The Council of Elders

A Negotiations Process for Off-Reserve Aboriginal Peoples in Ontario

Submission to the Royal Commission on Aboriginal Peoples

Executive Summary

The current government of Ontario has vigorously portrayed itself as a great ally of Aboriginal peoples. Unfortunately, the this is far from the truth. For the great majority of Aboriginal people in Ontario - those who do not live on Indian Act reserves - the NDP government has turned back the clock. Despite making bold statements on their recognition of Aboriginal peoples' right to self-determination, and signing a few deals with reserve based communities, the provincial government has refused to even reply to letters from off-reserve Aboriginal peoples asking for negotiations on basic land rights, social issues, and self-government. While no real progress had happened under the previous provincial governments, at least they met with off-reserve communities from time to time and responded to their letters.

The government of Ontario claims that it has to "define who the off-reserve Aboriginal peoples are" and "who represents them" before it can negotiate with them. While this seems, on the surface, to be a good argument, we believe it is in fact a sham, because Aboriginal peoples have suggested several options for solving the problems of identification and representation, without receiving any response whatsoever from the province.

There will never be broad agreement on how to identify non-status Aboriginal individuals and communities. Our people believe it is time to recognize this fact, and to stop using the lack of agreement on such preliminary issues as an excuse to avoid good faith negotiations. We therefore propose that a Commission be established immediately to oversee and ensure good faith negotiations on all outstanding issues, including land claims and community self-government. Furthermore, and perhaps most importantly, the Commission should have the power to ensure that process issues such as "identification" and "representation" are negotiated in good faith or, in the alternative, arbitrated. Only by empowering such a Commission will we be able to ensure that negotiations finally take the place of excuses for not negotiating.

1. Identification

Off-reserve Aboriginal peoples in Ontario say that they are still the Forgotten People. Both levels of government continue to deal only with bands which are recognized under the Indian Act, and unregistered Aboriginal communities are denied access to government programs which are ostensibly designed for all Aboriginal peoples. Furthermore, the federal and provincial governments only negotiate land claims and self-government agreements with registered bands and their umbrella organizations.

The federal government has traditionally taken the position that, with few exceptions, it is only responsible for dealing with registered bands and reserves. According to federal officials, the provinces are responsible for meeting most, if not all Crown obligations to off-reserve Aboriginal peoples. Despite public statements suggesting otherwise, Ontario still takes the position that it has no legal obligation to provide programs or services for any Aboriginal peoples, or to negotiate land claims or self-government agreements with them.

The current government of Ontario claims that it is committed to negotiating recognition of the Aboriginal rights of all Aboriginal peoples in Ontario, regardless of whether the federal government will join in the negotiations. According to the representatives of off-reserve Aboriginal communities, however, Bob Rae, Bud Wildman, and their officials, have failed to even respond to proposals for negotiations.

The most fundamental objection of Ontario to negotiating with off-reserve Aboriginal peoples is their claim that they "do not know *who* the off-reserve Aboriginal people of Ontario" are. Ontario claims that reserve based Indians and their representatives are easily identifiable. There is however, no single definition of "Metis" or "non-status Indian" in Ontario. For example, some Metis claim that a "Metis" is any person with mixed Indian and non-Indian blood. By this definition, there may be over 500,000 Metis in Ontario. Others define "Metis" very narrowly, as those persons who possess a certain degree of "Indian blood", self-identify as "Metis", and are accepted by a Metis community or organization as being Metis. By such a narrow definition, there may be as few as 100,000 Metis in Ontario. Still others define"Metis" as any person who self-identifies as "Metis" and is accepted by an Aboriginal community as being a Metis. This definition allows for the inclusion of persons without Indian blood as "Metis" if they self-identify as such and are accepted by an Aboriginal community as "Metis" due to adoption or marriage.

Umbrella political organizations representing Metis in Ontario have, from time to time, attempted to define "Metis", but each time have become bogged down in divisive sectarian political debates which have completely failed to resolve the issue. Meanwhile, both Ontario and Canada maintain that the lack of a definition of the term "Metis" is a barrier to negotiations.

In our consultations with off-reserve Aboriginal communities, we have been told clearly an consistently that each community must define its own membership and that there is no reason to adopt a single, province-wide definition or registry of Metis and non-status Indians. Aboriginal communities feel strongly that only a neutral third party, such as the proposed Commission, can be trusted to ensure good faith negotiations.

2. Representation

Aboriginal peoples in Ontario have always been divided by culture, language and geography. Today, however, Aboriginal peoples in Ontario are also deeply divided into “non-status”, “status”, and “Bill C-31 status”, and “on-reserve”, and “off-reserve”. In many areas, each group and sub-group has its own representative political organization. Today, most Aboriginal people probably belong to more than one Aboriginal political grouping. Many of these organizations compete with each other for the right to represent overlapping constituencies. Non-Aboriginal governments and businesses often profess to be confounded by the problem of deciding “who to negotiate with”.

