June 4, 2014

Right Honourable Stephen Harper
Prime Minister of Canada

Honourable Bernard Valcourt
Minister of Aboriginal Affairs and Northern Development

Honourable John Baird
Minister of Foreign Affairs

Honourable Peter MacKay
Minister of Justice and Attorney General of Canada

Honourable Leona Aglukkaq
Minister of the Environment

Honourable Gail Shea
Minister of Fisheries and Oceans

Honourable Greg Rickford
Minister of Natural Resources

Dear Right Honourable Prime Minister and Honourable Ministers:

Re: Algonquins of Ontario Land Claim

We are writing you to convey the overwhelming concern of the undersigned property owners with respect to numerous provisions of the preliminary draft Algonquin Land Claim Agreement-in-Principle (AIP). We totally concur that the Algonquins of Ontario (AOO) are entitled to a modern day Treaty. We believe, however, that the draft AIP is legally flawed and that the processes used to develop it, and which will guide its implementation, fail to meet the principles of natural or fundamental justice, and will not lead to the desired reconciliation.

The signatories to this letter represent a large cross section of property owners across what has become designated by the Negotiating Teams as the "Algonquin Land Claim Area" of Eastern Ontario. Property owned by we citizens include, but is not limited to land, on and around Spectacle Lake, Aylen Lake, Lake Clear, Lake Kamaniskeg , Hay Lake and Lake Weslemkoon.

For the purpose of illustrating the impact that the transfer of specific land parcels will have on non-Aboriginal property owners, we have chosen to provide examples from Spectacle Lake, a lake partially in the County of Renfrew and partially in the District of Nipissing. We cannot overemphasize that the principles inherent in the examples put forward for Spectacle Lake are equally relevant to each and all of the other bodies of water in the Claim area, so negatively impacted by the end result of the processes and determinations used by the negotiators in drafting the draft AIP. We also cannot overemphasize the fact that other massive and troubling issues raised in the draft AIP, including but not limited to, land selection issues, environmental issues, harvesting issues, land access issues, planning procedures and processes, lack of transparency, lack of any meaningful dialogue, consultation and accountability, and the flagrant disregard for non-Aboriginal interests and input, are relevant across the entire "Algonquin Land Claim Area".

Thus the examples cited in this letter which pertain to Spectacle Lake are specific illustrations of local issues but which are also indicative of issues equally applicable across the entire "Algonquin Land Claim Area". This is an attempt to clarify the nature of issues and concerns and for the sake of brevity, rather than providing the many available specific examples from across the entire Claim geography.

The Spectacle Lake Situation

Spectacle Lake is a pristine, beautiful, tiny lake, barely one mile in length. The residents are mindful of their fragile ecosystem. Canoes, kayaks and paddle boats are the main watercraft. Lake water testing is done regularly for phosphorous and clarity. A review of the best practices for septic waste, cleaning products, and shoreline integrity is undertaken at every annual Cottager's Association meeting. After some fifty plus years of habitation, the lake is still pristine. This is the result of the small number of cottages (less than thirty) and good environmental stewardship.

The AIP identifies three land parcels surrounding Spectacle Lake to be transferred to the Algonquins:

- Parcel 299 to the south (2033 acres);
- Parcel 165 to the north (95 acres); and
- Parcel 301 to the north-west (340 acres).

All of these parcels have been designated for commercial development by the Algonquins.

It has been subsequently learned, at the August 9, 2013 meeting between representatives of the negotiating Parties and members of the Spectacle Lake Cottage Association, that there are four developments or changes planned for this tiny lake by the Algonquins. They are:

- **Cottage Lots** - as many as will be allowed (remaining vacant land is cliff, swamp, wetland; a fragile landscape);
- **Use of vacant Crown Land between lots 12 and 13 as the main water access for a back-lot subdivision/development and a possible marina;**
- **the back-lot subdivision/development**, planned for the Claim area is directly behind existing Spectacle Lake cottages;
- **New Plans and Usage of Spectacle Lake Lodge** - either working with current owner or through purchase by the Algonquins.

Given the nature and magnitude of the development plans expressed so far, this small lake cannot possibly survive. It is believed that the Government negotiators have handled this file badly: the process has led to a lose/lose/lose situation for the Algonquins, the Spectacle Lake property owners, and the environment. Any sustainable project must preserve the existing environment and be mindful of the current land use context.

Legal Aspects and Considerations Related to Aboriginal and Treaty Rights

Existing Canadian law pertaining to Aboriginal and Treaty rights and related processes is complicated and evolving. Initially, the Royal Proclamation of 1763 recognized First Nations hunting rights to lands not yet ceded, but it also established a framework for dealing with those rights. First Nations' lands could only be surrendered to representatives of the Crown, which in turn may grant it to third parties. The Royal Proclamation created legal obligations on Crown officials: a strict process had to be followed for transferring rights in land from First Nations to the Crown and settlers.

These legal obligations, which have since been enshrined in section 25 of the *Canadian Charter of Rights and Freedoms*, have been the foundation of treaty-making in Canada since 1763[1]

Section 35(1), in Part II of the *Constitution Act, 1982*, recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada and has given Aboriginal and treaty rights constitutional status and resulting protections[2]. It also created a broader legal framework for addressing longstanding Aboriginal claims, including claims to Aboriginal Title. This constitutional entrenchment did not create Aboriginal rights however; such rights already existed and were recognized at common law[3]. Because Section 35(1) recognizes and affirms, but does not define the "existing Aboriginal and treaty rights" of the Aboriginal peoples of Canada, the task of determining the nature and scope of these rights has fallen to the courts.[4]

A considerable quantity of jurisprudence, including the interpretation of the law and tests for how the law should be applied to Aboriginal land claims to achieve reconciliation has emanated from the Supreme Court of Canada (SCC) fairly recently. There have also been a number of recommendations flowing from formal investigations into why previous land claims and relations with Aboriginals in Ontario have failed, and how things can be improved.

