



August 2012

The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?

Holly L. Gardner

University of Waterloo, hologardner@gmail.com

Stephen R. J. Tsuji

University of Waterloo, stephen.tsuji@utoronto.ca

Daniel D. McCarthy

University of Waterloo, dmccarthy@uwaterloo.ca

Graham S. Whitelaw

Queen's University, graham.whitelaw@queensu.ca

Leonard J.S. Tsuji

University of Waterloo, ljsuji@uwaterloo.ca

Recommended Citation

Gardner, H. L. , Tsuji, S. R. , McCarthy, D. D. , Whitelaw, G. S. , Tsuji, L. J. (2012). The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?. *The International Indigenous Policy Journal*, 3(2) .

DOI: 10.18584/iipj.2012.3.2.7

The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?

Abstract

In northern Ontario, Canada, there have been two “negotiated” documents that required consultation between First Nations and the federated government of the land: Treaty No. 9 signed in 1905-1906 (Dominion of Canada, with the concurrence of the Province of Ontario) and Ontario’s Far North Act (2010). Treaty No. 9 has defined the relationship between First Nations and Canada; while, the Far North Act will define the relationship with Ontario. This article evaluated whether the Far North Act marked a new beginning or the reinforcement of an unacceptable relationship, using primary and secondary data analyses. Analyses revealed that the passing of the Far North Act was not a new beginning, but the continuation of an unacceptable relationship.

Keywords

First Nations, consultation, land use planning, Ontario, Canada, economic development

Acknowledgments

The authors would like to thank the Social Sciences and Humanities Research Council of Canada for their financial support.

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?

In 1867, the provinces of Ontario, Quebec, New Brunswick, and Nova Scotia were united under a federated system of government, known as the Dominion of Canada (Figure 1). The country of Canada would be formed through land acquisitions – Rupert’s Land and the North-Western Territory – and the partitioning of these land acquisitions to create new provinces, as well as to extend the boundaries of existing provinces. In keeping with the British Crown’s belief that Indians¹ held rights to land in North America, Indian lands had to be ceded or purchased (Henry, 2006; Royal Proclamation of 1763). Compensation for Indian lands had to be resolved equitably through Indian consent (Cauchon & Cockburn, 1867), which would require consultation and a negotiated settlement between the federal government and said Indians. Since this time, numerous treaties have been signed between the Government of Canada and the Indian groups of Canada (Figure 2) (INAC, 2007).

Typically, the extinction of Indian title only acquired importance after Indian land was recognized for its economic importance by the dominant society (Long, 1978a; Titley, 1986). The case of The James Bay Treaty or Treaty No. 9 of 1905 to 1906 (1964) was not atypical, in that, prior to 1905, the economic potential (e.g., hydroelectrical, logging, mining, and agricultural) had been recognized, with railway construction opening up the near north region of Northern Ontario to settlement and resource exploitation² (Dragland, 1994; Long, 1978b; Macklem, 1997; Titley, 1986). However, Treaty No. 9 was unique with respect to the numbered Treaties because Treaty No. 9 required the concurrence of a provincial government³ – the Government of Ontario had to concur with the terms that had been set (James Bay Treaty, 1964). As a result, the terms of Treaty No. 9 were fixed by the Government of Canada and the Government of Ontario prior to the commissioners’ treaty expedition into Northern Ontario to garner Indian approval. Indeed, in the report of the Treaty No. 9 expedition by the treaty commissioners, it is clearly stated “the terms of the treaty were fixed by the governments of the Dominion and Ontario; the commissioners were empowered to offer certain conditions, but were not allowed to alter or add to them in the event of their not being acceptable to the Indians” (James Bay Treaty, 1964, p. 4). Thus, there was a consultative process leading to a negotiated Treaty No. 9 agreement; however, all the consultation and negotiations were between the Government of Canada and the Government of Ontario (James Bay Treaty, 1964; Long, 1978a; Morrison, 1986; Titley, 1986). There exists no documented evidence that Indians or their

¹ Historically, the term “Indian” was inappropriately used to designate the first people inhabiting North America because European explorers believed that they had landed in India. In Canada, First Nations or Native is now used to designate people once designated as Indian. The term “Indian” is used throughout the paper to designate First Nations groups when appropriate (e.g., when the term was used in historical documents).

