LS-399E

BILL S-24: THE KANESATAKE INTERIM LAND BASE GOVERNANCE ACT

Prepared by:
Mary C. Hurley
Law and Government Division
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LEGISLATIVE HISTORY OF BILL S-24

HOUSE OF COMMONS		SENATE	
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

TABLE OF CONTENTS

BILL S-24: THE KANESATAKE INTERIM LAND BASE GOVERNANCE ACT*

Bill S-24, the Kanesatake Interim Land Base Governance Act, was introduced in the Senate of Canada on 27 March 2001. The legislation ratifies the *Agreement with Respect to Kanesatake Governance of the Interim Land Base* between the federal government and the Mohawks of Kanesatake(1) that was concluded on 21 June 2000and signed on 21 December 2000. **Bill S-24 was adopted without amendments by the Senate and the House of Commons on 15 May and 1 June 2001 respectively.(2)**

BACKGROUND(3)

The Kanesatake Mohawk community(4) located west of Montreal, at Oka, Quebec, came to national prominence during what has become known as the "Oka Crisis" of the summer of 1990. Many considered that conflict an acute manifestation of long-standing land claim grievances involving that community.(5) A summary overview of the relevant history will serve to provide context for Bill S-24.

A. 1717 to 1945: Pattern of Conflict Emerges

The Kanesatake Mohawk land claim has been described as "perhaps the most difficult Indian claim which the Canadian government inherited from pre-Confederation administrations."(6) The unique circumstances of Kanesatake Mohawks with respect to their land base can be traced to the 1717 grant of the Seigneurie du Lac des Deux-Montagnes (the Seigneury) to the Sulpician Order by the French Crown.(7) Conditions of the grant included the establishment of a mission within the Seigneury for the indigenous population in the region; the settlement, created in 1721, included Iroquois (Mohawks) among the Aboriginal inhabitants. The record shows frequent conflict between the Sulpicians and the Mohawks over ownership of Seigneury lands, beginning at least as early as 1763. The sale of parcels of those lands to private interests over Mohawk objections was a particular, ongoing source of frustration. Neither an 1841 Lower Canada statute confirming the Sulpicians' title to the land, nor a 1912 Privy Council decision(8) ruling that the legislation had placed that title beyond question,(9) put an end to the conflict.

B. 1945 to 1990: Federal Involvement Without Resolution

In 1945, the federal government sought to resolve the controversy by agreeing to purchase the remaining Sulpician lands and to assume the Sulpicians' outstanding obligations toward the Mohawks. The latter were not consulted about the agreement and did not consider it a final settlement of their claims.(10) The lands involved in the 1945 transaction consisted of a series of blocks interspersed with privately held lands within Oka; subsequent purchases by the federal government in the 1960s and early 1980s contributed further to the patchwork of properties. The non-contiguous nature of Mohawk holdings presented both a practical obstacle to their serving as an *Indian Act* reserve, as well as practical problems relating to land use and management decisions by and policy coordination between the Mohawk and non-Aboriginal communities.

In 1975, the Mohawks of Kanesatake, Kahnawake and Akwesasne presented a joint comprehensive land claim,(11) asserting Aboriginal title to lands that included the Seigneury. The claim was rejected on the bases that the Mohawks had not possessed the land continuously since time immemorial, and that any Aboriginal title had been extinguished. In 1977, the Mohawks of Kanesatake filed a specific land claim;(12) it, too, was rejected in 1986 as not meeting specific claim criteria. Despite its contention that Kanesatake Mohawks had no proprietary rights outside of federally purchased lands held for their use and occupancy, the

federal government committed itself to purchase additional lands in order to provide them a unified land base.