Section 7 of the *Canadian Charter of Rights and Freedoms* guarantees `to all citizens of Canada that their rights to life, liberty and security of their person "can only be deprived in accordance with the principles of fundamental justice". These principles concern procedural fairness and, if adhered to, should ensure that a fair decision is reached by an objective decision maker[5]. They apply whenever the rights, property or legitimate expectations of an individual are affected by a decision[6], and govern all decisions by judges or government officials when they take quasi-judicial or judicial decisions[7].

Three internationally accepted common law rules are referred to in relation to natural justice or procedural fairness, viz:

- the Hearing Rule
- the Bias Rule, and
- the Evidence Rule[8]

Details pertaining to these legal aspects and other considerations that may influence the outcome of Aboriginal or Treaty land claims are set out in the Appendix.

Commitments Made and Broken

"All First Nations believed that their values and traditions were gifts from the Creator. One of the most important and most common teachings was that people should live in harmony with the natural world and all it contained. In oral stories and legends that Elders passed from one generation to another, First Nations' children learned how the world

[1] Active History.ca History Matters, "the said Lands…shall be purchased only for Us": The Effect of the Royal Proclamation on Government, by Brandon Morris and Jay Cassel, researchers for the Ontario Ministry of Aboriginal Affairs.
[2] [PDF] Primer: Canadian Law on Aboriginal and Treaty Rights, University of British Columbia Faculty of Law, p3
[3] *Ibid*, p3
[4] Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw* v. British Columbia, Library of Parliament Research Publication, bp459-e.htm, p4
[5] Natural Justice – Justice4you
[6] What is meant by Principles of Natural Justice and Procedural Fairness, Government of South Australia, p1
[7] Natural Justice – Justice4you
[8] Ibid

came into being and that they were a part of the whole of creation. People gave thanks to everything in nature, upon which they depended for survival and development as individuals and as members of their communities. First Nations treated all objects in their environment – whether animate or inanimate – with the utmost respect."[9]

It is impossible to reconcile the above statement with the commercial development plans the Algonquins have for Spectacle Lake. There is no harmony with the natural world and no respect for the environment since their proposals would irreparably damage the lake and degrade the natural environment.

One is forced to question who was driving the land selection process, e.g., the Ontario Ministry of Natural Resources who are the custodians of the Crown Land and the only player that could make the final decision with respect to how much land was to be transferred and in what form, i.e., one contiguous area or a number of discrete parcels; the hired non-Algonquin consultant, under contract to the Algonquins; the Algonquins themselves; or some combination of these options.

It is known that, for various reasons, both political and financial, Ontario wanted a swift decision. The hired non-Algonquin consultant could see that the transfer of discrete parcels of land, as opposed to one contiguous area, could accommodate land wanted by the Algonquins for cultural and heritage reasons, as well as provide greater economic development opportunities. The consultant would also be aware of possible future benefits from post Treaty activity involving the design and construction of marinas and new subdivisions, such as the one unveiled by that same contractor for a 46-lot subdivision in Mattawa River Provincial Park as part of a land claim. [10] Finally, at the August 9, 2013 meeting at Spectacle Lake Lodge, not a word was heard from the Algonquins although they were present. They were content to have their hired non-Algonquin consultant, and a Ministry of Natural Resources (MNR) official speak for them.

The excessive development plans came about, at least in part, through a stunning disregard of five of the eight "Shared Objectives", or principles, which were initially signed by all three negotiating Parties in 1994 and re-affirmed in 2006[11], viz:

- to avoid creating injustices for anyone in the settlement area;
- to establish certainty and finality with respect to the title, rights and interests in the land and natural resources with the intention of promoting stability within the area and increasing investor confidence;
- to protect the rights of private land owners, including their rights of access to and use of their land;
- to establish effective and appropriate methods and mechanisms for managing the lands and natural resources affected by the settlement, consistent with the principles of environmental sustainability;
- to continue to consult with interested parties throughout the negotiation process and to keep the public informed on the progress of negotiations.

How can there be any legitimacy in what is being proposed in the AIP when such flagrant breaches of these fundamental assurances have occurred?

Injustices have certainly occurred, particularly for private land owners who bought their properties in good faith directly from the Ontario government; certainty and stability with respect to land title and access to natural resources has decreased; the rights of private land owners have been savaged, particularly concerning their access to trails in the area, which were developed and paid for with taxpayers dollars over the years; the concept of environmental sustainability

[9] First Nations in Canada, Aboriginal Affairs and Northern Development, Part 1, Spiritual Beliefs, p7
[10] Algonquins propose 46-lot subdivision, North Bay Nugget, June 25, 2013
[11] Affirmation of and Addition to the 1994 Statement of Shared Objectives, March 2006

has been totally abandoned in favour of unbridled economic development; and the concept of continuing to consult with interested parties throughout the negotiation process was disregarded when the Parties decided more than two years ago to negotiate behind closed doors, a development which precluded any participation by the citizenry and those directly impacted.

These shared objectives or principles were intended to guide the Parties during the course of negotiations in order to achieve a just and equitable settlement leading to reconciliation. Unfortunately, about two to three years ago, for some reason, these principles were jettisoned and, not surprisingly, the end result has been just the opposite of reconciliation.

Conclusions

1. The negotiation process leading to the AIP, particularly the process for selecting the parcels of land to be transferred to the Algonquins of Ontario, was, undemocratic, extremely arbitrary, and open to political manipulation. The zoning of these land parcels promises to continue this undemocratic and unacceptable process, a practice that is secretive and fails to meet internationally accepted principles of natural and fundamental justice.