The result of Bill C-31 has been further division and confusion. Now, in addition to the thousands of Metis and non-status Indians in Ontario, there are thousands of status Indians living off-reserves. Although many organizations make competing claims to represent off-reserve status Indians, the Council of Elders has found that most off-reserve Native people are themselves confused with respect to which organization(s) represent them.

The government of Ontario claims that it is unable to negotiate service delivery arrangements, land claims, or self-government arrangements with off-reserve Aboriginal peoples because of this confusion and division. They say that they simply do not know which organization(s) to deal with. The result is that off-reserve Aboriginal peoples in Ontario have not benefited from the current provincial government’s widely publicized Aboriginal policy initiatives.

The Council of Elders has found that there is a very strong sense of alienation and frustration amongst off-reserve Aboriginal peoples in Ontario. These feelings of alienation and bitterness have grown in the past year, as the forgotten people have watched their reserve-based brothers and sisters make great progress in their relations with the provincial government. The gaps between the registered bands and the forgotten people have grown dramatically in the past two years. As a result, resentment has grown and has produced growing frictions between on reserve and off-reserve Aboriginal peoples.

The divisions between reserve based communities and off-reserve Aboriginal peoples are probably greater in Ontario than in any other province. In most cases in Ontario, there has never been a clear distinction between "Metis" communities and off-reserve Indians, such as there is in the prairies. Most off-reserve Aboriginal communities in Ontario were, until recently, made up of mixtures of Metis families and non-status Indian families.

With Bill C-31, many non-status Indians became status Indians and, under the Indian Act registration system, these "new-status" Indians have been assigned membership in the bands which they or their status ancestors belonged to. Most of these "new-status" Indians continue be full members of the "Metis communities" or off-reserve Native communities which they have often been associated with for generations. However, now that they are named on band lists, both Ontario and Canada assume that they are represented by "their" bands. With few exceptions, however, off-reserve status Indians do not participate at all in band elections and do not feel that they are fully represented by the bands.

Off-reserve Aboriginal communities are now being split into "non-status" and "status" groups. Status individuals are now assumed by Canada and Ontario to be represented by band councils, even though they may have no vote in band council elections, while non-status families are represented by organizations which both levels of government continue to refuse to recognize and negotiate with, because of the problem of "identification".

Within off-reserve Aboriginal communities, the non-status members often resent those who have regained status under Bill C-31, viewing them as having traded their identity as non-status Aboriginal people, and members of unregistered communities for the benefits available to status Indians.

The off-reserve new-status individuals, in turn, often resent the bands which claim them as members, because they are not afforded all of the same rights and benefits available to those members who live on reserves and vote in band elections. Many off-reserve status Indians now profess to be confused with respect to whether they are represented by "their" bands, or by the "Metis communities" to which they have always belonged.

The result has been growing frustration and confusion. Aboriginal nations in Ontario are today more divided than at any time in our history. There is virtually no communication between the organizations representing off-reserve Aboriginal peoples, and the band councils of reserve based First Nations. This is a great concern to the Council of Elders. The divisions between us have hindered progress by many Aboriginal peoples, but especially off-reserve communities.

While our efforts to mediate disputes in our communities will continue, we can not afford to postpone negotiations between our peoples and the federal and provincial governments until the representation issue is resolved. Without a forum such as the Commission, it may never be resolved. We therefore recommend that the Commission be the forum for resolution of any dispute with respect to representation of a claimant community.

3. Traditional Government

Traditional Aboriginal governments have continued to exist in varying forms in most Aboriginal nations. Even in communities governed by band councils or incorporated organizations, many Aboriginal peoples continue to practise consensus decision-making under the surface veneer of formal, majority-vote decision making practices. We find, for example, that although voting is often used in formal meetings, informal consensus development often precedes voting. Formal bodies of Aboriginal government, such as band councils, which neglect to observe such traditions usually suffer from problems of legitimacy in the eyes of the communities they claim to represent.

It is important to note, however, that the art of consensus decision making is dying. We are greatly concerned that Aboriginal people are increasingly equating "democracy" with the act of voting. While we do not disapprove of majority vote decision making, and we do not want to threaten the authority of elected Aboriginal political leaders, we are convinced that the practise of consensus decision making is essential to the culture of our peoples, as well as being the only tested and effective means of Aboriginal community self-government.

