91(24) of the [Constitution Act, 1867](#), [7] grants the federal government legislative power over "Indians, and lands reserved for the Indians." [8] This legislative power however, does not give the government an automatic right over the "lands reserved for Indians". [9] Instead, there is a complex surrender system.

Aboriginal peoples can only surrender their land to the federal Crown (not the provincial Crown or anyone else) but upon surrender full title of the land passes to the provincial government. However, this rule has been altered through different agreements. In the prairie provinces, reserve lands were retained as federal lands when the other public lands were transferred to the provinces. Aside from Quebec, Prince Edward Island, and Newfoundland (which has no reserves), provincial/federal agreements grant the federal government the right to manage, sell, and lease surrendered reserve lands. [10] This means that the federal government plays an important role when Aboriginal lands are surrendered.

The Provincial Government's Constitutional Powers Concerning Aboriginals

"The general rule is that provincial laws apply to Indians and lands reserved for the Indians." [11] In other words, as long as the province has the constitutional authority to pass

the law, the province can make the law “applicable to Indians and on Indian reserves”.

Because the federal government has the explicit power to pass laws concerning Aboriginal peoples, the provincial authority is usually limited to laws that apply generally to everyone in the province. If the provincial law appears to apply specifically to Aboriginal peoples or to limit Aboriginal rights, the province may be stepping on the federal government’s toes and the law may be challenged as outside of the province’s constitutional powers.

Overview of the Events in Caledonia Ontario

Henco Industries acquired a plot of land in Caledonia Ontario in 1992 with the intention of building a housing subdivision. In 1995, the Six Nations Confederacy filed a lawsuit against the federal and provincial governments asserting a historical land claim that includes the proposed development.[13] The land claim goes back to 1784 when the British Crown rewarded the Six Nations for its loyalty during the American Revolution by allowing them to “take possession of and settle” 385,000 hectares of land.[14] The land formed a strip almost 20 kilometers wide running alongside the Grand River. [15] The original grant was reduced in 1792 to 111,000 hectares and in subsequent years additional portions of the land were sold, surrendered, or taken away. The issue is figuring out what part of the land grant was properly surrendered by the Six Nations to the Crown for sale or lease, what portion was retained, and what portion was taken without the proper consent of the Six Nations Confederacy.

Henco industries began constructing homes on the land but on February 28, 2006, a group of Six Nations protesters moved onto the construction site and set up tents, a teepee, and a wooden building.[16] Despite an injunction ordering protesters off the site and a police raid conducted on April 20, 2006, Six Nations protesters remained on the site and erected barricades. Since the first protesters set up camp, there have been counter protests by Caledonian residents, more barricades built, barricades removed, and acts of violence and vandalism. According to CBC News, the Six Nations want meaningful negotiations to begin with the Department of Indian affairs and want a hold put on development until their outstanding land claim is resolved.[17] Caledonia residents who do not support the Six Nations cause want to see order and stability in their town and are frustrated that the police and government are not resolving the dispute quickly.[18]

The Dispute in Caledonia: Provincial or Federal Responsibility

With most land transactions, the federal government does not have to be involved. Section 91(13) of the *Constitution Act, 1867* gives the Province the power to legislate concerning property and civil rights within the province. This makes land transfers primarily a provincial concern. But a land claim that involves Aboriginal peoples or lands can engage both the provincial constitutional powers over property and the federal constitutional powers concerning Aboriginal people. In other words, both levels of government may potentially become involved.

When Henco industries registered the subdivision plan in July 2005, the province of Ontario guaranteed title to the property.[19] In April, Henco stated that they wanted to continue to build on the site and asserted that they "have a provincial guarantee of the title of ownership." [20] The provincial government is also responsible for policing within the province.[21] In the case of the dispute in Caledonia, policing the town and keeping the peace is a provincial concern.