To achieve an agreement quickly and simply, the Federal and Ontario government negotiators essentially made an agreement behind closed doors with the Algonquins of Ontario (AOO), using the provision in the Royal Proclamation of 1763, that requires the Algonquins to surrender their land only to the Crown; i.e., you (Algonquins of Ontario) surrender any and all current and future claims for Ontario Crown Land, and we (Ontario) will agree to transfer back to you in *fee simple* a total of not less than 117,500 acres plus 300 million dollars cash, the vast majority of which will come from the Federal Government.

The AOO were then allowed to cherry pick over 200 parcels of Crown land, to be transferred to them as part of the deal, many of which did not serve to reconnect them with their heritage but were attractive for the purpose of economic development.

This approach ignored the principles and tests set out in the *Delgamuulw* and previous Supreme Court rulings to determine the scope of Aboriginal rights and whether or not a claim to Aboriginal Title was even valid. As well, the determination of whether or not to include in any final agreement infringing measures that serve the common good and/or other "valid legislative objectives", such as natural resource conservation, was simply bypassed.

Ontario also ignored the sage advice emanating from its own Ipperwash Inquiry, i.e., the objective of a land claim settlement must be much more than simply to settle a legal dispute and that the principles enunciated by the Supreme Court of Canada to guide judges who are called upon to decide disputes about treaties, should also apply to the process of negotiation.

2. The negotiators also ignored the three internationally accepted common law principles of natural justice, i.e., the Hearing Rule, the Bias Rule and the Evidence Rule. For anyone that has been following the Algonquins of Ontario Land Claim Process, it is obvious that none of these principles has been followed. A few examples will illustrate this point:

With respect to the **Hearing Rule**, opportunity of affected parties to be heard and make their concerns known, and any involvement in the negotiation process by land owners adjacent to the parcels of land to be transferred to the

Algonquins was rejected outright. Even the possibility of a single individual, representing the concerns of land owners adjacent to the lands to be transferred was rejected on the basis that constitutionally there could only be three Parties to the negotiations; the Algonquins of Ontario, Ontario, and the Federal Government.

This flies in the face of the Supreme Court of Canada's recommendation in *Haida* that the Crown can delegate some procedural matters of consultation to others, including private parties. The Court also expressed the practical desire that affected third parties remain committed to and involved in the process, regardless of constitutional obligations.

Simply put, Ontario, for whatever reason, did not want affected land owners involved in the consultation process and so they were kept out.

The information sessions following the development of the AIP were not meaningful consultation by any stretch of the imagination. When the AIP was released, it was a *fait accompli.* These information sessions were a one way conversation; an attempt to explain and justify what had already taken place. No meaningful attempt was made to solicit outside input.

With respect to the **Bias Rule**, an example of how the negotiation process worked, or didn't work, is gleaned from what we have learned about how the Chapter 8 Harvesting provisions came to be.

In the summer of 2012, at a public meeting, an Ontario Federation of Anglers and Hunters (OFAH) representative asked Brian Crane, Chief Negotiator for Ontario "who wrote Chapter 8?" He responded that he had. When queried further as to why, he replied it was based on a submission he received from the Algonquins[12]. He had other submissions from the OFAH and others but chose to ignore them.

In addition, we now know that the Ontario MNR injected itself into the AIP land selection process, which was conducted behind closed doors, and that when MNR chose to meet with municipal officials, after the land selection process was completed, those officials were only allowed to attend if they first swore a declaration of secrecy. In effect, a premature land selection process, spearheaded by Ontario MNR, had been finalized with no public consultation and input.

This same type of secretive intrusion into the negotiating process has already begun with respect to zoning designations for the parcels of land to be transferred. A seconded group of the Ontario Ministry of Municipal Affairs and Housing employees is currently carrying out a preliminary review of the affected municipalities official plans and bylaws in the settlement area with respect to zoning requirements. The objective is to have zoning requirements assigned to every parcel of land to be transferred before the environmental assessment process begins.

After the vote on the revised AIP is completed and before the final agreement is reached, the recommended zoning designations plus all the environmental studies available will be taken to the municipalities for discussion to finalize zoning designations. There will be no appeal possible for these designations until after the final agreement is ratified because until this happens, the land in question is still Crown Land and the Ontario Planning Act does not apply.

For all intents and purposes this process does an end run around the Ontario planning process and pre-empts any meaningful input and challenges to zoning designation; a process that normally would proceed with the checks and

[12] Algonquin Land Claim Information, www.algonquinlandclaim.ca, OFAH Video

balances inherent under the Ontario Planning Act. Once again, the adjacent land owners will be faced with a *fait accompli* that was arrived at behind closed doors.

Under the **Evidence Rule**, an administrative decision must be based upon logical proof or evidence material.

We understand that the Algonquins were nomadic and undertook annual migrations. We acknowledge that the Algonquins may have passed through and around Spectacle Lake at some point in their history. We are not aware however of any evidence with respect to grave sites, buildings or signs of cultivation in the vicinity of Spectacle Lake that would indicate any exclusive occupation or settlement.

We do not know whether or not the parcels of land to be transferred meet the Supreme Court's criteria for Aboriginal Title. This was never investigated, or if it was, was never made public. If this process proceeds unchecked we may never know.

It is one thing if land, proven to meet Aboriginal Title criteria, is granted as a *sui generis* right to land within a land claim process. It is quite another in a land claim process to designate transfers of land as a *fee simple* right to land without having any evidence to support this decision. A f*ee simple* designation implies absolute ownership of land, something that a *sui generis* title does not. In *fee simple*, the owner may do whatever he or she chooses with the land within the limits of the law.

Landowners around Spectacle Lake hold *fee simple* title and yet do not have total freedom to do what they want. They must buy licences to fish and hunt and observe the possession limits. They cannot take out a gun and shoot a moose that happened to wander onto his or her property at any time because of the restrictions on gun use in built-up areas and the observance of closed hunting seasons. The AIP as now written may allow Aboriginal landowners with *fee simple* title to do just that however, because they have been allowed, in addition to getting *fee simple* title, to retain their traditional unrestricted hunting and fishing rights. This in effect reduces non-aboriginal landowners to second class citizens.

