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THE LAND CLAIM DISPUTE AT OKA

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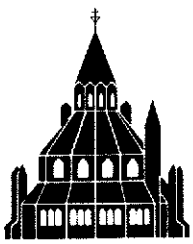

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INTRODUCTION

The historical and contemporary facts leading up to the 1990 crisis at Kanesatake and Oka, Quebec were complex; many were matters of controversy between the parties concerned and many probably remain to be made public. This paper is intended simply to provide a brief overview of facts and issues.

The Mohawk community of Kanesatake is located west of Montreal at Oka, Quebec. It has a population of 1,549 people. The federal government says it has been negotiating a land settlement at Kanesatake since 1987. In July 1989, the federal, provincial, municipal and *Indian Act* band governments reached a framework agreement which anticipated the creation of a reserve under the *Indian Act* in the area of the disputed land. In January 1990, clan mothers appointed a new chief and council, who suspended negotiations. The Municipality of Oka then lifted its moratorium on a golf course expansion on to the land and the Mohawk people of Kanesatake responded by erecting a barricade on a recreational road. After the Municipality of Oka had obtained an injunction for removal of the barricade and called on the *Sûreté du Québec* to enforce it, on 11 July 1990 Quebec police officers arrived at the town. According to media reports, police fired tear gas and stun grenades. A police officer was killed in the ensuing gun fight. The resulting standoff involving the Mohawk Warriors, the Canadian military and the *Sûreté du Québec* lasted 78 days.

HISTORY OF THE DISPUTED LAND AT OKA

In 1717 the King of France granted the Seigneury of the Lac des Deux Montagnes to the Seminary of St. Sulpice. The Legislature of Lower Canada in 1841 passed an Act

confirming the Seminary's proprietary title to the seigneury. From the 18th century until the present time, the Indians of Oka have claimed title to this land. In 1912, in a case decided by the Judicial Committee of the Privy Council (JCPC), the Chief of the Indian band at Oka put forward his band's claim to title. The religious authorities denied this claim, arguing that any original rights that might have existed had been eliminated by government actions beginning with the grants by the King of France in the 18th century. In its ruling, the JCPC stated that the Act of 1841 had rendered the Seminary's title to the land explicit; accordingly the Indians' claim was defeated.

In January 1975, the Mohawks of Kanesatake, Kahnawake and Akwesasne made a joint, comprehensive land claim to the federal government and the Quebec government asserting aboriginal title to lands that included the Seigneury of St. Sulpice. According to a federal land claims policy, a comprehensive land claim must be a viable legal claim demonstrating that the land claimed is not covered by a treaty and that aboriginal title has not been superseded by law; the claim must be buttressed by evidence of continuing use and occupancy by the land since time immemorial. The Mohawks' 1975 claim was rejected by the federal Minister of Indian and Northern Affairs. In the government's view, the Mohawks had not possessed the land since time immemorial and any aboriginal title that may have existed had been extinguished by historical statutes.

In June 1977, the Mohawks submitted a specific land claim. A specific claim deals essentially with claims regarding the administration of an existing treaty, such as unfulfilled treaty provisions or complaints regarding mismanagement of Indian assets including lands. Settlement of specific claims normally entails land grants or cash compensation. The federal government rejected the Mohawks' specific land claim in October 1986, relying on a Department of Justice opinion that there was no legal obligation owed by the federal government to the Mohawks in relation to past dealings with their land.

Before the Senate Standing Committee on Aboriginal Peoples, representatives of the Longhouse of the Mohawk Nation at Kanesatake stated that the decision to submit claims to the federal claims process had been taken by the *Indian Act* band council and not the Longhouse. This is one example of the different approaches of these two elements of the Mohawk community at Kanesatake. There appear to be important areas of agreement, however, such as

the claim to inherent, pre-existing rights to self-government and jurisdiction over land and other critical matters.

THE CURRENT SITUATION

Soon after the events of 11 July 1990, the police began blocking food and medical supplies destined for Mohawk residents of the Kanesatake community and Kahnawake reserve. Following widespread public criticism of this action, the government of Quebec on 26 July ordered police to lift this blockade.

