*Algonquin Nation Secretariat*

*Timiskaming First Nation*
*24 Algonquin - Box 367*
*Notre Dame du Nord (Quebec) J0Z 3B0*
*Tel.: (819) 723-2019 Fax: (819) 723-2345*
*Email: anpss@sympatico.ca*

# CLAIMS THAT DON'T FIT:

# AN EXAMPLE FROM THE UPPER OTTAWA VALLEY.

**September 20, 2000**

# Claims that don't fit:

# An example from the Upper Ottawa Valley.

## Background.

One panel at this year's conference has already discussed the need to reform existing federal claims policies, at minimum to bring them into line with domestic case law and international human rights standards. There is also the reality that existing claims policies do not match the many situations where First Nations find that they have to defend their rights.

Existing policies are very constrained in terms of the kinds of disputes that are "eligible", and in terms of the processes that they offer for resolution. This poses challenges for First Nations who may be confronted with immediate and potentially long-lasting infringements of their rights arising from actions by other governments or third parties. It also poses special challenges for research units or TARR centres when they are called upon to provide assistance to their member First Nations on issues which fall outside of the narrow parameters of "claims policy".

These situations highlight the fossilized nature of existing policy, and call for creative approaches to the defence of Aboriginal and treaty rights. It also raises legitimate questions about the mandate of TARR Centres and Claims Research Units, and the definition of what constitutes "progress" for the purposes of reporting.

## Infringement & Justification.

Although there has been much debate about the meaning of such Supreme Court of Canada judgements as *Delgamuukw*, *Sparrow*, and *Marshall*, this much can be said with confidence: when a section 35 right is infringed, or stands to be infringed, the Crown must justify the infringement. First Nations are supposed to have a voice in how their lands and resources are used. This involves a series of steps laid out by the Court, which include substantive consultation (sometimes consent), and a serious consideration of the rights and interests of the affected First Nation, leading to a process of negotiation aimed at reconciling rights and interests.

In other words, when decisions are made, there is supposed to be a place in the process which allows for a full and fair consideration of the potential infringements and mitigative measures.

Unfortunately, in the wake of the Court decisions referred to, the Crown has not taken any

steps to seriously respond to this duty. As a result, First Nations are increasingly forced to use other avenues to have their rights considered. Although these other avenues may lie outside of existing claims policy, First Nations must still rely on historical research to document the extent of their rights and to provide evidence regarding potential infringements and approaches to reconciliation.

**Adams Mine.**

The Timiskaming First Nation has had this experience with respect to the Adams Mine, located near Kirkland Lake, Ontario. The Adams Mine was an open pit iron ore operation which was decommissioned in the 1980's. There are a number of huge pits, the deepest of which is about 600 feet (300 feet below the water table).

Since the early 1990's, Notre Development has been pushing to use one of the pits as a dump for solid waste. They propose to haul in about 1.3 million tonnes of waste per year by rail, every year for 20 years. To "prevent" groundwater contamination, they want to pump 300 million litres of clean groundwater through the pits annually, which would then de-toxify in the old tailings ponds. This water usage will continue for the entire "active" toxic life of the dump, which Notre Development estimates to be 120 -180 years. By their own admission, the site will require active monitoring for another 800 years after that.

**Algonquin Aboriginal title.**

The site lies within the traditional territory of the Timiskaming First Nation, and is subject to unextinguished Algonquin Aboriginal title. As well, the site is in the same watershed as the Timiskaming Reserve. Runoff from the mine site travels directly to the head of Lake Timiskaming, adjacent to the reserve. This is also the source of the community's drinking water. (See map)

Needless to say, the view of the Timiskaming First Nation was that this proposal represented a significant long term infringement of their Aboriginal title. It also represented a major health and safety threat. They began to make interventions to ensure that their rights and interests were adequately considered. What they found was that other governments were not prepared to consider these rights and interests, and there were few, if any processes available for a fair hearing.

**Province of Ontario.**

Beginning in 1995, the Timiskaming First Nation began attempts at having their rights and interests considered. Some funding was provided by the Environment Directorate at Indian Affairs to hire technical consultants to assess the proponent's environmental assessment, and to prepare interventions for a provincial environmental assessment.