It is beyond the scope of this paper to detail the events of 1990.(13) It should be noted, however, that at the time the conflict escalated into armed confrontation, the government was attempting to negotiate an agreement to deal with future land assembly and management. Kanesatake Mohawk lands at the time consisted of 828.1 hectares (2,046 acres), which was

> really 11 separate [non-contiguous] pieces of land . . . Furthermore, various public roads, which are not Indian property and have been the subject of official protests since the last century, criss-cross their territory and make it into 20 isolated pieces of land.
>
> Within the limits of the municipality of Oka, the situation is even more disquieting: 27 isolated pieces of land, divided into 60 lots occupied by Indians, are located within the urban perimeter …(14)

C. 1990 to Present: Post-Crisis Developments

1. Parliamentary Report

In its May 1991 report entitled *The Summer of 1990*, the House of Commons Standing Committee on Aboriginal Affairs (the Committee) noted that as a consequence of the historical events outlined above,

> The status of Kanesatake with respect to land does not fit within the usual pattern of Indian reserve lands in Canada. The Kanesatake people are in an anomalous situation under Canadian law: members of the Kanesatake "Indian band" are "Indians" within the meaning of that term under the Indian Act [*sic*], have an Indian Act Band Council, live on federal Crown lands (since 1945) reserved for their use (within the meaning of s. 91(24) of the Constitution Act, 1867 [*sic*]) but do not live on lands clearly having status as an Indian Act reserve. This means there is no clear legislative regime applicable to provide for local control and administration of these lands.(15)

The Committee underscored the significance of the enduring turmoil dividing the Kanesatake Mohawk community on the issue of leadership selection, between those identifying with traditional Mohawk law and customs for whom only the Longhouse system of government has legitimacy, and those endorsing other processes. The report pointed out that "[p]rogress on the issue of Mohawk leadership is essential to progress on the issue of land rights," and that, "[i]n the meantime, the Kanesatake community remains in a state of legal and political uncertainty."(16)

2. Governmental Interventions

In its October 1991 response to the Committee recommendation favouring a process, such as mediation, for dealing with land use conflicts between municipalities and Mohawk authorities, the federal government acknowledged long-standing problems over land use issues such as zoning. The response commented that a new agenda for negotiations on land-related matters had been ratified by Kanesatake in August 1991,(17) and that

> In keeping with the objective of creating a unified land base and a reserve . . . the federal government acquired 106 acres . . . in the summer of 1990. The Department of Indian Affairs and Northern Development will negotiate the purchase of additional parcels of land.(18)

Land acquisitions by the federal government in the immediate post-Oka period occurred without prior consultation with the Kanesatake community; a Canada-Kanesatake Memorandum of Understanding stipulating that subsequent land purchases would be made in consultation has been in effect since December 1994.(19) The surface area of Kanesatake is now 1108.8 hectares (2739.6 acres).

In June 1999, Canada and the Kanesatake Mohawks agreed to establish a Mohawk Development Corporation;(20) under a two-year property management agreement, the corporation is responsible for the management, use and maintenance of the 177 properties acquired since 1990. This development was considered a significant precursor to the land governance agreement of 2000.

3. The Agreement

Canada had never taken a position on the question of whether Kanesatake lands fell under subsection 91(24) of the *Constitution Act, 1867*, as "Lands reserved for the Indians," arguing instead that they came under federal jurisdiction as "public property" under subsection 91(1A) of the Constitution. As a result, Kanesatake, unlike other First Nations, has not had access to the land-related provisions of the *Indian Act*, in particular the Act's by-law powers. The uncertain status of Kanesatake lands was underscored in a 1998 decision of the Quebec Court of Appeal ruling that municipal zoning and construction by-laws applied to at least the Mohawk properties at issue which were not, in the Court's view, "public property."(21)

Canada and Kanesatake's decision, in the late 1990s, to negotiate a land governance accord that would address the singular state of affairs prevailing on Kanesatake lands culminated, in June 2000, in the *Agreement with Respect to Kanesatake Governance of the Interim Land Base* (the Agreement).(22) The Agreement is of relatively narrow scope; it aims to give Kanesatake Mohawks a recognized land base and governance jurisdiction that approximate those available to other First Nation communities. In addition to the lands in and around Oka discussed above, that land base includes the "Doncaster Reserve No. 17." This reserve of 7,897.2 hectares (19,513.7 acres) of uninhabited land in the Quebec Laurentians north of Montreal is shared with the Mohawks of Kahnawake, and was conferred on the two communities by the *Act of 1851*. (23)

More specifically, the Agreement:

- provides for the interim land base to be reserved as "Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867* (subsection 91(24) lands) but not as a "reserve" for purposes of the *Indian Act*, while Doncaster Reserve No. 17 remains a "reserve";

- requires adoption of a Land Governance Code, following which Kanesatake is authorized to adopt community laws and regulations on land use and other land-related matters;

- establishes a framework for the harmonization of Kanesatake and Municipality of Oka laws in relation to land use and land use standards; and

- defines the relationship between Kanesatake Mohawk Laws and (1) federal laws, (2) provincial laws of general application, and (3) municipal by-laws.