We must find a way to preserve the tradition of consensus building within our communities, otherwise Aboriginal self-government could simply mean brown faces occupying white institutions. The form of self-government should not be ignored. The means by which we govern ourselves is just as important as gaining recognition of the right of self-government.

Also, in most Aboriginal communities, elders continue to play a major role in maintaining harmony and peace within the community. Many problems and disputes are resolved through the mediation of elders. Thus, the key role of elders in traditional community governance continues to partially survive in many nations.

Many Aboriginal people believe that traditional forms of Aboriginal government are more representative and more democratic than the European forms of government which have been imposed by the Indian Act. Further, traditional methods of governance are seen by many as being essential to the maintenance and enhancement of essential cultural and spiritual values, such as community harmony and "whole-ness". Non-Aboriginal, electoral forms of governance are generally seen as incompatible with the survival of such values.

In addition to band councils, many Aboriginal "governments", or institutions of self-management (such as Aboriginal social services agencies), are in fact non-share capital corporations, operating under provincial or federal statutes and regulatory regimes, and self-made by-laws, often based on "boiler plate" by-laws of similar organizations. This situation is especially true of off-reserve Aboriginal peoples. In many communities and organizations, efforts have been made to recognize the continuing importance of consensus building and mediation by elders. Aboriginal peoples have often recognized the limitations of such institutions by providing in their by-laws, or simply in practise, for elders to be present at meetings of Boards of Directors and management committees as advisors to the elected politician leaders and directors.

We have found, however, that often such arrangements constitute mere lip service to the vital tradition of involving elders in consensus building procedures, rather than genuine blendings of traditional forms of governance with modern, "imported" forms of institutions. Beneath the surface appearance of these arrangements there may be very little genuine respect paid to elders and their advice. Often, although formally recognizing and respecting the leadership of elders, the elected politicians seem to regard elders and traditional government structures as threats to their authority.

To date, unfortunately, very little attention has been paid to the problem of maintaining and enhancing the traditional governments which continue to co-exist with other, European based institutions of Aboriginal community governance. Meanwhile, important traditions which may be essential to the effective governance of Aboriginal communities are slowly, gradually dying under the combined influences of government funding and recognition for the non-traditional institutions of governance, and the general cultural assimilation.afflicting all aspects of our communities.

While some communities have taken practical, effective steps to preserve important traditions of self-government, most have not. We recommend that the Commission be mandated to ensure that negotiations and agreements preserve and enhance the vital elements of traditional governance which we believe are essential if Aboriginal nations are to be effectively governed.

An Aboriginal Claims Commission

In Ontario, no forum exists for the negotiation of issues such as the Aboriginal and treaty rights of Metis and off-reserve Indian peoples, self-government arrangements for off-reserve Aboriginal people, and the identification of off-reserve Aboriginal communities and the rights of those communities. The governments of Ontario and Canada claim that a fundamental obstacle to negotiations is the problem of identifying which organization(s) represent off-reserve Aboriginal communities.

The Council believes that the problem of representation must be aggressively tackled by governments. Our communities can not continue to be shut out of all processes for the resolution of our claims and the recognition of our rights while the political organizations squabble over their competing claims to represent us. The appointment of a neutral party, with powers binding Canada, Ontario, and Aboriginal governments, is the only way to move forward.

The purpose of the proposed Aboriginal Claims Commission is to provide a neutral forum for the settlement of issues affecting off-reserve Aboriginal peoples, including negotiations for self-government arrangements, claims to natural resources, land, and/or social services based on Aboriginal right or treaty entitlement, and identification of persons living off-reserve who have Aboriginal or treaty rights and what those rights are. The Commission would also be used, in the first instance, to break the log-jam of representation.

Off-reserve Aboriginal communities see a neutral forum as essential to progress on these issues. There is deep mistrust within our communities for the internal processes of government due to the observation that governments control all the rules and resources, such as funding, for these processes, and that governments have not responded appropriately (or at all) to our concerns and proposals. Hundreds of proposals by our communities have been arbitrarily rejected or ignored by the existing "processes".

It is our conviction that unless there is a neutral third party, with clear authority over the negotiating parties, governments will continue to have no real incentive to negotiate in good faith with our peoples.

Possible Issues to be Considered by the Commission

Some issues that could be considered by the Commission include:

- treaty and Aboriginal food harvesting rights of Metis and off-reserve (status and non-status) Indians in Ontario, both on province-wide and a regional basis;

- land claims by communities which do not have access to the ICO;

- proposals by off-reserve communities for co-management agreements for land and natural resources;

- claims for compensation for erosion or loss of identified rights;

- potential amendments to provincial and federal statutes, regulations and policies to ensure that they recognize appropriately the rights of off-reserve people (could include rights to appropriate social services, self-government institutions and consultative mechanisms as well as rights to land and natural resources).