In April 2006, a spokesperson for the Minister of Indian Affairs of Canada was quoted as saying that the Six Nations dispute "is not a land claims matter" and that the blockade "has nothing to do with the federal government." [22] A March 24 press release from Indian and Northern Affairs Canada stated that Professor Michael Coyle will "undertake a fact-finding initiative related to the ongoing situation involving members of the Six Nations of the Grand River near Caledonia, Ontario." [23] The press was able to read the confidential report and Mr. Coyle was cited as saying that the provincial and federal governments need to cooperate:

"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."
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." [24]

On April 30, 2006, former Ontario Premier David Peterson was appointed to assist with resolving the conflict. Negotiations between the provincial and federal governments and the Six Nations have been ongoing. On June 16, 2006, the Ontario government purchased the land from the developers to hold in trust until the dispute is resolved.[25] Though both the provincial and federal governments have been negotiating, Ontario Superior Court Justice David Marshall was not happy with the lack of action. On June 1, 2006, Justice Marshall said he would hold a case conference and compel the federal government to become involved in the dispute.[26] Following the issuance of orders demanding the removal of all protesters and barricades, Justice Marshall ordered that "the parties involved — including the provincial police, the attorney general of Ontario, First Nations leaders and developers" appear for a special court session to explain why his court orders were not being followed.[27]

On June 29, 2006, the provincial and federal governments as well as the Haudenosaunee Confederacy traditional government were reported to have resumed negotiating, but Justice Marshall was left wondering why the protesters had not been removed as he ordered.[28] The negotiations were expected to continue throughout the summer. [29] However, on August 8 Justice Marshall controversially ordered that all negotiations be suspended until the protesters ceased occupation of the construction site and that police should charge the Six Nations protesters for not complying with his earlier court injunction ordering them off the disputed land.[30] The Ontario government is appealing Justice Marshall's decision. On August 25, the Ontario Court of Appeal granted a stay on the injunction ordering the protesters off the land until hearing of the appeal, and allowed the negotiations to

continue.[31]

Summary and Conclusions

As with most land claims, the Six Nations land dispute in Caledonia involves complex questions. Attempting to figure out what portion of the original land grant was surrendered or reclaimed by the Crown will involve looking at events over a century old. There are also questions of whether the Six Nations willingly transferred the land, whether the land was transferred by Six Nations leaders with authority to do so, and whether the proper procedures were followed. Moreover, if the land was properly transferred, did the Crown uphold its end of the bargain and discharge all of its obligations? These complex questions may explain the reluctance of government officials to get involved. What is clear is that the disputed land was at one time granted to the Six Nations and currently, someone else holds title. Further negotiations between the affected parties (including the provincial and federal governments) are necessary to begin unraveling this complicated issue.

[1] "Aboriginal Land Claims and the Federal and Provincial Governments" Online: Ontario Secretariat for Aboriginal Affairs (2005)

[2]"Fact Sheet: Aboriginal Land Claims in Canada" Online: Indian and Northern Affairs Canada (18 September 2006).

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7]*Constitution Act, 1867*, s. 91(24).

[8]*Supra* note 5.

[9]*Ibid.*

[10]*Ibid.*

[11]*Ibid.* at 27.2(a)

[12]*Ibid.*

[13]"Indepth: Caledonia Land Claim, Historical Timeline", Online: CBC NEWS (21 April 2006) <<http://www.cbc.ca/news/background/caledonia-landclaim/historical-timeline.html>>, "Ont. judge wants Ottawa involved in land claims dispute", Online: CBC NEWS (02 June 2006)

[14]"Indepth: Caledonia Land Claim, Historical Timeline", Online: CBC NEWS (21 April 2006) <http://www.cbc.ca/news/background/caledonia-landclaim/historical-timeline.html>

[15]*Ibid.*

[16]"Indepth: Caledonia Land Claim, Timeline of recent events", Online: CBC NEWS (16 June 2006) <http://www.cbc.ca/news/background/caledonia-landclaim/index.html>.