The Agreement specifies that it is not a treaty or land claim agreement under section 35 of the *Constitution Act, 1982*.(24)

Under the terms of the Agreement, ratification by Canada follows ratification by Kanesatake. The Kanesatake community ratified the Agreement on 14 October 2000. The completed process involved a secret ballot vote by participating members aged 18 or over, with requirements for approval being a simple majority, together with a Mohawk Council resolution signifying approval. In fact, fewer than half of more than 1,000 eligible voters took part in the ratification vote. The final tally of 239 votes in favour and 237 opposed, with ten spoiled ballots, testified to significant division over the Agreement within the Kanesatake Mohawk community.

Bill S-24 is intended to fulfil the Agreement's requirement that Canada proceed with ratification by enacting implementing federal legislation.

DESCRIPTION AND ANALYSIS

Bill S-24 consists of 24 clauses and a Schedule, most of which correspond to provisions in the Agreement (Appendix 3); the latter are indicated below in parentheses alongside the relevant clause number. The following discussion focuses on selected substantive provisions, grouped according to subject matter and arranged for ease of comprehension, rather than in strict numerical sequence.

A. Purpose

Clause 3(1) (section 4) asserts that the purpose of Bill S-24 is to implement the Agreement, in particular its central components relating to:

- the constitutional status of "certain" lands of the interim land base;

- the framework for the exercise of Mohawk jurisdiction over that land base; and

- harmonization principles for the use of neighbouring Mohawk and non-Mohawk lands in

Oka.

Clause 3(2) (preamble statement 2, sections 5 and 7) states the bill's neutrality with respect to the existence or scope of any Aboriginal or treaty rights of Kanesatake Mohawks, by providing that the bill does not address such rights, and is intended neither to prejudice nor to recognize them. The terms of the provision differ from those of more familiar "non-derogation" clauses in previous federal laws.(25) They are intended to mirror the approach taken in the Agreement, which does not address Kanesatake's outstanding claims to Seigneury lands, while explicitly providing that it was concluded without prejudice to the parties' positions on those grievances, or to their resolution.

Clause 3(3)(*a*) (preamble statements 4-6) provides that Bill S-24 does not address the constitutional status of any lands prior to the bill's coming into force. In essence, this *caveat* signifies that: (1) the parties maintain their respective positions with regard to the past constitutional status of Kanesatake Mohawk Lands, i.e., the Mohawks assert that they have been subsection 91(24) lands, and Canada takes no position; and (2) the future treatment of those lands as such results from an Agreement between Canada and Kanesatake. In other words, Bill S-24 does not resolve the ambiguous status of Kanesatake lands for the past.

B. Kanesatake Mohawk Lands

Under Bill S-24's definition clause 2(1) (section 3), the "Kanesatake Mohawk interim land base" (the interim land base) consists of lands described in the bill's Schedule (Schedule A). These are Doncaster Reserve No. 17, which is shared with Kahnawake;(26) pre-Oka holdings identified as Kanesatake Indian Lands No. 16 and Lands known as "Assenenson," "Chemin du Milieu" or "Centre Road"; and Lands described in Article 2.1.1 of the property management agreement of June 1999 referred to above. These are the 177 properties acquired by Canada for the Kanesatake Mohawks in the post-Oka period.

Clause 4 (section 12), one of Bill S-24's pivotal provisions, sets aside lands in the interim land base – other than Doncaster Reserve No. 17 – as subsection 91(24) lands, but not as a "reserve" under the *Indian Act*. The distinction signifies that the specified Kanesatake lands are not subject to the reserve provisions of that Act, but are to be managed under the terms of the Agreement and the implementing Bill S-24, instruments specific to the Kanesatake situation. Those provisions of the *Indian Act* not related to reserves continue to apply to Kanesatake Mohawks. Doncaster Reserve No. 17 is excluded from the "set aside" effected by clause 4 as it is already an *Indian Act* reserve and therefore covered by subsection 91(24).