- the representative roles of registered Indian bands and off-reserve Native organizations and communities in geographic or sectoral areas in which there may be overlapping interests or jurisdictions.

- proposals by communities for establishing community-managed social services or programs.

This list is meant to be illustrative only. The Commission would deal with all issues brought forward by off-reserve Aboriginal groups. However, it is not meant to deal with cases involving individual rights or grievances, which can be better dealt with via Aboriginal or non-Aboriginal justice systems.

The Structure and Composition of the Commission

The Commission will have two essential components:

a) An independent, neutral third party to preside over negotiations.

b) A funding allocation process independent of the negotiating parties, to determine eligibility and quantum of funding for participation in negotiations, and to provide for funding for pre-submission proposal development.

The proposed structure is as follows:

Steering Committee

Commissioners

Technical Working Groups/Subcommittees

Commission Secretariat

The Steering Committee would consist of the federal Minister of Indian Affairs, the Ontario Minister Responsible for Native Affairs, and the representatives of five regional umbrella organizations of unregistered Aboriginal communities. It would meet at least twice per year and have overall responsibility for the establishment and operation of the Commission.

The Steering Committee will appoint the Commissioners, who would be experts on Aboriginal peoples and Aboriginal and treaty rights, acceptable to all members of the Steering Committee. Commissioners would not be employees of the Commission, but would serve on an ad hoc basis. A process to select the Commissioner(s) who would be assigned to oversee specific negotiations on proposals and claims submitted to the Commission would be worked out by the Steering Committee.

Technical working groups or sub-committees would be appointed by the parties to each set of negotiations to conduct research or perform other specific tasks necessary to the resolution of a claim or proposal, under the overall direction of the Commissioner assigned to that proposal. All negotiating parties would have the right to participate in these working groups or sub-committees.

A Commission Secretariat would provide administrative support to the Steering Committee, the Commissioners, and the Working Groups/Sub-committees, as required.

Funding for Negotiations

An independent funding authority - either an entirely separate body or a subcommittee of the Commission - would allocate funding for negotiations according to a formula and process agreed upon by the Steering Committee, and confirmed in federal and provincial legislation.

Proposed Commission Process

On receiving a claim or proposal, the Acting Commissioner (determined by a rotation of the Commissioners) would determine whether there is prima facie evidence to support further investigation of the claim or proposal. If the claim or proposal is accepted for further investigation, the Commissioner would have the duty to appoint working groups or sub-committees, under terms of reference devised by the Commissioner in consultations with the parties, to perform the work necessary for further consideration of the claim or proposal.

The acceptance of the claim or proposal for further work/investigation would also qualify the claimant/proponent to apply to the funding authority for funding the costs of its participation in negotiations.

The Commissioner would also have the duty to inform the Steering Committee of the submission of the claim or proposal, and provide information to the Committee on its ramifications, such as the number of people involved in the proposal, third party interests potentially affected, potential requirements for changes in policy and legislation, potential liability for compensation, etc....

Negotiations would then begin, together with any necessary research, to be conducted by working group(s) made up of members appointed by the parties. The working group would report to the negotiators. If negotiations fail to produce agreement, a party could refer the matter back to the Commissioner, together with the report(s) of the working group(s).

Upon receiving the report(s) of the working group(s) assigned to the claim or proposal, the Commissioner would report to the Steering Committee on the findings of the working group(s), and provide a recommendation on whether the Steering Committee should accept or reject the claim in whole or in part.

If the Steering Committee cannot unanimously agree on the disposition of the claim, another Commissioner (or, if the parties agree, the same Commissioner) would be appointed to **mediate**. The Mediator would endeavor to bring the parties to a negotiated agreement. If mediation fails, the Mediator would report to the Commission, making recommendations as to how, in his/her opinion, the matter should be resolved.

If, after receiving the recommendations of the Mediator, the Steering Committee still cannot agree on resolution of the claim or proposal, another Commissioner (or, if the parties agree, the same Commissioner) would be appointed as an **Arbitrator** to hear arguments from the parties, review the evidence compiled by the working groups, and make a ruling on the claim based on uniform criteria for such rulings agreed to in advance by the parties.

Any objections by any party, or by band councils or other organizations to the "representativeness" of the claimant group would be dealt with by the Commission before negotiations begin. The Commission would have the power to make any orders necessary to ensure that the claimant community is properly represented in the negotiations, including ordering that parties be added to the negotiations.

The parties would be bound by the Commissioner/Arbitrator's decision. There would be no appeal from a decision of the Commission.