We believe that as a tenet of democracy, all citizens of Canada should be treated equally. We believe that special and privileged treatment of any minority group is bad public policy and counterproductive; it will not contribute to reconciliation but rather to greater discord.

It is clear that the negotiators ignored and did not follow the internationally accepted common law principles of natural and fundamental justice with respect to ensuring that the processes they followed met the requirements for administrative fairness.

Finally, given the fact that political elements of the governing party injected themselves into the land selection process, is it simply a coincidence that approximately 80 percent of the parcels of land to be transferred in the entire land claim settlement lies within the riding of Renfrew-Nipissing-Pembroke[13], a Conservative riding, when the majority of Aboriginal Communities reside outside of this riding?

The Ontario Government obviously knew that the land parcels to be transferred would be controversial. This explains the secrecy and confidentiality requirements they insisted on when they discussed the transfers with the municipalities.

[13] Tentative Algonquin land claim unveiled, Pembroke Daily Observer, March 15, 2013

Was pressure put on the government representatives by their political masters to minimize the impact of transferring land in their own ridings by ensuring that most of the land being transferred and the controversy that goes with it would occur in ridings held by the Opposition? Once again, we will never know, since everything occurred behind closed doors.

3. We believe the Federal Government has been very passive in its involvement in the negotiation process and has not exercised its legislative authority adequately to ensure that the Treaty will lead to reconciliation between the Algonquins of Ontario and their non-Algonquin neighbours.

While it is recognized that any future Treaty will involve the transfer of Crown Land (a provincial matter) the Federal Government has broad legislative authority and a responsibility to ensure that laws and changes to existing laws are consistent with the promotion of Peace, Order and good Government in Canada. It also has a unique role and responsibility with respect to Aboriginal people and a responsibility in achieving administrative fairness.

At the August 9, 2013 meeting between representatives of the negotiating Parties and members of the Spectacle Lake Cottage Association, the Federal representative, like the Algonquin representative, said not a word. They both relied on the Ontario representative and the hired consultant for the Algonquins to describe the situation. As one of the three chief negotiating Parties however, the Federal Negotiator has certain responsibilities; otherwise why would he be at the negotiating table?

While it may be convenient to place all of the responsibility for what has transpired on the back of the Province of Ontario, the Federal Government cannot claim it is powerless to do anything. It was directly involved in the negotiating process, including when it retreated behind closed doors and when it rejected the Statement of Shared Objectives. It is therefore complicit in whatever is the final outcome.

We are aware of the on-going and overlapping Aboriginal claims within the same land mass that is being claimed by the Algonquins of Ontario, i.e., the Algonquins of Quebec are making claims for harvesting rights; the First Nations who gave up their fishing and harvesting rights in the 1923 Williams treaty are now back in court to re-establish these rights; and the Metis were just given permission by the Supreme Court to pursue their options. If any of these initiatives have any validity, the question of exclusive occupation is moot.

There are nine Federal Algonquin reserves in Quebec, compared with only one Federal Algonquin reserve in Ontario, e.g., the Golden Lake Pikwàkanagàn Reserve, a reserve that in the 2011 census, revealed that there are only 432 men, women and children at that Reserve. If the single Algonquin of Ontario Reserve results in a settlement of 117,500 acres and 300 million dollars cash, what will the settlement and impact of the nine Federal Algonquin Reserves in Quebec amount to?

In *Delgamuukw*, Chief Justice Lamer stated that treaty negotiations should also include other aboriginal nations which have a stake in the territory claimed.[14] We believe that as a bare minimum, the Federal Government has an obligation to bring all possible claims on a given area together so that affected parties and private land owners are not subject to double or even triple jeopardy.

[14] R vs *Delgamuukw*, p 186

4. **Natural resource conservation, environmental sustainability and public safety are not priorities in the AIP.**

Although it is stated in section 8.2.2 of the AIP that "Conservation is the fundamental principle of the management of Fish, Wildlife and Migratory Birds", the actual provisions in Chapter 8 Harvesting belie this statement.

There is no reference to "best practices" for fishing and hunting, that include detailed, species specific ,fish and wildlife harvest allocation, fair sharing and management and conservation details. These practices have been successfully adopted and incorporated in other treaty negotiation processes in BC and the Yukon. Instead, the AIP advocates the following, viz:

- Moose and elk are the only Allocated Species identified. Harvesting limits for these two species are "to be determined";
- There is no closed season for any other species of fish, wildlife, or migratory birds; no bag or creel limits; no restrictions on gear or methods of harvest (basics of conservation); unlimited trade and barter rights amongst themselves;
- With the exception of moose and elk, the AIP actually sanctions what would now be considered outlaw behaviour and over harvesting of any other fish, wildlife or migratory species.

The AIP's anything goes, take all you want, at any time, and by any means approach, is a monumental step backward from the scientifically based resource management approach and enforcement that has served Ontario well for over 100 years. With no laws or restrictions, there would be no need for enforcement because there would be no laws to enforce. While Ontario does retain some right to implement measures necessary for conservation and safety, it would only be in a crisis situation after the resource has been depleted and only after consultation with the Algonquins.

With respect to environmental sustainability, one only has to look at what the Parties are proposing for Spectacle Lake in particular, and other affected lakes in general. Numerous lakes will be irreparably damaged and the legal rights of affected property owners will be infringed upon.

Section 2.13.1 of the AIP declares that Ontario's environmental assessment requirements related to this Agreement-in-Principle or the Final Agreement shall be fulfilled in accordance with the Algonquin Declaration Order.