² Petitions made by Indian leaders in Northern Ontario did indicate that some Indian groups desired to enter into treaty with the Government of Canada to protect their traditional way of life (i.e., living off the land) because railway construction (and other development activities), as well as an increase in non-Indian hunting and trapping, negatively impacted their way of life (Long 1978a, 1978b; Macklem 1997). However, the main reason, according to the commissioners of Treaty No. 9, “Increasing settlement, activity in mining and railway construction in that large section of the province of Ontario north of the height of land and south of the Albany river rendered it advisable to extinguish the Indian title” (James Bay Treaty, 1964, p. 3).

³ The Agreement Between the Dominion of Canada and the Province of Ontario (James Bay Treaty, 1964) set forth the following: “And whereas, by the agreement made the 16th day of April, 1894 ... entered into between the government of the Dominion of Canada ... and the government of the Province of Ontario ... in pursuance of the statute[s] of Canada ... [and] Ontario [both] passed [in 1891] ... [similarly entitled] ‘An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian lands,’ and by the sixth clause of the said agreement [of 1894] it is provided, ‘That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the government of Ontario’” (p. 26).

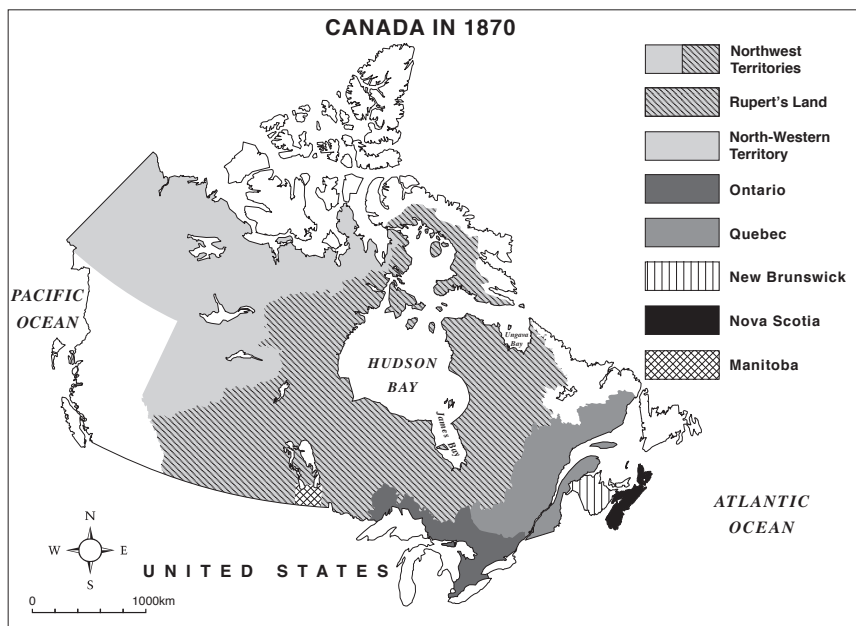


Figure 1. In 1867, Canada at Confederation only consisted of the provinces of Ontario, Quebec, New Brunswick, and Nova Scotia. Three years later, Rupert's Land and the North-Western Territory (1870) were acquired by Canada, and these two territories formed the Northwest Territories. This figure is based on the maps hc1867trty_e and hc1870trty_e (INAC, 2007).

