

FEDERAL REPLY TO HAUDENOSAUNEE SIX NATIONS'
WELLAND CANAL RESPONSE / COUNTER PROPOSAL
Presented by Ronald L. Doering

Introduction

Firstly, I would like to thank Haudenosaunee Six Nations (HSN) and the Province of Ontario for agreeing to meet here today. It has now been some time since our last meeting, and it is good to be back at the table. In August, we received the response of HSN to Canada's offer to resolve the Welland Canal flooding claim, as well as the HSN counter proposal (both dated August 29, 2008, and referred to collectively as the "HSN response").

Since that time, Canada has carefully considered HSN's positions, and now Minister Strahl has asked that I come to the table to present you with Canada's reply.

We will take this opportunity to restate the financial basis of Canada's offer, for the benefit of the Six Nations community, as well as for the broader public beyond Six Nations. We will also provide Canada's reaction to the HSN counter proposal, including the principles for future negotiations that have been advanced by HSN.

General Comments

Taken as a whole, the HSN response suggests that the parties remain far apart, particularly in respect of the settlement of the Welland Canal claim. This is disappointing because we had all agreed to concentrate our efforts of the last year on Welland Canal flooding as one of the most straightforward claims before us. While we were encouraged by your initial reaction upon receiving Canada's offer, the HSN official response now suggests that there remains significant work before us, both in terms of resolving land claims and in pursuing a stronger relationship over the longer term.

Canada remains committed to this negotiation process. That said, common ground will need to be found if we are to make progress for the benefit of all concerned, and seize the opportunities this process presents. This will require creativity, flexibility, compromise, and good will on all sides.

Canada's Offer on Welland Canal Flooding

Compensation principles

The HSN response seems to suggest that Canada is unwilling to explain the basis of its offer to settle the Welland Canal flooding claim. You appear to be looking for Canada to reveal the precise mathematical formula used to reach the

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amount of \$26 million. As we have explained to you, both in the course of negotiations and in our written presentation, "Understanding the Welland Canal Flooding Offer: Why it is Fair and Reasonable", dated April 16, 2008, we did not arrive at the offer by way of a numerical formula. We relied on Canadian law, which establishes that *equitable compensation* is to be assessed by considering a wide range of factors, and not simply by applying a mathematical formula and arriving at a number. This is not to say that various calculations did not inform our assessment: they did, and we have shared with you some of what those calculations involved.

We understand that HSN has chosen to base your position on the assumption that every penny of compensation would have been invested and re-invested, from 1830 to the present day. You appear to have relied upon economic theory, as well as a selective application of Canadian legal principles for assessing compensation in commercial cases, rather than upon the principles the courts have used to establish compensation in Aboriginal historical claims. We believe that your approach leads to an implausible and inflated value, and is not a practical basis for settlement.

We take a very different view of how equitable compensation should be assessed, relying primarily on recent case law such as the Ontario Court of Appeal decision in *Whitefish*, which provides that equitable compensation is to be assessed based on available evidence as to how an asset would likely have been used, and the position a party would likely have been in but for its loss. *Whitefish* states clearly that extreme conclusions – the idea, for example, that the entire time period will always attract full compound interest – are "unsupportable". In the case of the Welland Canal flooding claim, we were able to rely upon information of actual account patterns and current and past land values, together with other historical and economic contextual information, to help us arrive at the figure of \$26 million.

Loss of use

You are seeking compensation for the loss of use of the lands that were flooded, both for the past and into the future. Canada's offer of \$26 million provides compensation for the loss of use and value of the lands, both for the past and the future.

If, as we have previously discussed, the value of the land and amount of compensation that should have been paid by the Welland Canal Company was between \$8,034.41 and \$13,630.65 (circa 1830), then Canada has effectively offered between \$25,986,369.35 and \$25,991,965.59 for past loss of use. Ongoing future benefits and compensation for the loss of use of the original asset would depend upon the way in which compensation moneys were invested or used into the future, and would therefore be virtually unlimited. We continue to believe that the "perpetual care and maintenance" model discussed this spring

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could be the vehicle for addressing your interest of "future use" of lands or benefits.

Certainty in exchange for settlement

It is Canada's view that the flooded lands were ultimately surrendered during the course of events in 1831, 1834 and 1844. We recognize, however, that the HSN likely do not accept the validity of these surrenders, nor would you agree to a re-surrender or extinguishment of the rights you believe you still have in the flooded lands. As a compromise, and in an effort to be respectful of your views on surrender and extinguishment, we sought a promise that Six Nations would not assert any rights it may have in the flooded lands in exchange for the benefits outlined in a settlement agreement. On this approach, any rights Six Nations may have in the flooded lands would theoretically remain intact, although Six Nations would undertake not to exercise the rights (whatever they might be), and that undertaking would be legally enforceable.