On 23 July 1990, the Deputy Minister of Indian and Northern Affairs, Harry Swain, in a briefing to the media on the history of the disputed land at Oka, described the Mohawk Warriors as a "criminal organization involved in smuggling and the possession of illegal weapons, one that mixes successful criminal enterprise with the devoutly held ideology that they are a separate nation." He said that Warriors had "hijacked the process dealing with this land claim and that the people at Oka are not calling the shots now and...the warriors...are not blessed by the community, by the Longhouse, by the traditional government or by the Iroquois confederacy." The Minister of Indian and Northern Affairs, Tom Siddon, stated in an interview later that day that he did not think the Warrior Society was a criminal organization and that he did not have evidence that they had hijacked the process on the Oka land claim. The next day, however, in response to questioning from the media, Mr. Siddon stated that he would not terminate Mr. Swain's employment and added, "I may not have used the words he used, but the facts speak for themselves." Subsequent media reports have observed that some of the hereditary chiefs have expressed concern that the Mohawk Warrior Society does not represent all of the Mohawk people. One spokesperson stated "there are broader Mohawk issues presented by the Warrior Society which cloud the land dispute at Oka."

On Friday, 27 July 1990, Quebec's Native Affairs Minister offered to withdraw all police from the barricades if the natives agreed to disarm. In addition, the federal government agreed to buy 22 hectares of disputed land and give it to the Mohawks, to negotiate a larger land claim and to provide economic resources for economic and social development.

A Mohawk negotiator, Joe Deom, stated on 28 July, "This land is ours; it has always been ours, so I don't understand this talk about buying land." He has also put forward three pre-conditions that would have to be met before talks between the Mohawks and the government resumed: free access to food and medicine, free access for spiritual leaders and free access for international observers.

Informal talks continued intermittently between the Quebec government and the Mohawks for another week and on 8 August 1990, Prime Minister Brian Mulroney appointed Alan B. Gold, the Chief Justice of the Quebec Superior Court, as mediator to negotiate an agreement on the pre-conditions to full negotiations. On the same day, the Prime Minister also announced that the Canadian Army was available to the Quebec government, if needed.

On 12 August 1990, Alan Gold, with the assistance of the Mohawks and the governments of Quebec and Canada, reached an agreement on the free access of food and medicine, the free movement of Mohawk spiritual leaders and advisers, and the creation of an international team of observers to monitor the events while negotiations took place. Two days later, General John de Chastelain, Chief of the Defence Staff, announced the provincial government had requested that the Army troops move closer to Oka. The subsequent deployment saw more than 2,500 soldiers move into four locations near Oka and Châteauguay. On 16 August 1990, negotiations involving the Mohawks, provincial and federal governments began and a team of international observers took up its position at the barricades.

The next day, the Canadian Armed Forces announced that soldiers would replace provincial police at the barricades in Oka. The move was completed on 20 August 1990 and resulted in a temporary suspension of negotiations as the Mohawk leaders complained that the soldiers had advanced too close to the native blockade.

The talks between Mohawks and the governments resumed on 24 August 1990, and later that day there were reports of substantive progress. Prime Minister Mulroney warned that the government's patience was wearing thin.

The next day, Bernard Roy, the federal negotiator, announced that the talks had reached "a serious impasse over some of the most fundamental issues." These issues involved the dismantling of the barricades, the surrendering of Mohawk weapons, and the Mohawk demand for immunity from criminal prosecution for acts committed after the crisis began.

Prime Minister Brian Mulroney indicated on 26 August 1990 that the Army might clear the barricades unless Indian demands were scaled down. On the issue of immunity from criminal prosecution, the Prime Minister stated: "We are going to apply the laws of Canada in that situation as they apply across the nation. There are going to be no exceptions."

On 28 August 1990, General John de Chastelain announced that the Army would remove the Mohawk barricades at Oka, with the soldiers using force if necessary. Two days later, Quebec Premier Robert Bourassa called off negotiations to remove the Mohawk barricades peacefully and ordered the Army to dismantle them. Early on the morning of 1 September 1990, after the Army had secured the area controlled by the Mohawks and taken control of the main barricade, the Mohawk Warriors were forced to retreat to a small wooded area. The Army dismantled the Oka barricades on Sunday, 2 September, and the following day advanced on the Mohawks, forcing them to retreat to a building housing an alcohol treatment centre.