Alternatives and Other Models Considered

The Council of Elders has taken into consideration a variety of experiences in proposing the Commission structure and procedures outlined above. The Australian Aboriginal Claims Commission, the Environmental Assessment Board (Ontario), the Indian Commission of Ontario, and the Ontario Labour Relations Board were all sources of inspiration and experience.

As well, the Council has considered the option of relying on the courts to secure the recognition of Aboriginal claims; the option of "direct action" to assert rights and promote claims; and continuing the present "non-process" of bi-lateral and tri-lateral discussions without an independent party such as the Commission to monitor the discussions.

Litigation, all parties recognize, is very expensive, takes years to come to a final conclusion, and does not always result in the answers that the parties require for a settlement. Direct action is often successful, but it tends to exacerbate conflicts, and does not usually produce positive co-operation between Aboriginal and non-Aboriginal communities. Tri-lateral or bi-lateral discussions without the option of involving and empowered independent third party, or prior recognition of the rights of off-reserve Aboriginal peoples, are controlled by government and have produced few results.

The Aboriginal communities and organizations consulted by the Council have become convinced that without a Commission to facilitate negotiations, there will never be any real negotiations. Without negotiations, there will either be conflict, or the continuing cultural genocide of Ontario's off-reserve Aboriginal peoples.

The Council of Elders sees the advantages of the Commission as being its relatively low cost and expeditiousness, the facilitation of a co-operative approach to resolving issues, and the assurance of a final settlement for each issue brought before the Commission.

According to Canada and Ontario, there may be some difficulties with the concept of binding arbitration as a method of settling Aboriginal claims. The Council points out, however, that both governments submit to the decisions of tribunals established to resolve international trade disputes, and to labour relations boards, human rights commissions, etc....

Ontario's position is especially puzzling inasmuch as it claims that it recognizes that Aboriginal peoples have an inherent right of self-government. Insisting on a negotiations process which presumes from the outset that it (Ontario) has the right to veto any proposal made by the Aboriginal participants in the negotiations clearly contradicts this stated policy.

In any event, even if Canada and Ontario refuse to accept binding arbitration and insist on maintaining a veto, they could at least agree to some limits on the use of their veto. They could, for example, propose that the Commission have powers analogous to Ontario's Environmental Assessment Board. The EAB makes "Orders" on matters before it. An EAB Order is deemed to be an order of the Cabinet unless it is varied or vetoed within 30 days. If it is varied or vetoed, the reason(s) for so doing must be given in writing.

Other Issues

a) Participation by Canada and Ontario

While a tri-partite forum would be preferable, there are a sufficient number of bilateral issues for the Commission to be worthwhile without participation by Canada, should the federal government choose not to participate. Many issues, including identification of off-reserve Aboriginal people and their rights, access to land and natural resources, and access to appropriate social services, can be addressed without Canada's involvement. For those issues where Canada's involvement is necessary, all of the communities and organizations consulted by the Council indicated that they are willing to discuss alternatives means of assuring federal involvement. Alternatively, Canada could also be offered the option of participation in the Commission with the proviso that it may not be bound by decisions of the Commission which are based explicitly on rights claims.

b) Representativeness of the Aboriginal Peoples

There is no provincial umbrella organization representing the communities which would be served by the Commission. Ontario's off-reserve Aboriginal communities are, and will continue to be, autonomous, and must negotiate on their own behalf rather than being represented by any umbrella organization. Such organizations, should they form in the future, may participate in the negotiation of province-wide issues, and may provide advice and support to communities if they desire it.

The Council of Elders recognizes that off-reserve Aboriginal communities are autonomous, and stresses that all parties must respect the autonomy of those people and communities. The Council has a mandate from the communities to enter into an agreement to establish a process for resolving off-reserve Aboriginal peoples issues with Canada and Ontario, but has no authority to speak for communities in substantive negotiations.

One of the first steps in the proposed claims process may be the identification of the claimant or proponent community and its members in cases where these are not clear. As part of this step, the mandate and representativeness of the proponents of the claim/proposal could be verified by the Commission as a preliminary matter.

c) Who is Bound by Binding Arbitration?

The governments of Ontario and Canada would likely be bound by binding arbitration, as democratically elected governments and legal entities. Ontario and Canadian governments are bound by arbitrators' awards in labour relations and international trade, for example. The only legal recourse from such awards is on procedural or jurisdictional grounds.

There is no reason to believe that an Aboriginal community would not likewise be bound by binding arbitration on issues involving their rights. Nevertheless, it is possible that an agreement imposed by a third party, without explicit consent of the Aboriginal party, may be open to challenge under Charter of Rights and Freedoms. The mere possibility that a statute, policy or agreement *may* be subject to a constitutional challenge (which may or may not succeed) does not normally, however, prevent governments from acting in a manner which is otherwise deemed to be appropriate.