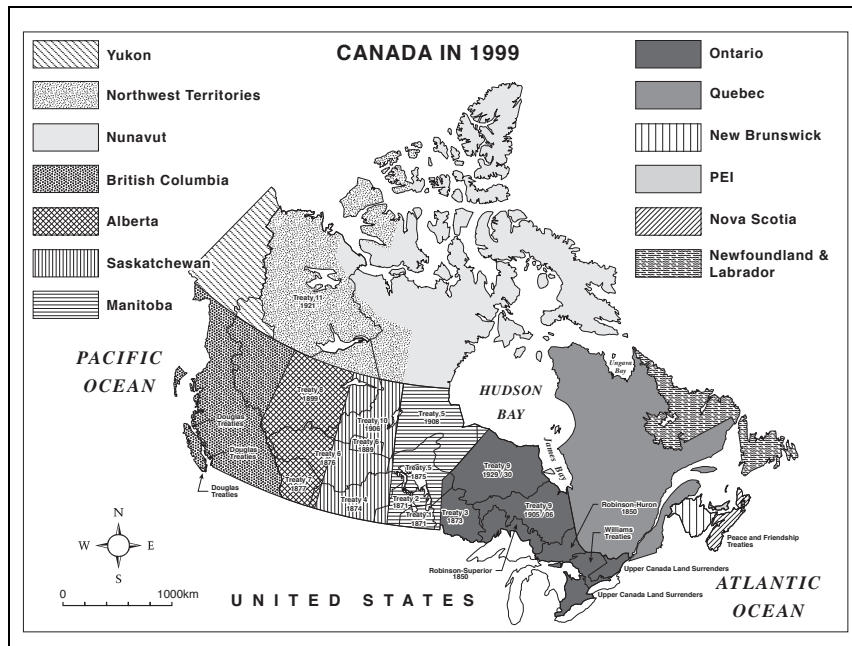


Figure 2. Canada in 1999 showing the historical treaties. This figure is based on the maps hc1999trty_e, and htoc_e (INAC, 2007).

representatives were consulted and/or involved in these government deliberations (Tittle, 1986). It is no wonder that historians (e.g., Dragland, 1994; Long, 1978b; Long, 1989; Morrison, 1988) and First Nation leaders (e.g., Louttit, 2011) have asserted that there was no meaningful consultation and negotiation with respect to Treaty No. 9, as the treaty was basically a “take-it or leave-it” proposition (Long, 1978a).

It should also be emphasized that the Indian signatories of Treaty No. 9 could not read the terms of the agreement, as the English text had not been translated into the Ojibway or Cree syllabics (Long, 1989, 1993; Louttit, 2010a). Thus, the oral translation of the terms of Treaty No. 9 was crucial. As the commissioners did not travel with translators (James Bay Treaty, 1964), the translation was not consistent. When Hudson’s Bay Company’s employees acted as translators – as they often did because treaties were typically signed at Hudson’s Bay Posts (James Bay Treaty, 1964) – there was a clear conflict of interest, as Indians upon signing the treaty, would spend their treaty money at the Hudson’s Bay Post (Dragland, 1994). D.C. Scott, one of the Treaty No. 9 commissioners, suggests that the contents of the Treaty were not properly translated and explained:⁴

They were to make certain promises and we were to make certain promises, but our purpose and our reasons were alike unknowable. What could they grasp of the pronouncement on Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between a dominion and a province which had the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing. So there is no basis for argument. The simpler facts had to be stated, and the parental idea developed that the King is the great father of the Indians, watchful over their interest, and ever compassionate. (Scott, 1947, p. 115)

Clearly, the Treaty No. 9 consultative and negotiation process was wanting in all respects.

It has been over one hundred years since Treaty No. 9 was signed, and since this time (i.e., 1905) the Near North region of Ontario (below the Forest Management Line/Cut Line/Far North Line, Figure 3) has been extensively developed with little consultation with First Nations groups (James Bay Cree Society, 1979; Rickard, 1977). Recently, the Far North region⁵ of northern Ontario has been recognized for its mineral rich areas and potential sites for hydro-electric development. In addition, persistent development pressure in the Far North region has led to the identification of community-based land use planning as a potential means to ensure informed decision-making, shared benefits resulting from development, and adequate protection of social, cultural, and environmental conditions (Hibbard, Lane, & Rasmussen, 2008). On June 2, 2009, the Government of Ontario introduced Bill 191 (2009) for first reading. Bill 191 (2010), also known as *An Act with Respect to Land Use Planning and Protection in the Far North*, underwent second reading on June 3, 2010. On September 23, 2010, the Province of Ontario passed Bill 191; once Bill 191 had received Royal Assent (October 25, 2010), it was referred to as the Far North Act (2010). The legislation outlines an approach that Government of Ontario officials purport will allow First Nations of the Far North region to play a more significant role in development through community-based land use planning (Far North Act, 2010, s.5.(1)).

⁴ It should be noted that even when clergy acted as translators, such as, the Adhesion to Treaty No. 9, 1929-1930, in Winisk (Cain & Awrey, 1930), there is some evidence that “its [Adhesions to Treaty No. 9] meaning was not made clear or comprehended ...” (Bird, 2005, Note 1).