This declaration states that aspects related to the Algonquins of Ontario Land Claim Settlement are not subject to sections 5 (Application for Approval) and 13 (Obligation to Consult) of the Ontario Environmental Assessment Act. It combines all assessments required to be made by various Ministries into a single assessment to be administered by the Ministry of Aboriginal Affairs and is intended to assist the proponent (Ontario) on behalf of proponent Ministries in meeting the *Environmental Assessment Act* requirements for undertakings resulting from the settlement of the Algonquin Nation Land Claim. There will be no appeal possible until after the final agreement is ratified.

Public safety concerns and resentment are exacerbated by the Algonquins pushing their land claim boundaries right to the back door of current land owners ' properties. This intrusion, combined with the year round harvesting rights for Algonquins contained in the AIP generate real personal safety concerns which could create severe social problems and possible confrontation.

Deer and moose are harvested with high powered rifles whose bullets travel a long way. Right now there are restrictions limiting the distance between the discharge of guns and residences for non-Algonquins. Residents and

cottagers have accepted the need to stay out of the bush during the hunting season but they are unwilling to accept this quarantine year round. It is inevitable, given the proximity, that sooner or later a shooting or a fatality will occur. This is senseless and avoidable.

5. The status and interests of non-Algonquins have not been adequately taken into account during the negotiation process and in the AIP.

The press has reported both Brian Crane, Chief Negotiator for Ontario and Robert Potts, Chief Negotiator for the AOO, as saying that there are approximately 9 - 10,000 Algonquins registered to vote in the proposed settlement area. This is misleading, since of this number, only about 1,000 are voter registered Status Algonquins. The majority of the remainder consists of voter registered Non-Status Algonquins, many of whom were not raised in an Algonquin culture or an Algonquin community, and for the most part worked and enjoyed the benefits and privileges of being ordinary Canadian citizens. In contrast there are over one million non-Algonquins living and working in the settlement area. They will see their current rights and life style severely restricted.

The Draft Treaty fails to consider public needs: it does not uphold existing laws which were originally enacted to protect the public interest, e.g., The Public Lands Act and The Fish and Wildlife Conservation Act. It will create new access restrictions to trails, lakes and lands located on existing Crown Land which for the most part were developed by MNR with taxpayer's dollars. It has resulted in a weakening of the Environmental Assessment Act which will now be administered for the proposed settlement area by the Ministry of Aboriginal Affairs and not the Ministry of the Environment.

The landowners at Spectacle and other lakes face the loss of the glorious Crown Land and public hiking trails used for bird watching, animal sightings, blueberry picking and the like; pleasures which drew them to their properties, and which they have previously enjoyed. They have been told that they will be trespassing if they attempt to access the long established and maintained public hiking trails. Continued access to these trails needs to be protected in the AIP and the final Treaty.

It is not surprising that we have arrived at this state. Unlike the situation when the original treaties were negotiated between the First Nations and Europeans for mutual benefit and common ground, there no longer exists any incentive to negotiate in the true sense of the word. Considering the fact that all of the Parties, particularly Ontario and the Algonquins of Ontario, were being funded totally with unlimited tax payers dollars, there was no incentive for any of the Parties to really negotiate for anything, certainly not the public interest. This resulted in an inherent conflict of interest because none of the Parties had an incentive to find common ground. They were really negotiating amongst themselves.

Our perception of how the negotiating process was conducted is that Ontario insisted on maintaining at least nominal control of Algonquin Park , even though there are already miles of good logging roads in the Park which the Algonquins have access to for hunting and fishing. The Algonquins have already been given the keys to Algonquin Park, de facto, without having to pay for it.

In spite of this, Ontario then said to the Algonquins that they could cherry pick an additional 117,500 acres of individual land parcels from the remaining Crown Land plus receive a substantial cash settlement, which would again be taken from taxpayers dollars. We don't know this for sure however because all the discussions occurred behind closed doors.

6. The Draft Treaty as set out in the AIP will not lead to the desired reconciliation between the Algonquins and their non-Algonquin neighbours.

In his final report on the Ontario Ipperwash Inquiry, the Commissioner, Hon. Sidney B Linden, set out his view on the objective of resolving treaty and land claims:

> "the objective of a land claim settlement must be much more than simply to settle a legal dispute. The aim must be to re-establish relationships that embody the commitment to mutual respect and mutual benefit that was the original foundation for the Indian nations and the Crown when they made Treaties with each other".[15]

He identified other provincial issues that were crucial to achieving success, including consideration of non-Aboriginal interests and accountability and transparency and went on to state that the principles enunciated by the Supreme Court of Canada to guide judges who are called upon to decide disputes about treaties, "also apply to the process of negotiation".[16]

Since *Sparrow*, an increasingly broad conception of reconciliation has emerged as the fundamental objective of section 35(1):

- In 2013, the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada stated "reconciliation recognizes the reality that Canada is made up of people of First Nations descent but also people who are descended, not just from European forbears, but from people from all parts of the globe. Whatever our views about that, it is a reality and we must accept it;[17]
- In Delgamuukw, Chief Justice Lamer concluded his remarks with the statement "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, supra, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay;[18]
- In Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), Justice Ian Binnie held that "the fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non- Aboriginal peoples and their respective claims, interests and ambitions."[19]

Despite this sage advice, the negotiating Parties chose to disregard it. Their winner take all approach, which ignores non-Aboriginal interests and needs, and the lack of any accountability and transparency in the process does not bode

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[15] Report of the Ipperwash Inquiry, Volume 2, Settling Land Claims, p85

[16] Report of the Ipperwash Inquiry, Volume 2, Settling Land Claims, p70 and p91

[17] Defining Moments: The Canadian Constitution, Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada to the Canadian Club of Ottawa, 2013

[18] SCC Cases (Lexum) *Delgamuukw,* para 186

[19] SCC Cases (Lexum) - **Mikisew** Cree First Nation **v**. Canada (Minister of Canadian Heritage, para1

well for the long term success of this initiative. A backlash has begun and will continue until the AIP provisions are changed.