In any event, a ratification mechanism for communities may have to be worked out. It is proposed that this matter also be resolved through negotiations under the Commission process.

All of the communities consulted by the Council indicated that they would, prefer agreements based on mutual consent of the parties over any imposed, arbitrated settlement. Our view is that agreements based on consent are much more likely to be lasting and attract the voluntary compliance and support of the parties. Failure to reach an agreement may indicate a fundamental divergence of perception and conviction among the parties, which may not be settled with finality by an imposed solution. As noted above, however, it is our firm belief that negotiated agreements will only be possible within a process such as the proposed Commission. In the interests of assuring productive negotiations, therefore, all of the communities and organizations which we consulted have indicated that they would be willing to support and abide by settlements imposed by a third party such as the Commission.

d) Who would Use the Aboriginal Claims Commission?

The Council believes that off-reserve communities should be self-defining, both on an individual level (does the person identify himself as Aboriginal and belonging to an Aboriginal community?) and on a community level (does the community recognize that the person is part of that community?)

An off-reserve community could include status Indians, non-status Indians, and Metis people. Geographically, communities could define themselves by area of traditional land use, kin ties, existing political boundaries (i.e. Lambton County, Metropolitan Toronto) or any other criterion which they believe to be appropriate.

It is therefore possible that communities might involve a variety of organizations in negotiations through the proposed Commission, including traditional governments, elected councils, Friendship Centres, ONWA Locals, OMAA Locals, and Aboriginal service delivery organizations, as appropriate. The community, in defining itself and determining its representation, will be doing the "front-line" work in involving the groups which it believes to be appropriate.

Any disputes or objections by any party relating to the composition of the community, or the representativeness of the claimant group, would be dealt with by the Commission as a preliminary matter.

A Claims Process, Off-Reserve Self-Government, Aboriginal and Treaty Rights, and Identification: Four Interrelated Issues

The Council sees the establishment of an impartial mediation and adjudication process as the key to facilitating negotiations towards resolving several outstanding disputes between off-reserve Aboriginal peoples and the governments of Ontario and Canada. Fundamentally, the proposed Aboriginal Claims Commission is to be the mechanism through which off-reserve Aboriginal people re-define their relationship with non-Aboriginal society.

One basic part of this redefinition is the identification of Aboriginal peoples and their communities. One of the first tasks of the Aboriginal Claims Commission could be the negotiation of mutually acceptable criteria for the identification of off-reserve Indian and Metis peoples. As community negotiations on rights and/or self government issues go forward, identification of the members of claimant communities could take place.

Identification of the Aboriginal and treaty rights of non-status and Metis peoples, and members of off-reserve communities, can easily go hand in hand with identification of those Aboriginal peoples. The Claims Commission might examine the traditional uses and attachments of claimant communities to land, and the claims of peoples to rights to access to services and programs. Through this investigation and negotiation process, the Aboriginal and treaty rights of off-reserve Aboriginal people can be identified, defined and recognized.

The Aboriginal right to self-government would likely be one of the rights to be discussed in the proposed Aboriginal Claims Commission process. The self-government right may be recognized and defined through negotiations with a claimant community for self-governing institutions, or the shape of self-government may become apparent in negotiations on other Aboriginal and treaty rights, (i.e. natural resources harvesting and management rights).

If the federal government does not wish to participate in any parts of the proposed Aboriginal Claims Commission, certain self-government discussions which are considered by Ontario and the Aboriginal party to be tripartite may have to be undertaken in another forum.

Without an impartial Commission as proposed here, the Council believes that progress on the other three issues (self-government, rights, and identification) will be difficult, if not impossible.

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A Discussion Paper
August, 1993

The Need For An Aboriginal Claims Commission

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The acceptance of the claim or proposal for further work/investigation would also qualify the claimant/proponent to apply to the funding authority for funding the costs of its participation in negotiations.

The Commissioner would also have the duty to inform the Steering Committee of the submission of the claim or proposal, and provide information to the Committee on its ramifications, such as the number of people involved in the proposal, third party interests potentially affected, potential requirements for changes in policy and legislation, potential liability for compensation, etc....

Negotiations would then begin, together with any necessary research, to be conducted by working group(s) made up of members appointed by the parties. The working group would report to the negotiators. If negotiations fail to produce agreement, a party could refer the matter back to the Commissioner, together with the report(s) of the working group(s).

Upon receiving the report(s) of the working group(s) assigned to the claim or proposal, the Commissioner would report to the Steering Committee on the findings of the working group(s), and provide a recommendation on whether the Steering Committee should accept or reject the claim in whole or in part.