At a news conference on 9 September 1990, the federal Minister of Justice, Kim Campbell, stated: "The Warriors do not represent legitimate native grievances legitimately advanced. They carry guns, they are resisting enforcement of the law and we will not negotiate with them. We will only discuss the terms of the surrender of their firearms." She later said that Warriors who accepted the offer to provide safe custody, after they had laid down their weapons and surrendered, would have their safety guaranteed.

The following day, the federal Minister of Indian Affairs denounced the continuing presence of what he described as heavily armed and lawless Mohawk Warriors at Oka. The Minister also stated that the silence of aboriginal leaders "has in a way encouraged the Warriors to stay there these many weeks."

The armed standoff at Oka came to an end on 26 September 1990 as the Mohawk Warriors, along with the women and children inside the treatment centre, agreed to lay down their weapons and turn themselves over to army custody. Later that evening, Indian Affairs Minister Tom Siddon announced that he would meet with Mohawks as soon as possible to discuss negotiations of the disputed land.

Approximately 32 Mohawks were convicted in trials of offences committed during the dispute. The final trials ended 3 July 1992 as a further 34 Mohawks were acquitted of all charges by a Quebec Superior Court jury. The Mohawks faced a variety

of charges, including obstructing police officers, assault, participating in a riot and possession of a weapon for a purpose dangerous to the public peace.

OVERVIEW OF ISSUES RELATING TO FEDERAL LAND CLAIMS POLICY

Since the Supreme Court of Canada decision in *Calder* v. *A.G. of British Columbia* [1973] S.C.R. 313, the concept of aboriginal title has been recognized as part of Canadian common law and the federal government has followed a policy of negotiating aboriginal land claims that the federal Department of Justice considers to have a sufficient legal basis for an out-of-court settlement. If a claim is judged "valid" and the Department of Indian Affairs accepts it for negotiation, the same Department has the mandate to negotiate a settlement and to allocate funds for claims research. Since 1973, federal policy has distinguished between "comprehensive claims" (claims based on unextinguished aboriginal title) and "specific claims" (legal claims arising from federal obligations under treaties or from federal management of Indian assets, such as reserve lands and band funds). The current federal policy statement on specific claims is a 1982 document entitled "Outstanding Business." The original policy statement on comprehensive claims policy was entitled "In All Fairness" (1981). A revised policy statement issued in March 1987 modified some areas of the comprehensive claims policy but kept intact the most fundamental aspects of the policy and process.

There are many substantive aspects of both claims policies that have never been accepted by aboriginal people as fair or reasonable; for example, the federal government's insistence that comprehensive claims settlements must lead to a legislative extinguishment of aboriginal title and that self-government arrangements must be negotiated separately from the land claims process (i.e., not as part of a claims settlement).

Criticisms by aboriginal people of the process for submitting and negotiating a settlement of land claims - whether specific or comprehensive - have remained consistent over the years and have received support from a number of authorities. A Committee of the Canadian Bar Association (CBA) conducted an analysis of aboriginal affairs policy that resulted in a document entitled "Aboriginal Rights in Canada: An Agenda for Action." This Report was adopted by the CBA at its 1989 annual meeting. The Committee concluded that a new policy

environment was needed for land claims matters before any constructive and meaningful discussions could be expected. The following excerpt regarding the specific claims process echoes many of the criticisms of the comprehensive claims process:

> Aboriginal leaders have expressed many times their perceptions of numerous conflicts of interest that the Specific Claims Branch may be in. First DIAND, which has been indicted as the cause of many of the claims filed, is asked to assess their "validity." Second, this same department controls access to the process and the funding. Third, the department acts to defend the federal Government in reaching a compensation agreement with the Indian claimants; yet the department also has fiduciary or trust responsibilities to the Indian people to protect "Indians, and Lands reserved for the Indians", under section 91(24) of the Constitution Act, 1867. ("Aboriginal Rights: An Agenda for Action," p. 55)