[17] "Native occupiers stay at Ontario site as deadline passes", Online: CBC NEWS (22 March 2006)

<http://www.cbc.ca/news/canada/native-occupiers-stay-at-ontario-site-as-deadline-passes-1.597324>

[18] "Mayor's comments anger aboriginal protesters in Caledonia standoff" Online: CBC NEWS (25 April 2006) <

- <http://www.cbc.ca/canada/story/2006/04/25/caledonia-protest-060425.html>>.
- [19] *Supra* note 2.
- [20] "Government 'dropped the ball' on Caledonia dispute: developers", Online: CBC News (25 April 2005).
- [21] *Constitution Act, 1867*, s. 92(15). Section 92(15) of the *Constitution Act, 1867* grants the province authority for "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in
- [22] Hillary Bain Lindsay, "Home on Native Land", Online: *The Dominion* (19 April 2006) http://dominionpaper.ca/original_peoples/2006/04/19/home_on_na.html
- [23] "Michael Coyle Appointed To Undertake a Fact Finding Initiative in Relation to the Situation in Caledonia", Online: Ministry of Indians and Northern Affairs (24 March 2006)
- [24] "'Liability' hinders resolution of Caledonia crisis, report says", Online: *The Globe and Mail* (24 June 2006) <http://www.theglobeandmail.com/servlet/story/LAC.20060624.CALEDONIA24/TPStory/TPNational/Ontario/>.
- [25] Chris Wattie and Jeffrey Hawkins, *National Post*, "Ontario to buy land in Caledonia dispute", Online: Canada.com (17 June 2006) <<http://www.canada.com/nationalpost/news/story.html?id=4cc9daba-97ae-44ef-8374-d176eff95766>>.
- [26] "Ont. judge wants Ottawa involved in land claims dispute", Online: CBC NEWS (02 June 2006).
- [27] "Judge wants to know why Caledonia order not enforced", Online: CBC NEWS (30 May 2006).
- [28] *Supra* note 27.
- [29] John Burman, "Land claim talks resume: Negotiations to continue through summer", Online: *The Hamilton Spectator* (29 June 2006).
- [30] "Indepth: Caledonia Land Claim, Timeline of recent events", Online: CBC NEWS (09 August 2006) <http://www.cbc.ca/news/background/caledonia-landclaim/index.html>.
- [31] *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council* (25 August 2006) Ontario M34121 (Ont. C.A.) at para. 6, 7, 29 and 43. Online: Six Nations <<http://www.sixnations.ca/M34121rere.pdf>>
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Corbiere v. Canada (1999)

John Corbiere was a status Indian belonging to the Batchewana First Nation, an Ojibway band near Sault Ste. Marie, Ontario. He was among the two thirds of Batchewana Band members who did not live on the band's reserve land and were not permitted

Members of BC's Tsartlip Band Permitted to Hunt at Night

Two members of the Tsartlip Indian Band of the Saanich Nation were charged under the British Columbia Wildlife Act (Act) after shooting at a decoy deer set up by conservation officers. The charges included hunting at night, hunting with the aid of lights, shooting from a vehicle, and unsafe hunting. The two men argued that under the North Saanich Treaty of 1852 (the Douglas Treaty), they have a [treaty right](#) to hunt at night and that the Act cannot take away this treaty right. The province of BC took the position that the ban on night hunting applies to everyone, including Aboriginal people. The Crown argued that there are inherent and unavoidable dangers involved in night hunting and that these safety issues trump the Tsartlip Band's treaty right to hunt at night.

The minority of the Supreme Court of Canada (Chief Justice McLachlin, Justice Bastarache, and Justice Fish) sided with the lower courts saying that night hunting should be prohibited due to its inherent dangers. However, the majority of the Court (Justices Deschamps, Abella, Binnie, and Charon) concluded that the Act's ban on night hunting and hunting with lights is too broad and does not apply to Aboriginal peoples affected by the Douglas Treaty. The majority did not believe there were sufficient safety concerns to justify a complete ban on night hunting. They pointed out that the Tsartlip hunters have yet to cause an accident while hunting at night, and that vast areas of BC are uninhabited, thereby decreasing the danger involved in night hunting. The majority concluded that despite the BC Wildlife Act's general ban on night hunting, members of the Tsartlip Band have an established treaty right to hunt at night and that the potential danger is not great enough to limit this right.

Sources

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- Janice Rose Knighton, "The Oral History of the 1852 Saanich Douglas Treaty: a treaty for Peace" UVIC (25 August 2004)