However, the Mike Harris government in Ontario wanted to fast-track the project, so they gave a very narrow mandate to the provincial Environmental Assessment panel: they could only consider technical issues related to the proposed hydraulic containment mechanism. Two major issues which they were not allowed to consider were downstream impacts and Aboriginal interests. The technical work which had been prepared by Timiskaming for the provincial EA was never used, since it was deemed to be outside of the review board's mandate.

Outside of the EA process, the government of Ontario took no steps to consult the Timiskaming First Nation or consider their interests. In fact, Ontario tried to delegate this duty to the proponent, by requiring Notre Development to "consult" with Timiskaming as one of the conditions of approval for the project. At the time, the Timiskaming First Nation challenged the provincial Crown's ability to transfer its duty to a third party, but these complaints were dismissed. As it turned out, the proponent did not even take steps to consult with the Timiskaming First Nation. The last formal contact between the proponent and the Band was in the fall of 1997.

**Metro Toronto.**

From the beginning, Notre Development had targeted the City of Toronto as its major client: faced with the imminent closure of the Keele Valley dump, Metro was looking for an alternate site for waste disposal. Timiskaming took steps to intervene in the various public consultation processes at the Metro level, beginning in 1996. Issues of health and safety, and of Aboriginal rights and title were raised, but to no avail. Metro refused to consider these things, and instead, put Notre's proposal at the top of the short list. Toronto is to be making a final decision on the contract by October 4, 2000.

**Federal Government.**

Faced with a consistent refusal by Ontario and Toronto to consider their interests, the Timiskaming First Nation turned to the federal government.

As mentioned already, this situation does not fit into the narrow confines of existing claims policy. As such, the Department of Indian Affairs - the lead fiduciary - could not provide a forum in which the interests of the Band could be considered.

Attention then focussed on the federal Minister of the Environment. We reviewed the Federal Environmental Assessment Act, and decided to petition for a federal environmental assessment of the project.

Section 5 of the Act lays out a number of criteria which make a federal EA compulsory. An initial review of the project by the Canadian Environmental Assessment Agency had found that there was nothing to trigger a compulsory federal EA.

However, other portions of the Act allow the Minister to make a decision to convene an EA panel. In particular, we focussed on s. 46 and s.48.

Section 46 says that the Minister of the Environment can call for a federal EA if "the Minister is of the opinion that the project may cause significant adverse environmental effects in another province". As you can see from the map, the Timiskaming reserve lies just east of the Ontario-Quebec border, in Quebec. The provincial border cuts right down the centre of Lake Timiskaming. Since the provincial EA had not considered downstream impacts, there was no opportunity to address inter-provincial effects.

Section 48 deals with federal lands, including lands in which Indians have an interest. The Minister can require an assessment if he is of the opinion that the project may cause significant adverse environmental effects on reserve lands, federal lands, or lands in which Indians have interests.

We will review each in turn:

> A) lands in a reserve that is set apart for the use and benefit of a band and that is subject to the *Indian Act*,

The Timiskaming reserve is downstream from the Adams Mine site, and the community takes its drinking water from the same watershed. We provided evidence regarding the establishment of the reserve, current boundaries, and sources of drinking water.

> B) federal lands other than those mentioned in paragraph (a)

As already mentioned, the Adams Mine site lies within the traditional territory of the Timiskaming First Nation. These lands were reserved for their exclusive use pursuant to a series of treaties between 1760 and 1764, and further confirmed by the Royal Proclamation of 1763. Based on the Supreme Court's findings in *Delgamuukw*, the lands in question are "lands reserved for Indians", and remain subject to federal authority pursuant to s.91(24) of the *Constitution Act, 1867*.

We provided evidence on the application of the Royal Proclamation and the extent of the traditional territory, as well as an analysis of the relevant portions of *Delgamuukw*.

> C) Lands in respect of which Indians have interests

Here we focussed on Aboriginal title and rights. We provided evidence on the Band's traditional territory. We also provided evidence on continuity of occupation through time. Genealogical work carried out by the research unit was able to demonstrate that ancestors of the current membership were using and occupying the same territory in 1760. We also

provided evidence related to current harvesting patterns and land use, based on land use studies that were carried out in 1996/97.