Recommendations

Given the commitment that the Ontario and the Algonquin Chief Negotiators have shown for the AIP as written, it is highly unlikely and probably humanly unreasonable to expect that the three negotiating Parties themselves would be able to agree on the extensive and substantive changes needed to convert the current draft AIP into a document that would contribute to the desired reconciliation, should it be referred back to them.

We therefore respectfully request that you, the Federal Government, as one of the three negotiating Parties, intervene in the ongoing Algonquin Land Claim process by pulling the current draft AIP off the negotiating table, until a substantive review of the current AIP is completed with respect to:

- All of the shortcomings as identified herein
- The honouring of all eight of the negotiators Shared Objectives set out in their 2006 Statement of Shared Objectives[20]
- The adherence of the negotiation and proposed implementation processes with the internationally accepted principles of natural and fundamental justice
- The ways and means of meaningfully including affected third parties into the negotiation process

An Aboriginal Treaty flowing from an approved and ratified AIP is a constitutionally protected document. There is only one chance to get everything right and that chance is now, prior to any Treaty being signed. Avoidance of Court challenges by affected parties, after positions have been entrenched in defective agreements, is in everyone's best interest.

The objective of reconciliation, as outlined by the Supreme Court of Canada and Ontario's Ipperwash Enquiry requires meaningful input by all affected parties throughout the entire process. This has not happened but surely is the best path forward.

Respectively submitted by the undersigned Land Claim Concerned Citizens (LCCC)

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[20] Affirmation of and Addition to the 1994 Statement of Shared Objectives, March 2006

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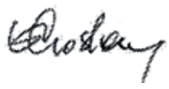

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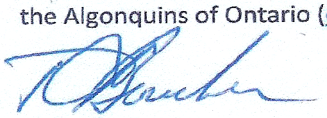
For the Private Landowners Adjacent to Parcels 323 and 324 on Lake Weslemkoon to be Transferred to the Algonquins of Ontario (ontprivatelandowners@gmail.com). See individual members below



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Barry Devolin, M.P. Haliburton – Kawartha Lakes
Dean Del Mastro, M.P. Peterborough
Rick Norlock, M.P. Northumberland – Quinte West
Scott Reid, M.P. Lanark – Frontenac - Addington

Honourable Kathleen Wynne, Premier of Ontario
Honourable David Orazietti, Ontario Minister of Natural Resources
Honourable David Zimmer, Ontario Minister of Aboriginal Affairs

John Yakabuski, MPP Renfrew-Nipissing-Pembroke
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Victor Fedeli, MPP Nipissing

APPENDIX

LEGAL ASPECTS AND CONSIDERATIONS RELATED TO ABORIGINAL AND TREATY RIGHTS

Existing Law

Section 35(1), in Part II of the *Constitution Act, 1982*, entitled "Rights of the Aboriginal Peoples of Canada", states:

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

Section 35(1), has given Aboriginal and Treaty rights constitutional status and resulting protections[21]. It also created a new legal framework for addressing longstanding Aboriginal claims, including claims to Aboriginal title. This constitutional entrenchment did not create Aboriginal rights however; such rights already existed and were recognized at common law[22]. Because the provision recognizes and affirms, but does not define the "existing Aboritional and treaty rights" of the Aboriginal peoples of Canada, the task of determining the nature and scope of these rights has fallen to the courts.[23]

The Algonquins in their 1983 petition to the Federal Government for a comprehensive land claim settlement, referenced the Royal Proclamation of 1763 as their basis for rights and title for lands not yet ceded or extinguished. The Algonquins obviously agree, with others[24], that the Royal Proclamation is still valid in Canada, since no law has overruled it. Indeed, the Royal Proclamation is enshrined in Section 25 of the *Constitution Act*; this section of the *Charter of Rights and Freedoms* guarantees that nothing can terminate or diminish the Aboriginal rights outlined in the Proclamation.

In the Royal Proclamation of 1763, then King George III claimed sovereignty over a large territory in North America but went on to say that **"such Parts of Our [British] Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them [First Nations], or any of them, as their Hunting Grounds…"** The document continues, **"if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies…"[25]**

In other words, the Proclamation recognizes First Nations' rights to lands not yet ceded, but also establishes a framework for dealing with those rights. First Nations' lands could only be surrendered to representatives of the Crown, which in turn may grant it to third parties. The Royal Proclamation created legal obligations on Crown officials: a strict process had to be followed for transferring rights in land from First Nations to the Crown and settlers. These legal obligations, which have since been enshrined in section 25 of the *Canadian Charter of Rights and Freedoms*, have been the foundation of treaty-making in Canada since 1763[26].

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[21] [PDF] Primer: Canadian Law on Aboriginal and Treaty Rights, University of British Columbia Faculty of Law, p3

[22] *Ibid*, p3

[23] Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuukw* v. British Columbia, Library of Parliament Research Publication, bp459-e.htm, p4

[24] Royal Proclamation of 1763 a Living Constiutional Document, "NNL NetNewsLedger, posted 23 September 2013 by James Murray in Aboriginal

[25] "Royal Proclamation of 1763," (http://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645)

[26] Active History.ca History Matters, "the said Lands…shall be purchased only for Us": The Effect of the Royal Proclamation on Government, by Brandon Morris and Jay Cassel, researchers for the Ontario Ministry of Aboriginal Affairs.

Supreme Court Rulings and Interpretations

A considerable quantity of jurisprudence, including the interpretation of the law and tests for how the law should be applied to aboriginal land claims has emanated from the Supreme Court of Canada (SCC)fairly recently. There have also been a number of recommendations flowing from formal investigations into why previous land claims and relations with aboriginals have failed and how things can be improved.