It should be noted that, unlike the Schedule to Bill S-24, Schedule A of the Agreement (paragraph 1(e)) includes "lands which may be added . . . through the resolution of the [Seigneury] grievance, or as the result of any other means," provided both Canada and Kanesatake agree they are subsection 91(24) lands, and that Canada agrees to set them aside as such. The analogous provision of Bill S-24, clause 19(1), authorizes the Governor in Council to amend the bill's Schedule, by way of Order in Council, to include lands that Canada and Kanesatake agree should be added. Under this measure, future land acquisitions by Kanesatake need not automatically fall subject to the Agreement or the bill, leaving open the possibility that Kanesatake Mohawks may acquire lands that are not subsection 91(24) lands, or subject to the Kanesatake Mohawk laws discussed below under the "Governance" heading.

Under clause 3(3)(*b*) (section 8), existing jurisdiction over the creation and transfer of interests

in lands within the interim land base is maintained. That is, subject to the eventual negotiation of other arrangements, the Department of Indian Affairs and Northern Development (the Department) retains its current responsibility for matters such as the creation or transfer of land interests held by individual Kanesatake Mohawks.(27) Clause 20 (section 10) further stipulates that an existing right or interest in the interim land base continues under its terms and conditions. Thus, under Bill S-24, Kanesatake may not alter the terms of existing leases, expropriate or transfer individual interests in land

C. Governance

1. Kanesatake Mohawk Laws

Under clause 6 (no equivalent) in the Agreement, the powers and jurisdiction of Kanesatake Mohawks set out in Bill S-24 are to be exercised by the Mohawk Council of Kanesatake (the Council). The Council currently consists of chiefs who are elected by "custom," meaning that the process is not subject to the electoral provisions of the *Indian Act*. As previously mentioned, the community has long been divided over the method of selection of its leaders; this internal conflict, if left unresolved, may compromise the Council's ability to exercise its jurisdiction effectively. The federal government's position has been to deal with Kanesatake's elected officials; in its view, leadership disputes within the community must be settled internally or in the courts.

Clause 7(1) of Bill S-24 (section 21) implements a central provision of the Agreement with a non-exhaustive listing of the areas in which Kanesatake may make laws "in relation to the use and development" of the interim land base. Significantly, because that land base is not a "reserve," such laws will not be subject to the ministerial disallowance that applies to by-laws under the *Indian Act*. The 11 subject matters enumerated in clause 7(1) are, for the most part, similar to their equivalents in the broader general by-law making section (section 81) of the Act,(28) and include: health and quality of life; wildlife management; law and order; trespass; residency; construction and related aspects of local works and buildings; and zoning and regulation of traffic. Two additional areas not set out in section 81 of the Act are fire safety and protection, and waste management and public sanitation. The authority to control undesired or harmful land uses is of particular importance in light of past attempts to locate garbage dumps on Kanesatake lands.

Under clause 7(2) (section 36), Kanesatake jurisdiction includes the authority to create summary conviction offences, and applicable sanctions, for violation of Kanesatake Mohawk laws. The sanctions must not exceed limits for like offences in subsection 787(1) of the *Criminal Code*, i.e., a $2,000 fine and/or six months imprisonment. Clause 7(2) also authorizes "restorative justice" sanctions such as restitution or community service. Bill S-24 does not give Kanesatake jurisdiction over the criminal law, which remains under exclusive federal authority.

2. Relationship of Laws

Clauses 17(1) and (2) of Bill S-24 (sections 43 and 44) are intended to replicate, for Kanesatake, the situation that prevails on reserves regarding the application of provincial laws and municipal by-laws.

Under section 88 of the *Indian Act*, as interpreted by Canadian courts, provincial laws of

general application that would not otherwise be applicable may in fact apply to Indians on reserve land,(29) subject to the terms of any treaty or federal legislation, and provided they are both consistent with the Act and with any instruments made under it, and do not address matters that are addressed in the Act.

Given that lands in the interim land base do not have reserve status and are not subject to section 88 of the Act, Bill S-24 introduces a parallel specific to Kanesatake. Under clause 17 (1), neither provincial laws to which section 88 applies nor municipal by-laws apply if they are inconsistent with Bill S-24 or a Kanesatake law, or deal with any matter provided for by or under the bill. The extension of clause 17(1) to inconsistent municipal by-laws parallels the legal position on reserve land in that by-laws relating to land are generally inapplicable to reserves.