It seems unreasonable to expect the Crown to fully compensate for the flooding and loss of use and value of the land without receiving, in exchange, the certainty that the very same lands will not then be subject to further claims or occupied at will by Six Nations individuals. We note in the HSN response that you "can provide certainty in the context of ...on-going discussions on a case-by-case basis". This is a matter we will need to explore further if we are to reach an agreement on any of HSN's historical claims.

The Crown HSN Relationship

Although our focus to date in negotiations has been on the resolution of land-related claims, we understand that a core concern for HSN is the nature of the Six Nations/Crown relationship. This issue is also of great concern to Canada, as demonstrated by our ongoing commitment to continue negotiating with HSN through the tripartite process that we have established. We hope not only to achieve a resolution of HSN's historical claims, but also to build upon and clarify our relationship into the future.

There are, undoubtedly, many issues that could be explored under the "relationship" heading, including our respective views on the history of that relationship and our ideas about how that relationship can be strengthened and modernized into the future. Our experience in addressing such profound questions suggests that it is difficult, if not impossible, to reach agreement on a common historical narrative, particularly where the parties bring such different views to the table. Instead, we believe that our time would be most usefully spent addressing the shape and content of a Six Nations/Crown relationship that builds towards the future, while respecting the past.

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In addition to addressing the pressing issue of HSN's historical claims, our discussions could include such matters as land tenure and management, HSN jurisdiction and authority, and governance. New arrangements would not have to be definitive of the historical and legal relationship among the parties, but could be negotiated on an incremental basis, responsive to the evolving aspirations and needs of Six Nations. We would be pleased to share with you some examples of settlement agreements concluded across Canada, while respecting the unique circumstances of Six Nations.

It would be possible to consider a wide spectrum of arrangements that recognize and respect HSN jurisdiction over its lands and its people. The involvement of Ontario as an equal partner in such discussions would be indispensable to the development of arrangements that respond to the unique aspirations and realities of Six Nations.

Like any set of negotiations, however, jurisdiction/governance/land negotiations would have to be framed by certain agreed upon principles.

Future Negotiations

We offer the following responses to the specific principles you suggest should form the basis of future negotiations (at page two of your counter proposal):

- (i) The introduction of legislation in Parliament in order to ratify and give effect to a negotiated settlement amongst the parties is something that can be considered. Whether the Government of Canada would do so depends upon a number of factors, including the nature of the settlement reached. However, legislation to recognize an ongoing negotiations process, already in existence for HSN, would be unnecessary.
- (ii) As we have previously indicated, both at the table and in writing, Specific or Comprehensive Claim policies do not limit our negotiations, and we are prepared to consider other policies on a case-by-case basis should they arise. Despite this flexibility, we cannot go so far as to say that our negotiations will never be governed by any federal policy or "law applying to Indians". The suggestion is too broad, seeks to bind future administrations, and may not in any event be within our power (some laws, for example, may be constitutional in nature or otherwise bind the Crown).
- (iii) As mentioned earlier, Canada's requirement for legal certainty language within a settlement agreement would not require HSN to agree, in all cases, that it no longer has any interests in lands that are the subject of settled claims. The precise technique for achieving

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certainty might vary depending upon the nature and scope of the claim in question, but at a minimum, it would require an acceptable degree of clarity as to the future interests in, and use of, the lands in question.

- (iv) It is possible to explore arrangements that recognize Haudenosaunee Six Nations jurisdiction over its lands and its people. However, we could not agree to unrestricted use of these lands such that they would be completely immune, in all circumstances, from any federal or provincial laws.
- (v) We do not have any objection to the structuring of financial compensation as "perpetual care and maintenance", or to the prohibition of *per capita* distributions.
- (vi) Settlement compensation would not limit Six Nations' eligibility to participate in and benefit from federal programs for Aboriginal people in accordance with general criteria established from time to time.
- (vii) We are not prepared at this time to agree to arbitration. Presently, a judicial resolution to all or some claims and issues is an alternative to negotiation that Canada would be prepared to discuss.
- (viii) We agree that settlements need not be limited to lump sum payments and may, as negotiated, include the acquisition of lands.

In conclusion, though we are disappointed to find ourselves so far apart on the Welland Canal claim at this stage in our deliberations, we trust that you will review this response carefully, and we remain hopeful that you will find some basis for moving forward.

Canada presented what it believed in good faith to be a fair offer of compensation for the Welland Canal flooding, and one which represented a real opportunity for resolving one of your many historical claims, thereby creating confidence in, and momentum for this negotiation process. We had also hoped through this offer to begin to develop a closer relationship amongst the HSN, Ontario and Canada, and begin the process of reconciliation for the benefit of present and future generations of the HSN, Ontarians and indeed all Canadians. Let us ensure this historic opportunity does not slip away.

Thank you.