The Canadian Environmental Assessment Agency is still carrying out its review of the petition, so we do not yet know if the federal government is prepared to provide a forum in which the rights and interests of the Timiskaming First Nation can be given fair consideration. One of the problems with both s 46 and s 48 of the Act is that ultimately it is up to the Minister to exercise his discretion in calling for a federal EA: it's a political call.

We trust that the Minister will do the right thing and fulfil his fiduciary duties to the Timiskaming First Nation. If the Minister declines to proceed with a federal environmental assessment, the Timiskaming First Nation will pursue the defence of its rights by other means.

**Role of the Research Unit.**

The Algonquin Nation Secretariat has been conducting research into both Aboriginal title and Specific Claims since 1996. We relied on the results of the research to date to prepare the summary of evidence for the federal petition. This included data on the reserve itself, oral history, evidence on Aboriginal title, genealogy, and current use mapping.

**Conclusions.**

Regardless of the direction provided by the Courts, Canadian governments have not taken steps to ensure that First Nation rights and interests are taken into account in cases of potential or actual infringement. Recent court cases clearly place the onus on the Crown to justify infringements if existing Aboriginal or treaty interests stand to be negatively impacted. First Nations, in the defence of their rights, fully expect the Crown to fulfil this responsibility. This includes the duty to provide a mechanism through which potential infringements can be subjected to the justification tests, and appropriate remedies found.

The federal government, beset by policy paralysis, has declined to introduce a coherent or just response to these developments. As a result, First Nations are left to find their own means of having their rights and interests considered.

For the Timiskaming First Nation, in the case of the Adams Mine, this involved the submission of a petition to the federal Minister of the Environment. The Band relied on research carried out by the ANS as the basis for the evidence which was provided to the Minister.

As mentioned above, this raises legitimate questions about the mandate of TARR Centres and claims research units, and also about what constitutes "progress" for reporting purposes. When TARR Centres were first established, their names said it all: Treaty and

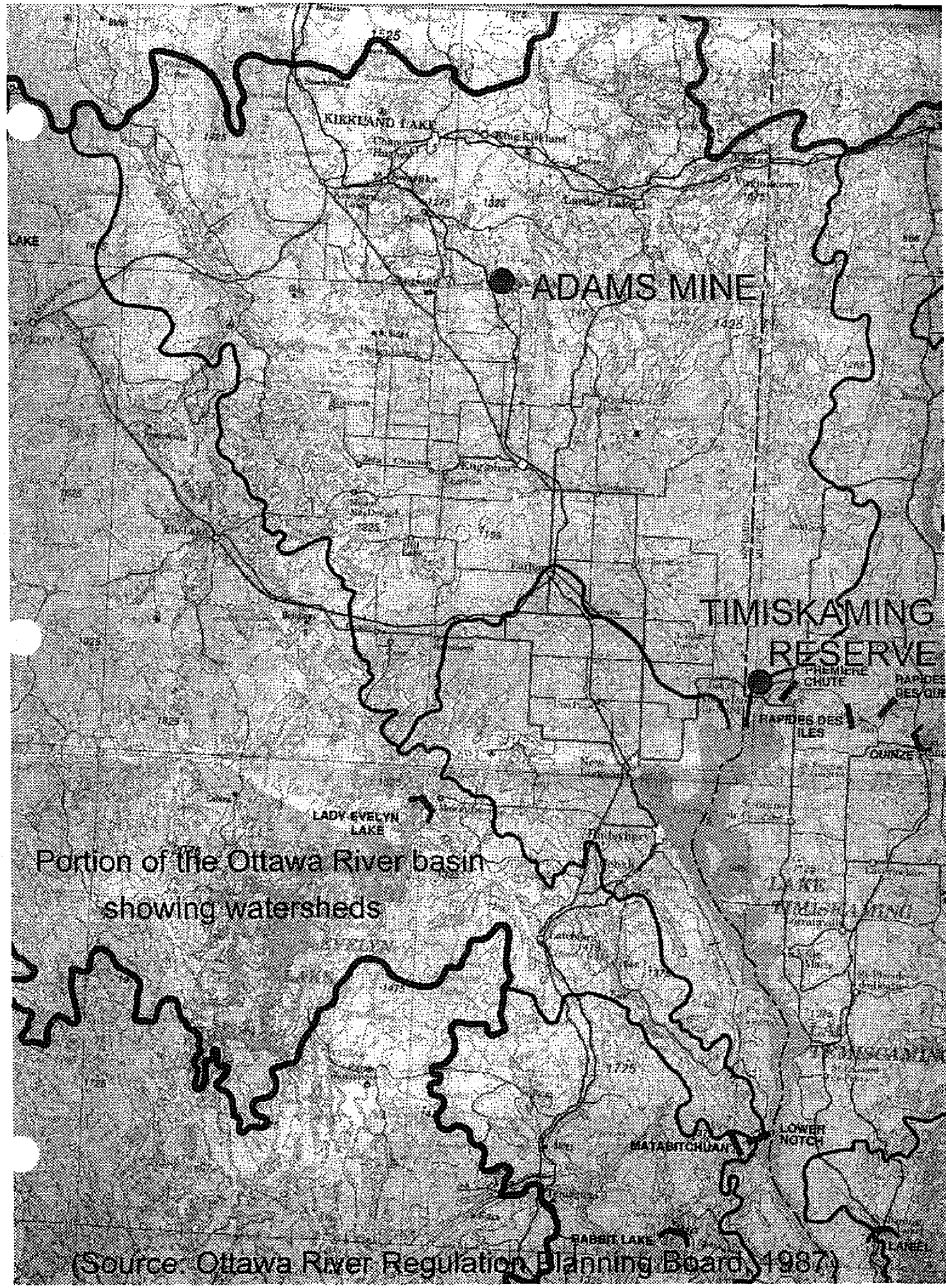
Aboriginal Rights Research Centre. Not "Specific Claims Research Centre", and not "Comprehensive Claims Research Centre". This reflected the fact that the research itself might be required in any number of forums, not just claims. Somehow, in the interim, this was turned around to focus on the development of claims pursuant to either the Specific or Comprehensive Claims policy.