Addressing the relationship between other provincial laws to which section 88 does not apply – that may apply to Indians on reserve of their own force – and Kanesatake laws, clause 17(2) provides that the latter prevail in the event of any inconsistency or conflict. This result is consistent with the case law rendered under the *Indian Act.*

Clause 17(3) (section 45) specifies that federal legislation is paramount over inconsistent or conflicting Kanesatake laws.

3. Conditions on Exercise of Jurisdiction

a. Land Governance Code

Clause 9(1) (section 20) stipulates that, prior to enacting any laws, Kanesatake must adopt a "land governance code" (the code) to govern the exercise of clause 7 jurisdiction. Under clause 9(2), the code must contain, at a minimum: processes for preparing and enacting laws and for assessing and approving proposed land uses and development; rules for ensuring the Council's accountability to the community, including conflict of interest rules; provision for rights of appeal or redress in relation to prescribed Council actions; and an amending procedure. Kanesatake adopted the requisite code, in addition to ratifying the Agreement, on 14 October 2000.

The clause 9(2) requirement that the code establish processes for dealing with proposed land uses is supplemented by an additional pre-condition set out at clause 10 (section 24). It provides that, prior to conducting any process that could lead to the authorization of proposed land uses with potentially adverse environmental impacts (such as commercial or industrial activity that would or could damage the environment, storage or transport of dangerous materials, and waste disposal), Kanesatake must adopt a plan defining general land use policies for the entire interim land base.(30) The desired effect of clauses 9(2) and 10 is the prevention of *ad hoc* decisions with respect to listed, possibly harmful, land use proposals. Neither clause explicitly requires that such proposals be consistent with the land use policy framework.

b. Doncaster Reserve No. 17

Bill S-24 takes account of the singular features of Doncaster Reserve No. 17 (the Reserve) by making special provision for the exercise of Kanesatake jurisdiction in the area. As previously mentioned, the Reserve was allotted jointly to Kanesatake and Kahnawake and, although the

Reserve is scheduled as part of the interim land base, the Agreement (section 16) explicitly preserves its "reserve" status under the *Indian Act*. Given these circumstances, clause 8(1) (section 15) prohibits Kanesatake from making laws regarding the Reserve unless: (1) an agreement has been reached with Kahnawake (for example, to divide the Reserve and split jurisdiction in accordance with each community's respective part); and (2) Canada has agreed to implement the agreement. The latter requirement acknowledges that Canada's intervention would be necessary to divide interests in the Reserve. Departmental officials advise that an agreement between Kanesatake and Kahnawake within the meaning of clause 8 is not anticipated in the near future.(31)

c. Harmonization of Laws

Clause 2(1) defines "Kanesatake Mohawk neighbouring lands" (neighbouring lands) as lands located in the sectors of Schedule B of the Agreement, in the area known as the "Village of Oka"(32) (Schedule C of the Agreement relating to harmonization defines these as "adjacent lands"). This description applies to 57 Mohawk properties that, while included in the interim land base as part of "Indian Lands No. 16,"(33) are interspersed with non-Mohawk properties. Neighbouring lands are in three sectors; Schedule B, referred to in clause 2(1), sets out a range of permitted uses, land use standards and dimensions for each sector that are consistent with those defined in Oka by-laws. For example, detached single-family dwellings are permitted in all three sectors, while commercial establishments and gas stations are permitted only in sector 3.

Clauses 12 and 13 of Bill S-24 (sections 29-32, Schedule C) implement a further key component of the Agreement. They prescribe rules specific to neighbouring lands that reflect both the intermingling of those lands with properties under the authority of the Municipality of Oka and the fact that Canada has no authority to impose obligations on Oka.(34)

Under clause 12, existing land use and land use standards on neighbouring lands are frozen until the adoption of Kanesatake laws in those areas; alterations to existing land uses or buildings that comply with Schedule B standards for the sector in question may, however, be undertaken beforehand. Clause 13(1) seeks to promote compatible development of neighbouring Mohawk and non-Mohawk properties by requiring Kanesatake to conclude a harmonization arrangement with the Municipality of Oka before enacting any law under which land use or land use standards for any sector of neighbouring lands would differ "significantly" from those established in Schedule B. Clause 13(2) prescribes general matters that such an arrangement must minimally address – such as "reciprocal obligations" and a "dispute resolution process" – but does not define specific obligations or modalities for the parties. According to departmental documents, Kanesatake and Oka are currently negotiating a harmonization agreement.