If the Steering Committee cannot unanimously agree on the disposition of the claim, another Commissioner (or, if the parties agree, the same Commissioner) would be appointed to **mediate**. The Mediator would endeavor to bring the parties to a negotiated agreement. If mediation fails, the Mediator would report to the Commission, making recommendations as to how, in his/her opinion, the matter should be resolved.

If, after receiving the recommendations of the Mediator, the Steering Committee still cannot agree on resolution of the claim or proposal, another Commissioner (or, if the parties agree, the same Commissioner) would be appointed as an **Arbitrator** to hear arguments from the parties, review the evidence compiled by the working groups, and make a ruling on the claim based on uniform criteria for such rulings agreed to in advance by the parties.

Any objections by any party, or by band councils or other organizations to the "representativeness" of the claimant group would be dealt with by the Commission before negotiations begin. The Commission would have the power to make any orders necessary to ensure that the claimant community is properly represented.

The parties would be bound by the Commissioner/Arbitrator's decision. There would be no appeal from a decision of the Commission.

Alternatives and Other Models Considered

The Council of Elders has taken into consideration a variety of experiences in proposing the Commission structure and procedures outlined above. The Australian Aboriginal Claims Commission, the Environmental Assessment Board (Ontario), the Indian Commission of Ontario, and the Ontario Labour Relations Board were all sources of inspiration and experience.

As well, the Council has considered the option of relying on the courts to secure the recognition of Aboriginal claims; the option of "direct action" to assert rights and promote claims; and continuing the present "non-process" of bi-lateral and tri-lateral discussions without an independent party such as the Commission to monitor the discussions.

Litigation, all parties recognize, is very expensive, takes years to come to a final conclusion, and does not always result in the answers that the parties require for a settlement. Direct action is often successful, but it tends to exacerbate conflicts, and does not usually produce positive co-operation between Aboriginal and non-Aboriginal communities. Tri-lateral or bi-lateral discussions without the option of involving and impowered independent third party, or prior recognition of the rights of off-reserve Aboriginal peoples, are controlled by government and have produced few results.

The Aboriginal communities and organizations consulted by the Council have become convinced that without a Commission to facilitate negotiations, there will never be any real negotiations. Without negotiations, there will either be conflict, or the continuing cultural genocide of Ontario's off-reserve Aboriginal peoples.

The Council of Elders sees the advantages of the Commission as being its relatively low cost and expeditiousness, the facilitation of a co-operative approach to resolving issues, and the assurance of a final settlement for each issue brought before the Commission.

According to Canada and Ontario, there may be some difficulties with the concept of binding arbitration as a method of settling Aboriginal claims. The Council points out, however, that both governments submit to the decisions of tribunals established to resolve international trade disputes, and to labour relations boards, human rights commissions, etc....

Ontario's position is especially puzzling inasmuch as it claims that it recognizes that Aboriginal peoples have an inherent right of self-government. Insisting on a negotiations process which presumes from the outset that it (Ontario) has the right to veto any proposal made by the Aboriginal participants in the negotiations clearly contradicts this stated policy.

In any event, even if Canada and Ontario refuse to accept binding arbitration and insist on maintaining a veto, they could at least agree to some limits on the use of their veto. They could, for example, propose that the Commission have powers analogous to Ontario's Environmental Assessment Board. The EAB makes "Orders" on matters before it. An EAB Order is deemed to be an order of the Cabinet unless it is varied or vetoed within 30 days. If it is varied or vetoed, the reason(s) for so doing must be given in writing.

Other Issues

a) Participation by Canada and Ontario

While a tri-partite forum would be preferable, there are a sufficient number of bilateral issues for the Commission to be worthwhile without participation by Canada, should the federal government choose not to participate. Many issues, including identification of off-reserve Aboriginal people and their rights, access to land and natural resources, and access to appropriate social services, can be addressed without Canada's involvement. For those issues where Canada's involvement is necessary, all of the communities and organizations consulted by the Council indicated that they are willing to discuss alternatives means of assuring federal involvement. Alternatively, Canada could also be offered the option of participation in the Commission with the proviso that it may not be bound by decisions of the Commission which are based explicitly on rights claims.

b) Representativeness of the Aboriginal Peoples

There is no provincial umbrella organization representing the communities which would be served by the Commission. Ontario's off-reserve Aboriginal communities are, and will continue to be, autonomous, and must negotiate on their own behalf rather than being represented by any umbrella organization. Such organiations, should they form in the future, may participate in the negotiation of province-wide issues, and may provide advice and support to communities if they desire it.

The Council of Elders recognizes that off-reserve Aboriginal communities are autonomous, and stresses that all parties must respect the autonomy of those people and communities. The Council has a mandate from the communities to enter into an agreement to establish a process for resolving off-reserve Aboriginal peoples issues with Canada and Ontario, but has no authority to speak for communities in substantive negotiations.