Meanwhile the courts have widened the definition of lawful obligation and of what constitutes a claim, but there has been no corresponding revision of federal policy. If Canada is not prepared to change its land claims policies to conform to the state of the law, then First Nations will continue to be faced with the need to prepare historical and related evidence for other forums.

The Timiskaming First Nation is involved in a conflict over the proposal to turn the Adams Mine into a dump, one which flows from constitutionally protected rights. This involves claims, although not as defined in existing federal policy. A federal EA may serve to resolve this conflict. As such, our land claims research is assisting in resolution of that conflict, and should be treated as legitimate "product".

If Canada is not prepared to adjust its land claims policies to conform to the direction of the courts, then at the very least it should be prepared to incorporate flexibility to enable TARR Centres and research units to assist First Nations in defending their rights in other forums.

September 20, 2000




Portion of the Ottawa River basin showing watersheds

(Source: Ottawa River Regulation Planning Board, 1987)

# TIMISKAMING FIRST NATION

NOTRE-DAME-DU-NORD
18 ALGONQUIN AVE.
P.O. BOX 336
QUEBEC J0Z 3B0

TEL: (819) 723-2335
FAX: (819) 723-2353
e-mail: timiskaming@sympatico.ca


**PETITION TO FEDERAL MINISTER OF THE ENVIRONMENT**

**REQUESTING A FEDERAL ENVIRONMENTAL ASSESSMENT**

**OF RAILCYCLE NORTH'S PROPOSAL FOR THE ADAMS MINE SITE.**

This petition is submitted on behalf of the Timiskaming First Nation, part of the Algonquin nation and an Indian Band recognized by the *Indian Act*. The objective of this petition is to request the federal Minister of the Environment to convene a review panel in accordance with section 29 of the *Canadian Environmental Assessment Act*.