Clauses 13(3) and (4) describe circumstances that release Kanesatake from harmonization commitments. Under the former, Kanesatake may enact laws relating to land use or land use standards for neighbouring lands if, (1) prior to entering into the arrangement and (2) without being legally obliged to do so under provincial legislation, Oka unilaterally amends its by-law (s) to authorize uses or standards in any sector that differ significantly from those set out in Schedule B.

Clause 13(4) similarly authorizes Kanesatake to legislate in relation to any Schedule B sector despite the terms of a harmonization arrangement should Oka, without Kanesatake's

agreement, (1) unilaterally amend/repeal a municipal by-law in breach of its obligations and without being obliged under a provincial law, or (2) condone any use of Oka property that violates an Oka by-law on land use or land use standards and that "significantly prejudices" any interest of an occupant of neighbouring lands.

Bill S-24 does not address the effect on Kanesatake's obligations of a possible Oka by-law that is both required by provincial legislation and in breach of the harmonization arrangement.

4. Environmental Protection

Generally speaking, federal environmental laws apply on reserve lands and analogous provincial laws do not. The same legal regime will apply on lands in the interim land base. Clause 11 (sections 25-26) addresses the circumstance of a possible absence of federal standards in a given area, by providing that any Kanesatake law or Council measure relating to that area must be the equivalent of or stricter than relevant provincial norms. The intention is to minimize disparities between environmental protection regimes applicable to neighbouring Mohawk and non-Mohawk properties in Oka. Clause 11(2) ensures that federal environmental assessment legislation applies to the interim land base.

5. Law Enforcement

Clause 15(1) (section 41) empowers Kanesatake to prosecute offences committed under Kanesatake laws in any "court of competent jurisdiction." Competent courts include not only Quebec's provincial and superior courts, but also any court where justices of the peace, appointed by Kanesatake in accordance with clause 16, are authorized to enforce Kanesatake laws. Under clause 16 (sections 37-39), Kanesatake "may" appoint justices of the peace to ensure adequate enforcement of its laws, but only in accordance with a prior agreement with Canada that addresses matters related to the functioning of justice of the peace appointees such as qualifications, jurisdiction, independence, security, supervision, and relationship with the existing justice system. Because the administration of justice is a provincial responsibility, Quebec is a necessary participant in discussions on these issues. Departmental officials confirm that tripartite talks are under way.

D. Other

Clause 5 of Bill S-24 (section 19) states that the Mohawks of Kanesatake, defined in clause 2 (1) as the "band" known by that name, have the [legal] capacity of a natural person and may acquire property, borrow, spend and invest, participate in legal proceedings, and so forth. The *Indian Act* contains no such provision, leaving the precise legal status and capacity of "Indian bands" governed by the Act somewhat uncertain, as occasional legal disputes on the issue illustrate. Explicit provisions similar to clause 5 are often included in contemporary legislation dealing with First Nation communities.(35)

Clause 14 (section 34) requires that all construction on the interim land base meet minimal standards, specifically those of the *National Building Code 1995*.

Clause 21 (section 18) relates to the application of the *Canada Lands Surveys Act* to plans of the interim land base. Subsection 29(3) of that Act provides that the Surveyor General confirms plans that he/she is satisfied have been properly conducted and that are satisfactory to

the Minister of the department involved. Under clause 21, the plans must be satisfactory to the Council rather than to the Minister of Indian Affairs and Northern Development (Minister).

Under clauses 22 and 23 (no equivalents), the Minister and the Council must keep and make available for inspection copies of the Agreement, the property management agreement, and the agreement relating to Kanesatake justices of the peace, in the departmental library and the Council office, respectively. The Council is also required to keep a copy of the land governance code and any amendments to it.

COMMENTARY

Following its introduction on 27 March 2001, no public reaction to Bill S-24 was noted. The ratification and conclusion of the Agreement in October and December 2000, however, did elicit responses.