Priority issues frequently arise as a result of conflict between Aboriginal rights and interests and the rights and interests of others in the allocation and management of valuable resources, particularly natural resources. In the two leading cases on priorities, *R* v. *Sparrow* and *R* v. *Gladstone,* the SCC has developed a framework of guidelines that apply in determining priorities and resolving allocation problems.[27] The government must demonstrate an allocation of priorities consistent with not only the *Sparrow* scheme but also the *Jack* v. *The Queen.* In that case, the Court determined that the correct order of priority for fisheries is as follows: "(1) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing [and} (iv) non-Indian sport fishing."[28] In other words, conservation trumped Aboriginal rights.

Also, in its landmark 1990 *Sparrow* decision, the Court established an initial interpretive framework for section 35 that has been refined in a number of subsequent judgements[29]. Under *Sparrow*, the Court defined "existing" Aboriginal and treaty rights as those that were not "extinguished" prior to the enactment of the *Constitution Act 1982*. Therefore, s. 35 applies only to rights that existed at the time s. 35 was enacted or that will arise pursuant to modern treaties.[30]

As is the case with all rights, Section 35 rights are not absolute, hence not immune from regulation.[31] Under *Sparrow*, the Crown may enact legislation infringing existing Aboriginal and treaty rights, provided it can satisfy the justification test articulated by the Court. Reduced to its essence, the *Sparrow* justification test requires the Crown to establish that any infringing measures serve a "valid legislative objective" – such as natural resource conservation – and that they are in keeping with the special trust relationship and responsibility of the government vis-à-vis Aboriginal peoples.[32]

Several 1996 rulings supplemented the *Sparrow* guidelines. In the commercial fishing rights trilogy *Van der Peet, Gladstone* and *Smokehouse*, a majority of the Court defined Aboriginal rights as flowing from practices, traditions and customs central to Aboriginal societies prior to contact with the Europeans; such practices and traditions must – even if evolved into modern form – have been integral to the distinctive Aboriginal culture.[33] Chief Justice Lamer described the "integral to the distinctive culture" test in *Gladstone* as follows:

> "…. the *Van der Peet* test requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question."[34]

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[27] [PDF] Primer: Canadian Law on Aboriginal and Treaty Rights**,** University of British Columbia Faculty of Law, p14-15
[28] *Ibid*, p15
[29] Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, December 2007, p6
[30] [PDF] Primer: Canadian Law on Aboriginal and Treaty Rights**,** University of British Columbia Faculty of Law, p5
[31] Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, December 2007, p6
[32] *Ibid, p6*
[33] Aboriginal and Treaty Rights, Parliamentary Research Branch, PRB 99-16E,p 2
[34] Molested and Disturbed-Environmental Protection, s.cela.ca/files/uploads/376aboriginal.pdf, p13

In *Van der Peet* and the other 1996 decisions, Chief Justice Lamer described this "test" as a requirement of proof of all aboriginal rights and furthermore that integral activities must have continuity with traditions, customs and practices that existed before contact with Europeans. He also said that rights must be "central" to the culture; and that they must be "distinctive"; that is they cannot be "aspects of Aboriginal society that are true to every human society (e.g., eating to survive)."[35]

To be protected by section 35, the Court said that the aboriginal right must be more than "incidental" to the activities recognized by the Court. In *Van der Peet* and *Smokehouse*, trading fish was incidental to the "social and ceremonial activities," whereas in *Gladstone*, the right recognized (trading fish) was "a central and defining feature of the Heiltsuk society."[36]

In December 1997, the Court's ground-breaking Aboriginal title ruling in *Delgamuukw* outlined principles applicable to the comprehensive land claim category of Aboriginal rights ….. and distinguished Aboriginal title from other Aboriginal rights based on the connection it represents between an Aboriginal group and land. The Court saw this as pivotal in determining the scope of Aboriginal rights.[37] The court said that aboriginal title is a right to the land itself.[38] Aboriginal title is a *sui generis* (unique) right to land, something between a *fee simple* title and a *personal usufructuary*[39] right.[40]

The concept of Aboriginal title is an autonomous concept of Canadian Common Law that bridges the gulf between aboriginal land systems and imported European land systems. It does not stem from aboriginal customary law, English common law or French civil law. It coordinates the interaction between these systems without forming part of them.[41] Aboriginal title is thus a *sui generis concept* – one that does not fit into pre-existing legal categories.[42] Even though the actual land claim was not decided, the case has enormous significance …. because the judges went on to make a number of statements about Aboriginal rights and title that indicate how the courts will approach these cases in the future.[43] The Court established the three part test for establishing aboriginal title:

- The land must have been occupied prior to sovereignty
- If present occupation is relied on as proof of occupation pre-sovereignty, [there] must be continuity between present and pre-sovereignty occupation
- At sovereignty, that occupation must have been exclusive[44]

The Court also described limits and important differences between Aboriginal title and ordinary land ownership:

- Aboriginal title is a communal right. An individual cannot hold aboriginal title. This means that decisions about land must be made by the community as a whole.
- Because Aboriginal title is based on a First Nation's relationship with the land, these lands cannot be used for a purpose inconsistent with that continuing relationship. For example, if the people's culture was based on

[35] Molested and Disturbed-Environmental Protection, s.cela.ca/files/uploads/376aboriginal.pdf, p13
[36] *Ibid*, p13
[37] Aboriginal and Treaty Rights, Parliamentary Research Branch, PRB 99-16E,p 2
[38] A Lay Person's Guide to DELGAMUUKW, BC Treaty Commission, p2
[39] (Law) the right to use and derive profit from a piece of property belonging to another, provided the property itself remains undiminished and uninjured in any way, Collins English Dictionary – Complete and Unabridged © HarperCollins Publishers 1991, 1994, 1998, 2000, 2003
[40] Aboriginal Title after Delgamuukw,http://www.web.uvic.ca/~bthom1/Media/pdfs/abrights/rights.htm
[41] *Guerin v. The Queen* (1984) 2 S.C.R/ 335 (S.C.C.) *per* Dickson J. at 379-82
[42] *Ibid*
[43] A Lay Person's Guide to DELGAMUUKW, BC Treaty Commission, p2
[44] Casebrief.me/casebriefs/delgamuukw-v- british-columbia-2/

hunting, their Aboriginal title lands could not be paved over or strip mined if that would destroy their cultural relationship with the land.