This petition is being submitted pursuant to sections 46 and 48 of the *Environmental Assessment Act*, specifically:

**Trans-provincial impacts:**

> 46. (1) Where no power, duty or function referred to in section 5 or conferred by or under any other Act of parliament or regulation is to be exercised or performed by a federal authority in relation to a project that is to be carried out in a province and the Minister is of the opinion that the project may cause significant adverse environmental effects in another province, the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project in that other province. [...]
>
> 46. (3) The Minister shall consider whether to make a reference pursuant to subsection (1) [...]
>
> > (B) on the receipt of a petition that is
> >
> > (i) signed by one or more persons each of whom has an interest in lands on which the project may cause significant adverse environmental effects, and
> >
> > (ii) accompanied by a concise statement of the evidence supporting the contention of the petitioners that the project may cause significant adverse environmental effects in a province other than the one in which it is to be carried out.

**Federal lands, and lands in which Indians have interests, including reserve land:**

> 48. (1) Where no power, duty or function referred to in section 5 or conferred by or under any other Act of parliament or regulation is to be exercised or performed by a federal authority in relation to a project that is to be carried out in Canada and the Minister is of the opinion that the project may cause significant adverse environmental effects on
>
> > (A) lands in a reserve that is set apart for the use and benefit of a band and that is subject to the *Indian Act*,
> >
> > (B) federal lands other than those mentioned in paragraph (a) [...]
> >
> > (E) lands in respect of which Indians have interests,
>
> The Minister may refer the project to a mediator or review panel in accordance with section 29 for an assessment of the environmental effects on those lands. [...]

The legislation describes the steps required for the Minister to consider a federal Environmental Assessment under s. 48:

> 48. (4) The Minister shall consider whether to make a reference pursuant to subsection (1) or (2) [...]
>
> > (B) on receipt of a petition that is
> >
> > (i) signed by one or more persons each of whom has an interest in lands on which the project may cause significant environmental effects, and
> >
> > (ii) accompanied by a concise statement of the evidence supporting the contention of the petitioner that the project may cause significant adverse environmental effects in respect of which a reference may be made pursuant to subsection (1) or (2).

On behalf of the Timiskaming First Nation, we contend that Railcycle North's proposal to use to old Adams Mine site as a dump for solid waste may cause significant and adverse environmental impacts

- in lands and waters outside of Ontario, within the province of Quebec, where we reside;
- in the Timiskaming Indian Reserve No. 19 and the waters surrounding it;
- in federal lands, specifically the Fort Temiscamingue National Historic Site, and those lands covered by the Royal Proclamation of 1763 which fall under s. 91(24) of the *Constitution Act, 1867*;
- in the watershed where the Adams Mine site is located, particularly the lands and waters drained by the Misema River and the Blanche River, which form part of the Timiskaming

First Nation's traditional territory, and which is subject to unextinguished Algonquin Aboriginal title; and

- in the fish, wildlife and plants of the watershed, which we continue to harvest, and which are subject to Algonquin Aboriginal rights, including Aboriginal title.

We are not satisfied that the environmental reviews carried out by the proponent have adequately addressed health and safety issues, or our rights and interests.

Neither are we satisfied that the government of Ontario's Environmental Assessment process properly considered our rights and interests, or those of downstream residents generally. In fact, the government of Ontario has done nothing to address the justification tests that must be met in cases where Aboriginal interests stand to be infringed.

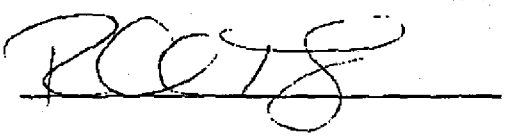
We have always had reservations about the way in which this project had been handled, but after this year's tragedy at Walkerton, we have even more concerns. We need to be assured that our health and safety, and out constitutionally protected rights, are not being put at risk.

Our ancestors have lived in this same territory for over 6,000 years. Railcycle North's proposal will pose a potential environmental threat for upwards of 1,000 years. Today's generation has a duty to protect the lands and waters for future generations, and this requires that a high standard of care be taken in assessing projects of such magnitude and with such a long time horizon.

The Federal Crown has a duty to act in the public interest when projects may have significant environmental consequences across provincial boundaries. At the same time, the Federal Crown has a special duty to protect our interests and consider our rights. We are respectfully requesting the Minister of the Environment to fulfil these duties, on our behalf and on behalf of all residents of the watershed, in Ontario and in Quebec.

Attached please find a statement of the evidence supporting our contention, as well as relevant maps.