In October, the closeness of the ratification vote attested to disagreement within Kanesatake as to whether the Agreement was a positive development. Opponents reportedly described the ratification process as flawed, hasty and providing little opportunity for discussion on the merits, and expressed concern over the scope of the Council's powers under the Agreement. Following the official signing in December, some individuals and spokespersons for the Longhouse were said to question whether the Council and the Mohawk Development Corporation, on which Council members sit, would represent the community adequately on land-related matters addressed in the Agreement. Some reportedly claimed they would continue to mobilize against the Agreement.

According to press reports, Grand Chief James Gabriel, while acknowledging an active campaign against the deal, maintained that both the consultation process leading to the Agreement and the information to community members prior to the vote had been adequate.

As previously mentioned, the Department deals with Kanesatake's elected leaders, preferring not to intervene in internal leadership disputes. Departmental documents suggest that opposition in Kanesatake has been focused on process and leadership issues rather than on the Agreement. They outline the information and consultation process that occurred prior to ratification and note that, following the vote, the Council responded to criticism within the community by commissioning an independent legal review of both the ratification process and the vote. This review, in turn, judged the process to have been thorough, and the vote count to be accurate.

Departmental material points out that the Agreement responds, not only to concerns of Kanesatake Mohawks with respect to past land difficulties, but also to those of Oka and Quebec with respect to the legal status of and regime applicable to Kanesatake Mohawk Lands; and that the Municipality of Oka's support for the Agreement and active engagement in harmonization negotiations signals optimism and greater cooperation in the area. They underscore the view that the Agreement is a key interim step in a longer-term process to deal with Kanesatake's outstanding land grievances and governance issues.

The positions outlined in preceding paragraphs were generally reflected in the testimony of witnesses appearing before the Standing Senate Committee on Aboriginal Affairs and the House of Commons Standing Committee on Aboriginal Affairs, Northern

Development and Natural Resources during their consideration of Bill S-24. Witnesses testifying for the bill were the Minister of Indian Affairs and Northern Development Robert Nault; Grand Chief James Gabriel, accompanied by the senior Mohawk negotiator and legal counsel; and the Mayor of Oka Yvan Patry. Members of the Kanesatake community testifying against the bill were traditionalist Ellen Gabriel, Pearl Bonspille and Steve Bonspille, who maintained that the majority of the Kanesatake community shared their opposition to the Agreement and the Bill. Pierre Goyette, a non-Aboriginal resident of Oka, opposed the bill's application within the Village of Oka on the basis that it would create jurisdictional confusion.

The December 2000 signature of the Agreement was followed by reports that the Quebec Minister for Aboriginal Affairs was seeking clarification on the question of whether provincial or Kanesatake laws would apply on the interim land base. Departmental documents indicate that, to date, the Agreement has Quebec's general support. **Quebec government officials did not request to appear before the Senate or House committees considering Bill S-24.**

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent and come into force.

(1) This paper uses the spelling of the Agreement and the bill; Kanehsatake or Kanehsatà:ke are also in use, and may be preferred by community members.

(2) See Legislative History for complete details of Bill S-24's passage through both Houses of Parliament.

(3) See also *The Land Claim Dispute at Oka*, Background Paper BP-235E, prepared by Wendy Moss and Peter Niemczak in September 1990, and available from the Parliamentary Research Branch, Library of Parliament.

(4) A Department of Indian Affairs and Northern Development Fact Sheet on the Mohawks of Kanesatake (location, area, population) can be found at Appendix 1, or *via* the Department's website, at http://www.ainc-inac.gc.ca/qc/gui/kanesatake_e.html.

(5) See, for example, *Oka-Kanehsatake – Summer 1990: A Collective Shock*, Report of the then Commission des droits de la personne du Québec (CDPQ), April 1991, p. 61.

(6) Richard Daniel, *A History of Native Claims Processes in Canada*, 1867-1979, Research Branch, Department of Indian Affairs and Northern Development, 1980 (E98 C6 D35).

(7) In 1735, a second grant enlarged the original land base.

(8) Until 1949, the Privy Council was the final court of appeal for Canada.

(9) *Corinthe et al.* v. *Seminary of St. Sulpice* (1912), 5 D.L.R. 263.