⁵ Ontario’s Far North region covers approximately 43% of the province and is home to a number of First Nations (Office of the Premier, 2008).



Figure 3. The First Nations of the Far North region are illustrated. The First Nations and the one community (Moosonee) in the Far North – where hearings were scheduled by the Government of Ontario, but later cancelled – are bolded and in italics. The names of cities where Far North hearings were actually conducted – all were outside the Far North region – are presented graphically with all letters in capitals. The figure is based on the Far North map of the Ontario Ministry of Natural Resources (2010).

The development of community-based land use plans in Ontario's Far North is a response to two related issues: (a) the current desire of local First Nation communities to preserve their traditional territories in a way that ensures that the land and resources will support future generations; and (b) a government initiative to address a number of planning and management issues, including orderly resource development, natural heritage protection, climate policy, and improved relations with First Nations. In addition, one issue that is never specifically mentioned in the Far North Act (2010), but must be taken into account in the present context is that Ontario is no longer one of the economic engines of Canada. In 2009, for the first time Ontario received a federal government equalization payment⁶ as a "have not" province (Holden, 2008) and will continue to receive equalization payments (Department of Finance, 2011). In other words, Ontario's economic growth and prosperity is intimately tied to developing the Far North region of northern Ontario, and there appears to be a sense of urgency tied to this development.

This article retrospectively explores the progression of Bill 191 from its introduction in June 2009 to October 2010 when it received Royal Assent and became known as the Far North Act of 2010, paying particular attention to the consultative activities that occurred (or did not occur) throughout the process. The Far North consultative process is also examined in the context of guidelines put forward by various Aboriginal⁷ political organizations in Canada and the global standard set for Indigenous rights through the *United Nations [UN] Declaration on the Rights of Indigenous Peoples* (2007).⁸ The article begins with a presentation of what consultation means in the Canadian (and international) context. This section is followed by information on the study area, the Far North Act (2010), the Far North consultative process, research methods employed, results, and discussion based on the primary and secondary data analyses pertinent to the research question and the conclusions.

Background

Duty to Consult

The judiciary [Supreme Court of Canada] has,

... held that the Crown is under a duty to consult [in order to reach a negotiated settlement] with a First Nation when it proposes to engage in an action that threatens to interfere with

⁶ Equalization payments are part of a Government of Canada transfer payment program that compensates poorer ("have-not") provinces "for their relatively weak tax bases or resource endowments, equalization works to ensure that all Canadians have access to a reasonably similar level of provincial government services at reasonably similar levels of taxation regardless of where in the country they live" (Holden, 2008, p. 1).

Equalization payments are entirely financed from federal government revenues (Holden, 2008) and given unconditionally, to be spent according to provincial priorities (Department of Finance Canada, 2011).

⁷ The term "Aboriginal" is used in Canada to refer to First Nations (also known as Indians), Inuit, and Métis groups. The term "Indigenous" will also be used throughout this article and refers to all groups who originally come from an area and currently live within a dominant state.

⁸ In 1982, the UN Working Group on Indigenous Populations was established and mandated to create a minimum standard of rights to contribute to the improvement with respect to issues (e.g., discrimination, exploitation, marginalization, and exploitation) impacting Indigenous people worldwide (UN, 2006, 2007). The first draft of the Declaration on the Rights of Indigenous Peoples was introduced in 1993 (UN, 2007). After extensive negotiation and revision the UN Declaration on Rights of Indigenous Peoples was adopted by the General Assembly on September 13, 2007. Initially, Canada, the United States, Australia, and New Zealand opposed the declaration based on concerns with several articles related to Indigenous rights and governmental obligations (INAC, 2010). On November 12, 2010, Canada reversed its position and endorsed this non-binding agreement ("Canada Endorses," 2010). Although the original declaration had not been revised to address existing concerns, the Canadian government identified flexibility in the way Canada interpreted the agreement to better align with its obligations under the Canadian Constitution (INAC, 2009).

existing Aboriginal or treaty rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982⁹ ... the duty to consult requires the Crown, in most cases, to make good faith efforts to negotiate an agreement specifying the rights of the parties when it seeks to engage in an action that adversely affects Aboriginal interests. (Lawrence & Macklem, 2000, p. 252)

As stated by Mr. Justice Finch of the B.C. Court of Appeal,

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that their representatives are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action ... (Supreme Court of Canada, 1999, para. 160).