Dated 31 August 2000, at the Timiskaming Reserve, on behalf of the Timiskaming First Nation:



Vice Chief Rheal Thivierge, Timiskaming First Nation

## *GATHERING STRENGTH — PARTNERSHIPS, PROMISES, & PRACTICES — SPECIFIC CLAIMS IN THE MARITIMES*

Executive Summary

In *Outstanding Business*, the government defined specific claims as "those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties".[1] Eighteen years later, the government has restated the policy as:

> Specific claims relate to the history of Canada's relations with Aboriginal peoples, also known as Indians or First Nations. For the most part, specific claims deal with First Nations land or assets.[2]

The criteria for recognition specific claim is narrowly defined as a breach of a lawful obligation on the part of Indian Affairs which occurs in one of the following circumstances:

- the non-fulfillment of a treaty or another agreement between Indians and the Crown
- the breach of an *Indian Act* or other legislative responsibility
- the breach of an obligation arising out of government administration of Indian funds or assets
- an illegal surrender of Indian land by government.[3]

---

[1] DIAND, *Outstanding Business A Native Claims Policy*, Ottawa: Supply & Services, 1982, p.7.

[2] http://www.inac.gc.ca/pr/info/info121_e.html

[3] *Ibid.*

*Outstanding Business* adds a further two types of specific claim which the government will consider, a failure to provide compensation for reserve land taken or damaged, and fraud in connection with the acquisition or disposition of Indian reserve land.[4]

But what about other circumstances? In the Maritimes we have many potential claims and research needs that are covered neither by the Comprehensive Claim nor the Specific Claims process.

The Hon. Jane Stewart, when introducing "Gathering Strength — Canada's Aboriginal Action Plan", mentioned the need for new partnerships between the Aboriginal peoples of Canada and the government of Canada five times. She also stated "we must also continue to address Aboriginal land claims in a fair and equitable way".[5] We respectfully submit that a new research partnership, of the type recommended by the "Review of Departmental Research Activities Getting Value from Research", be instituted between the First Nations of Atlantic Canada and the federal government to provide both flexibility and continuity in funding for the Mi'kmaq and Maliseet Nations of the Maritimes.

In the "Statement of Renewal" in *Gathering Strength* the government stated:

> The government will work with Aboriginal people to help achieve the objective of Strengthening Aboriginal Governance, building on treaty relationships whre appropriate. This means developing practical arrangements accountable; that have the strength to build opportunity and self-reliance; and that can work in a co-ordinated manner with other governments. It also means extending co-management arrangements, negotiating First Nations

[4] *Outstanding Business*, p.20.

[5] http://www.inac.gc.ca/nr/spch/1998/98j7_e.html

acquisition of land and resources through claims processes, and taking steps to improve the claims process.[6]

The Mi'kmaq and Maliseet Nations concur wholeheartedly that steps are necessary to improve the claims process. The First Nations of the Maritimes have been in contact with Europeans for over 500 years. Colonists and Settlers have been among them, on their land, continuously since 1604. An Indian Affairs portfolio and Indian Commissioners have (sporadically) "looked after" the Mi'kmaq and Maliseet for 300 years. Both the historic claims and continuing research needs of the Mi'kmaq and Maliseet Nations do not fit neatly into the inclusive lists of specific claims, nor are they appropriately within the comprehensive claims process. The length of contact, the chaotic state of much of the archival material, and the nature of the relationship between the First Nations of the Maritimes and the government has occasioned many circumstances which belie the rigid categorizations of the claims processes.

Historical research is not always easily compartmentalized into an entry on a time sheet. In the Maritimes, but for the notable exception of L.F.S. Upton who carried his work through to 1867, most research on the Mi'kmaq and Maliseet stopped at the fall of Louisbourg in 1759. In order to meet our research needs, in order to prepare and file claims, researchers often need to fill in the background to adequately prepare a claim.

I. Public and Private Lands, Claims and Development

The Specific Claims process does not easily accommodate the realities of life in Nova Scotia. For example, in *Gathering Strength*, the government affirmed its commitment to building strong, economically independent Aboriginal communities. Specifically, there is a guarantee that the government will seek to transfer more lands and more natural resources to First Nations, to assist them in providing for their own futures. In Nova Scotia, this poses a problem: only 28% of the province remains as provincial Crown land. The only large blocs of federal Crown land are administered

[6] http://www.inac.gc.ca/gs/chg_e.html

either by the Canadian Parks Service (Kejimkujik and Cape Breton Highlands) or the Dept. of National Defence. Therefore, much of the development in NS happens on private land, or involves both private and public lands.