(10) Nor did the federal intervention stop the transfer of disputed properties. For example, in 1947, Oka acquired part of the Seigneury's "Common lands" that dated back to the 18th century settlement.

(11) Comprehensive land claims are based on the assertion of continuing Aboriginal rights and title that have not been dealt with by treaty or other legal means.

(12) Specific claims arise from alleged non-fulfilment of treaties or other legal obligations, or from the alleged improper administration of lands and other assets under the *Indian Act* or other formal agreements.

(13) The dispute involved land that was privately held. The Municipality of Oka wished to exercise its option to purchase the land in order to lease it to the local golf club. The lands were part of the "commons" and also provided access to a Mohawk cemetery in "the Pines."

(14) CDPQ, note 4, p. 62. A contemporary map can be consulted at Appendix 2.

(15) House of Commons Standing Committee on Aboriginal Affairs, *The Summer of 1990*, May 1991, p. 7.

(16) *Ibid.*, p. 11.

(17) The "Agenda and Process for the Negotiations with the Community of Kanesatake" was concluded in March 1991.

(18) Department of Indian Affairs and Northern Development, "Response to the Standing Committee's Recommendations," 4 October 1991.

(19) Post-Oka purchases include 235 hectares (581.27 acres) west of Oka; 74 properties largely surrounded by Kanesatake lands; 1.233 hectares (3.048 acres) in "the Pines," the land most directly connected with the crisis of 1990; and a nursing home property called La Maisonnée.

(20) Kanesatake Orihwa'shon: a Development Corporation.

(21) *Oka (Municipalité)* c. *Simon*, [1999] 2 *Canadian Native Law Reporter* 1. In 1999, the Supreme Court of Canada declined to hear an appeal of this decision.

(22) The broader ongoing negotiation process between Kanesatake and Canada, as currently structured, involves a number of separate "Tables": the Seigneury and Land Base Table, including the Territorial Land Base Working Group whose mandate has been partially fulfilled with the conclusion of the Agreement; the Social Development Table; the Economic Development Table; and the Peacekeeping and Justice Table.

(23) This Act authorized the Commissioner of Crown Lands to set aside and administer areas in Lower Canada, not to exceed 230,000 acres in total, for the use of Indian bands.

(24) Canada does not consider the Agreement to be a comprehensive self-government package under its 1995 policy that recognizes the inherent right of Aboriginal self-government. See *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation*

of Aboriginal Self-Government, Ottawa: Minister of Public Works and Government Services Canada, 1995. The document may be consulted online *via* the website of the Department of Indian Affairs and Northern Development, at http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html.

(25) Non-derogation clauses typically provide that legislation is not to be construed so as to abrogate or derogate from existing Aboriginal or treaty rights, or from the protection provided such rights, under section 35 of the *Constitution Act, 1982*; see, for example, the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27 [R.S.C. 1985, c. S-6.6] (s. 3).

(26) Doncaster Reserve No. 17 is discussed further under the heading "Conditions on Exercise of Jurisdiction."

(27) Under section 20 of the *Indian Act*, the Minister of Indian Affairs issues "certificates of possession" as evidence of First Nation members' right to possess reserve land allotted to them by the community's council. Canada's administration of Kanesatake Mohawk lands has involved the issuance of analogous "Oka letters." That is, the Department's management of interests in those lands is akin to its management of interests in *Indian Act* reserves.

(28) Under sections 83 and 85.1 of the *Indian Act*, band councils governed by the Act are also authorized to make "money" and intoxicant by-laws respectively. Neither the Agreement nor Bill S-24 makes provision for Kanesatake Mohawk laws on these subject matters.

(29) This mechanism is called "incorporation by reference."

(30) Under clause 19(2) (section 24), revisions to the land use plan would be necessary to take account of any lands added to the bill's schedule.

(31) Under clause 8(2), if any eventual Kanesatake law applicable to the Reserve parallels an *Indian Act* provision, the latter does not apply to Kanesatake Mohawks collectively or individually.

(32) The former Village of Oka and the former Parish of Oka were merged in 1999 and are now part of the Municipality of Oka.

(33) See section 29 of the Agreement.

(34) Under the constitutional division of powers, municipalities fall under provincial jurisdiction.

(35) See, for example, subsection 18(2) of the *First Nations Land Management Act*, S.C. 1999, c. 24.