In addition, the degree of consultation can vary from case to case.¹⁰

In Canada, several Aboriginal-based consultation guidelines have been developed at the community, regional, provincial, and national levels (Métis National Council, 2007; Meyers Norris, 2009; Northern Secwepemc te Quelmucw Leadership, 2009; Union of Ontario Indians, 2003). For example, the Union of Ontario Indians¹¹ developed a consultation guide to deal with interactions with the Ontario Ministry of Natural Resources (Union of Ontario Indians, 2003).¹² In general, the guidelines describe an open process that emphasizes the rationale of the project and roles that each "stakeholder" plays in the advancement of the proposed activities. The consideration of the spirit of treaties, comprehensive land claims, and the Constitution Act of 1982 all frame the form that consultation should take. The importance of full communication of all material relevant to the project is a shared characteristic. Finally, inclusion of adequate funding to facilitate participation and

⁹ The Constitution of Canada was repatriated in 1982 so that the British Crown would no longer hold legal power to amend the Constitution of Canada (Feldstein, 2001). In addition, the repatriation of the Constitution of Canada, entrenched Indian treaty rights, in that "Section 35(1) [of the Constitution of Canada] recognizes and affirms the treaty rights 'of the Aboriginal peoples,' not the treaty rights of the Crown. In other words, treaty rights of the Aboriginal peoples are constitutionalized, while the treaty rights of the Crown are not. The Sparrow decision held that, because Aboriginal rights are constitutional, they take priority over other rights which are not constitutional" (Macklem, 1997, p. 31).

¹⁰ "The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands" (Lawrence & Macklem, 2000, p. 252).

¹¹ The Union of Ontario Indians, incorporated in 1949, advocates for 40 First Nations throughout Ontario with a combined population of approximately 55,000 people (Union of Ontario Indians, 2008).

¹² This guide defines consultation as "a process that facilitates the provision and receipt of natural resource information, between the parties, to assist in making informed decisions" (Union of Ontario Indians, 2003, p. 3). The Union of Ontario Indians (2003) guide outlines the necessary criteria to help ensure adequate consultation and includes features shared among other protocols developed nationally. Consultation should include the following: "be initiated at the early on in the process; include exchange of relevant information (proposal, rational, timelines, emerging issues); provide adequate means for representative participation; be flexible to adjust the process to individual circumstances, with agreed upon timelines; and participation should be in 'good faith' (defined as including the disclosure of relevant information, respectful communication and timely response to questions" (p. 11). Additional principles have been suggested by several Aboriginal organizations: recognizing Aboriginal rights; acknowledging mutual respect; recognizing the role of the Aboriginal group in establishing the framework for consultation; ensuring the exchange of knowledge is reciprocal; ensuring consultation and negotiation be done in the spirit of reconciliation; and making sure the process is transparent (Métis National Council, 2007; Northern Secwepemc te Quelmucw Leadership, 2009).

timelines that promote full understanding within involved communities and organizations is a shared characteristic of several guidelines (Métis National Council, 2007; Northern Sechwepemc te Quelmucw Leadership, 2009; Union of Ontario Indians, 2003).

UN Declaration on Rights of Indigenous Peoples

Although declarations lack legal status there is an expectation that their provisions will be followed by signatories (Posey & Dutfield, 1996). The UN Declaration on Rights of Indigenous Peoples (2007) includes a number of articles relevant to the consideration of interactions between Indigenous groups and dominant states with respect to the present study. For example, Article 37 mentions that,

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with State or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Further, the development of state legislation having a direct bearing on the development and protection of traditional territories requires a consultative process with regards to the impacted people:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. (UN Declaration on Rights of Indigenous Peoples, 2007, Article 19)

Lastly, the way that Indigenous people are to participate in the decision-making process is included in the declaration:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedure, as well as to maintain and develop their own indigenous decision-making institutions. (UN Declaration on Rights of Indigenous Peoples, 2007, Article 18)

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (UN Declaration on Rights of Indigenous Peoples, 2007, Article 32(2))

In summary, the UN Declaration on Rights of Indigenous Peoples (2007) emphasizes greater authority and control related to development, as Indigenous groups deal with social, environmental, and economic challenges (Eversole, 2010).