Under federal and provincial environmental legislation, most large economic projects require that the proponent complete the environmental assessment process before proceeding with a proposed development. With the current funding and research regime, it is often impossible for affected Bands to fully participate in the assessment process. The Mi'kmaq often continue to use private as well as public lands for traditional purposes. There are burial sites, sacred sites, and traditional use areas on private as well as public land. In the past few years in Nova Scotia alone, there has been a proposal to develop a gravel pit on Kelly's Mountain, near the caves that are a sacred site for the Mi'kmaq. In another case, a gypsum mine was proposed, on private land near two reserves, which would have affected traditional hunting territories.

In order to effectively participate in, and have a voice in, environmental assessments of the use of private as well as public lands, it is essential that the research organizations of the Mi'kmaq have the flexibility and authority to work with the various First Nations communities in the Maritimes to prepare the best possible submissions, to ensure that sacred sites, burial grounds, and harvesting areas are adequately protected.

II. Research and Government Administration of Crown Assets

Over the last 4 years, the Government of Nova Scotia, through its Ministry of Natural Resources has been developing an Integrated Resource Management plan. This plan, covering all provincial Crown land in Nova Scotia, will set the parameters for all uses of all Crown lands — including industrial uses, forestry, hunting, fishing, and wilderness areas. The Department of Natural Resources is currently soliciting public input and information about all uses on Crown lands to ensure those uses are considered when establishing the use policy for the blocs of Crown land in the province.

At the moment, there is no effective mechanism for co-management of Crown

lands in the Nova Scotia. However, in order to preserve Mi'kmaq use of Crown lands, it is essential that an effective and substantive submission be made to the government detailing the various Mi'kmaq uses of Crown land, whether for hunting, trapping, collecting medicinal plants and sweetgrass, or access to fishing areas. This is important for the ultimate disposition of a successful Specific Claim. It will be of little benefit to the Mi'kmaq if, when negotiating a settlement for a Specific Claim, the resources desired by the Mi'kmaq are gone because a traditional hunting territory is now part of a strip mine.

In addition, federal government policy requires that First Nations be consulted before the disposal of any federal Crown land. In the past two years, we have received numerous requests for information about potential claims on lands and waterways under federal jurisdiction. (Many of these requests were forwarded to the Treaty Centre from DIA's Regional Office in Amherst.) Under the current funding and administrative regime, it is impossible for the Treaty Centre to respond fully to these requests. Often they involve areas which are not currently part of a Specific Claim, but may indeed be part of an area subject to a claim.

In order to respond effectively to both federal and provincial policy initiatives, greater flexibility in the claims research funding structure is required.

III. Special and non-Specific Claims specific claims

One of the most troubling areas for Specific Claims researchers in the Maritimes is what may be termed our "Special Claims". Although these claims do not appear to meet the requirements to be a Specific Claim, they are of immense interest and concern to the Mi'kmaq Nation in Nova Scotia. One such claim, the Shubenacadie Mass House site, is now in the "Special Claims" stream, but only after intense public pressure to deal with the matter was applied to the government.

One of the most crucial potential claims in Nova Scotia focusses on the Centralization of the 1940s, yet once again DIA rejected its inclusion in our proposed workplan for the upcoming fiscal year. The Mi'kmaq Nation fails to see how its claims

in regard to Centralization differ substantively from the successful Inuit claims for compensation for their forcible removal from their homes.

Summary

These issues and claims may not be important to the Department, but they are important to the Mi'kmaq Nation. If the relationship is to be truly and effectively strengthened, then the Research Organizations of the Maritimes must have the flexibility to research and present the results of that research to the Department on issues of importance to the Mi'kmaq and Maliseet Nations. We urge that the definitions of "claim" and "acceptable research" be expanded to allow the Research Organizations of the Maritimes the flexibility to properly serve their members, in keeping with the government's commitments to strengthen its partnership with Aboriginal peoples and to improve the claims process.