One of the first steps in the proposed claims process may be the identification of the claimant or proponent community and its members in cases where these are not clear. As part of this step, the mandate and representativeness of the proponents of the claim/proposal could be verified by the Commission as a preliminary matter.

c) Who is Bound by Binding Arbitration?

The governments of Ontario and Canada would likely be bound by binding arbitration, as democratically elected governments and legal entities. Ontario and Canadian governments are bound by arbitrators' awards in labour relations and international trade, for example. The only legal recourse from such awards is on procedural or jurisdictional grounds.

There is no reason to believe that an Aboriginal community would not likewise be bound by binding arbitration on issues involving their rights. Nevertheless, it is possible that an agreement imposed by a third party, without explicit consent of the Aboriginal party, may be open to challenge under Charter of Rights and Freedoms. The mere possibility that a statute, policy or agreement *may* be subject to a constitutional challenge (which may or may not succeed) does not normally, however, prevent governments from acting in a manner which is otherwise deemed to be appropriate.

In any event, a ratification mechanism for communities may have to be worked out. It is proposed that this matter also be resolved through negotiations under the Commission process.

All of the communities consulted by the Council indicated that they would, prefer agreements based on mutual consent of the parties over any imposed, arbitrated settlement. Our view is that agreements based on consent are much more likely to be lasting and attract the voluntary compliance and support of the parties. Failure to reach an agreement may indicate a fundamental divergence of perception and conviction among the parties, which may not be settled with finality by an imposed solution. As noted above, however, it is our firm belief that negotiated agreements will only be possible within a process such as the proposed Commission. In the interests of assuring productive negotiations, therefore, all of the communities and organizations which we consulted have indicated that they would be willing to support and abide by settlements imposed by a third party such as the Commission.

d) Who would Use the Aboriginal Claims Commission?

The Council believes that off-reserve communities should be self-defining, both on an individual level (does the person identify himself as Aboriginal and belonging to an Aboriginal community?) and on a community level

(does the community recognize that the person is part of that community?) An off-reserve community could include status Indians, non-status Indians, and Metis people. Geographically, communities could define themselves by area of traditional land use, kin ties, existing political boundaries (i.e. Lambton County, Metropolitan Toronto) or any other criterion which they believe to be appropriate.

It is therefore possible that communities might involve a variety of organizations in negotiations through the proposed Commission, including tradtional governments, elected councils, Friendship Centres, ONWA Locals, OMAA Locals, and Aboriginal service delivery organizations, as appropriate. The community, in defining itself and determining its representation, will be doing the "front-line" work in involving the groups which it believes to be appropriate.

Any disputes or objections by any party relating to the composition of the community, or the representativeness of the claimant group, would be dealt with by the Commission as a preliminary matter.

A Claims Process, Off-Reserve Self-Government, Aboriginal and Treaty Rights, and Identification: Four Interrelated Issues

The Council sees the establishment of an impartial mediation and adjudication process as the key to facilitating negotiations towards resolving several outstanding disputes between off-reserve Aboriginal peoples and the governments of Ontario and Canada. Fundamentally, the proposed Aboriginal Claims Commission is to be the mechanism through which off-reserve Aboriginal people re-define their relationship with non-Aboriginal society.

One basic part of this redefinition is the identification of Aboriginal peoples and their communities. One of the first tasks of the Aboriginal Claims Commission could be the negotiation of mutually acceptable criteria for the identification of off-reserve Indian and Metis peoples. As community negotiations on rights and/or self government issues go forward, identification of the members of claimant communities could take place.

Identification of the Aboriginal and treaty rights of non-status and Metis peoples, and members of off-reserve communities, can easily go hand in hand with identification of those Aboriginal peoples. The Claims Commission might examine the traditional uses and attachments of claimant communities to land, and the claims of peoples to rights to access to services and programs. Through this investigation and negotiation process, the Aboriginal and treaty rights of off-reserve Aboriginal people can be identified, defined and recognized.

The Aboriginal right to self-government would likely be one of the rights to be discussed in the proposed Aboriginal Claims Commission process. The self-government right may be recognized and defined through negotiations with a claimant community for self-governing institutions, or the shape of self-government may become apparent in negotiations on other Aboriginal and treaty rights, (i.e. natural resources harvesting and management rights).

If the federal government does not wish to participate in any parts of the proposed Aboriginal Claims Commission, certain self-government discussions which are considered by Ontario and the Aboriginal party to be tripartite may have to be undertaken in another forum.

Without an impartial Commission as proposed here, the Council believes that progress on the other three issues (self-government, rights, and identification) will be difficult, if not impossible.