A number of authorities who have examined federal land claims policy in recent years have focused on issues relating to process, because of possible conflicts of interest and the very slow rate at which both types of claims are settled. Some claims have been under negotiation for more than 15 years (see attached chart of specific and comprehensive claims). Several authorities, and many aboriginal organizations, have recommended that the process for dealing with land claims, especially specific land claims, could be expedited and made more fair if some neutral third party were to deal with certain aspects. The creation of a quasi-judicial body to adjudicate specific land claims has been repeatedly suggested, most recently by the Canadian Bar Association. Comprehensive claims are regarded as less suitable for this kind of adjudication; their successful settlement will likely involve a number of complex matters, such as the type of legislation to be applied in the settlement territory, that are more amenable to political settlement. However, there have been recommendations over the years for creation of an independent body to allocate research and negotiation funds to comprehensive claimant groups. Funding issues also arose in the negotiations with the Dene/Metis of the Northwest Territories.

Proposals for claims commissions and other forms of third-party involvement have been made for many years in Canada. For example, Joint Committees of the Senate and the House of Commons in 1946-48 and 1959-61 recommended the creation of an Indian Claims

Commission. Enabling legislation to establish an Indian Claims Commission, with advisory powers only, was introduced twice, and died on the Order Paper in 1963 and 1965. An Indian Claims Commission was eventually created in 1969; Dr. Lloyd Barber was the sole Commissioner. The Commission, regarded by aboriginal organizations as powerless and consequently ineffective, was eventually dismantled. A review of the Office of Native Claims (the predecessor to the Specific Claims Branch and the Comprehensive Claims Branch of the Department of Indian Affairs) was made by Mr. Gerard La Forest, Q.C. (now a Justice of the Supreme Court of Canada) in 1979. Mr. La Forest commented on the Department's lack of objectivity in the claims process and recommended the establishment of an independent tribunal to deal with these claims.(1)

The Assembly of First Nations has stated that, as a result of frustration with the lack of reform in land claims settlement and other areas, it has implemented a strategy of "direct action" (court actions and non-violent protest action) to bring the government to the negotiating table.(2)

Other commentators have noted the increasing use of civil disobedience tactics by aboriginal people over land claims and related self-government issues. The 1988 CBA Report commented on the question of civil disobedience as follows:

> The public, as well as aboriginal communities, are paying far more attention of late to acts of civil disobedience. This is always the clear option for people who feel disenchanted with the legal system and powerless to change prevailing governmental policies through other means. It is the only way in which aboriginal communities as a whole can participate actively so as to feel that they are affecting their own future. (Aboriginal Rights: An Agenda for Action, p. 23-24)

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(1) Vic Savino, *The "Blackhole" of Specific Claims in Canada Need it Take Another 500 Years?*, Paper presented to the Canadian Bar Association Conference on Native Land Issues, April 1989.

(2) *Drumbeat, Anger and Renewal in Indian Country*, ed., Bryce Richardson, Summerhill Press/The Assembly of First Nations, Toronto, 1989, p. 6-7.

STATUS OF NATIVE LAND CLAIMS
(based on information received from the Department of Indian Affairs and Northern Development)

COMPREHENSIVE CLAIMS (AS OF SEPTEMBER 1992)

Settled Claims	4	
- Cree and Inuit (Quebec)		
- Naskapi (Quebec)		
- Inuvialuit (NWT)		
- Gwich'in Tribal Council (NWT)		
Claims in Negotiation	7	
- Nisga's Tribal Council		
- Labrador Inuit Association		
- Conseil Attikamek Montagnais		
- Tungavik Federation of Nunavut		
- Council for Yukon Indians		
- Innu Nation (formerly Naskapi Montagnais Innu Association)		
- Sahtu Tribal Council		
Accepted Claims	22	
Claim Submissions under Review	9	
Rejected Claim Submissions	4	

SPECIFIC CLAIMS (AS OF SEPTEMBER 1992)

Claims Resolved		
- Settlement Agreements	66	
- Rejected	48	
- Litigation	28	
- Administrative Referral	72	
- Closed File	52	
Total Claims Resolved		266
Claims in Process		
- Under Specific Claims Review	354	
- Under Negotiation	62	
Total Claims in Process		416
Total Band Claims Submitted to Date		682