- Aboriginal title lands can be sold only to the federal government.
- Aboriginal title has the additional protection of being a constitutional right. No government can unduly interfere with aboriginal title unless the interference meets strict constitutional tests of justification.[45]

The following chart shows the major differences established by the Delgamuulw decision between aboriginal title and the familiar kind of land ownership that is registered in the Land Titles office.[46]

	Ordinary Land Ownership	**Aboriginal Title**
Who can own land?	An individual or a group	A common group: there are no individual rights to Aboriginal Title
Can the owner sell the land?	Yes	May be sold only to the federal Crown
What limits are there to land use?	Zoning, and other provincial and municipal laws	Use must not impair traditional use of the land by future generations
What laws protect the land?	Common law and provincial statutes	Common law and the Canadian constitution

The Chief Justice also noted that nothing in this approach precludes the surrender to the Crown of lands held pursuant to Aboriginal title; in fact, such lands must be surrendered and converted into non-title lands if Aboriginal peoples wish to use them in a manner incompatible with their title.[47]

While the duty to consult remains squarely on the shoulders of the Crown and does not extend to third parties, the SCC in *Haida* explained that the Crown can delegate some procedural matters of consultation to others, including private parties, such as industrial stakeholders. Courts also express a practical desire that third parties remain committed to and involved in the process, regardless of their lack of constitutional obligations.[48]

Ontario's Views based on their Experience

The Ipperwash Inquiry was established in November 2003 to enquire and report on events surrounding the death of Dudley George, who was shot in 1995 during a protest by First Nations representatives at Ipperwash Provincial Park, and later died. The Inquiry was also asked to make recommendations that would avoid violence in similar circumstances in the future.

[45] A Lay Person's Guide to DELGAMUUKW, BC Treaty Commission, p2
[46] A Lay Person's Guide to DELGAMUUKW, BC Treaty Commission, p3
[47] Aboriginal Title: The Supreme Court of Canada Decision in *Delgamuulw* v. *British Columbia*, Library of Parliament, bp 459 – e.htm, p9
[48] [PDF] Primer: Canadian Law on Aboriginal and Treaty Rights, University of British Columbia Faculty of Law, p5

In his final report, the Commissioner, Hon. Sidney B Linden, set out his view on the objective of resolving Treaty and land claims:

> The objective of resolving Treaty and Land Claims must be much more than simply to settle a legal dispute. The aim must be to re-establish relationships that embody the commitment to mutual respect and mutual benefit that was the original foundation for the Indian nations and the Crown when they made treaties with each other."[49]

Although establishing a Treaty Commission for Ontario was his key recommendation for improving the land claims process in Ontario, he went on to identify five other provincial issues that were crucial:

- Eligibility for the Ontario Land Claims process
- Consideration of non-Aboriginal interests
- Provincial capacity, coordination, and support
- Accountability and transparency
- Funding[50]

The Commissioner also stated that the principles enunciated by the Supreme Court of Canada to guide judges who are called upon to decide disputes about treaties, "also apply to the process of negotiation".[51]

Professor Michael Coyne, in his submission to the Ipperwash Inquiry, stated that "every independent review of the current claims process in Ontario has identified, as one of its major flaws, the conflict of interest inherent in allowing the Government to determine all legal issues". He also observed that "these processes would benefit from improved accountability and transparency and better public education."[52]

Section 7 of the *Charter* states:

> 7. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

The principles concern procedural fairness to ensure that a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process.[53]

The opportunity to be heard by an impartial decision maker is at the heart of the rules of natural justice and procedural fairness. The rules of natural justice apply whenever the rights, property or legitimate expectations of an individual are affected by a decision.[54]

[49] Report of the Ipperwash Inquiry, Volume 2, Settling Land Claims, p85
[50] Report of the Ipperwash Inquiry, Volume 2, Settling Land Claims, p91
[51] Report of the Ipperwash Inquiry, Volume 2, Settling Land Claims, p70
[52] Report of the Ipperwash Inquiry, Volume 2, Settling Land Claims, p78
[53] Natural Justice – Justice4you
[54] What is meant by Principles of Natural Justice and Procedural Fairness, Government of South Australia, p1

There are three internationally accepted principles of natural justice, viz:

- The Hearing Rule

  The hearing rule demands that a decision maker must give an opportunity to a person whose interests may be adversely affected by their decision the opportunity to be heard.[55] This includes being given the opportunity to prepare and present evidence and to respond to arguments presented by the opposite side.[56]

- The Bias Rule

  The bias rule demands that the decision maker should be disinterested or unbiased in the matter to be decided. Justice should not only be done but seen to be done. If fair minded people would reasonably apprehend/suspect the decision maker had prejudged the matter, the rule is beached (often referred to as 'a reasonable apprehension of bias').[57] A decision- maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favoring one party over another.[58]

- The Evidence Rule

  The third rule is that an administrative decision must be based upon logical proof or evidence material. Investigators and decision makers should not base their decisions on mere speculation or suspicion. Rather, an investigator or decision maker should be able to clearly point to the evidence on which the inference or determination is based.[59]

55 What is meant by Principles of Natural Justice and Procedural Fairness, Government of South Australia, p1
56 Natural Justice – Justice4you
[57] What is meant by Principles of Natural Justice and Procedural Fairness, Government of South Australia, p1
[58] Natural Justice – Justice4you
[59] *Ibid*