The Far North Act (2010)

In June 2009, the Government of Ontario released Bill 191 for first reading. In the summer of 2009, following the first reading, a series of Senate Committee hearings were held to provide an opportunity for the public and stakeholders to comment on the Bill (Table 1). In October 2009, a clause-by-clause review was held in the Ontario Legislative Assembly, Toronto, Ontario. Further debate on the Bill was held in the spring of 2010, and a second reading occurred on June 3, 2010. A second round of hearings to receive comments from stakeholders and the public, scheduled for June

Table 1. Chronology of event type, location, and date related to the introduction, amendment, debate, and Royal Assent of the Far North Act (2010) (formerly Bill 191).

Activity	Location	Date
Bill 191- 1 st Reading	Ontario Legislative Assembly, Toronto, Ontario	June, 2, 2009 ¹
Standing Committee Hearings	Sioux Lookout, Ontario	August 6, 2009 ¹
Standing Committee Hearings	Thunder Bay, Ontario	August, 11, 2009 ¹
Standing Committee Hearings	Chapleau, Ontario	August 12, 2009 ¹
Standing Committee Hearings	Timmins, Ontario	August 13, 2009 ¹
Clause-by-clause Reading	Ontario Legislative Assembly, Toronto, Ontario	October 19, 2009 ¹
Bill 191 Official Debate	Ontario Legislative Assembly, Toronto, Ontario	May 18, 19, 2010 ¹
Bill 191 – Time Allocation	Ontario Legislative Assembly, Toronto, Ontario	June 1, 2010 ¹
Bill 191- 2 nd Reading	Ontario Legislative Assembly, Toronto, Ontario	June, 3, 2010 ¹
Standing Committee Hearings	Slate Falls First Nation, Ontario	Week of June 14, 2010 – CANCELLED ²
Standing Committee Hearings	Webequie First Nation, Ontario	Week of June 14, 2010 – CANCELLED ²
Standing Committee Hearings	Sandy Lake First Nation, Ontario	Week of June 14, 2010 – CANCELLED ²
Standing Committee Hearings	Attawapiskat First Nation, Ontario	Week of June 14, 2010 – CANCELLED ²
Standing Committee Hearings	Moosonee, Ontario (Moosonee is on the mainland, while, Moose Factory Island, the home of Moose Cree First Nation, is in the Moose River across from Moosonee)	Week of June 14, 2010 - CANCELLED ²
Clause-by-Clause Reading	Ontario Legislative Assembly, Toronto, Ontario	September 13-15, 2010 ¹
Bill 191 Official Debate	Ontario Legislative Assembly, Toronto, Ontario	September 22, 2010 ¹
Bill 191 3 rd Reading	Ontario Legislative Assembly, Toronto, Ontario	September 23, 2010
Royal Assent	Ontario Legislative Assembly, Toronto, Ontario	October 25, 2010

¹Ontario Legislative Assembly (n.d).

²Legislative Assembly of Ontario (2010, p. G-99).

2010, was cancelled (see Figure 3). Third reading took place on September 23, 2010 and ended in a vote of 46 ayes and 26 nays to pass the Far North Act, 2010 (Legislative Assembly of Ontario, 2010e). The Far North Act, 2010, received Royal Assent on October 25, 2010.

The Far North Act (2010) applies to areas in Ontario currently regulated as public lands by the provincial government and excludes reserve lands¹³ (Far North Act, 2010, 3, Figure 3).

Four expected outcomes of the Far North Act (2010, s. 5.(1)(2)(3)(4)) are as follows:

- (a) A significant role for First Nations in the planning.
- (b) The protection of areas of cultural value in the Far North and the protection of ecological systems in the Far North by including 225,000 square kilometers of the Far North in an interconnected network of protected areas designated in community-based land use plans.
- (c) The maintenance of biological diversity, ecological processes, and ecological functions, including the storage and sequestration of carbon in the Far North.
- (d) The assurance of sustainable economic development that benefits the First Nations.

The Far North Land Use Plan[ning] process is designed to include terms of reference to be prepared by each community with an interest in participating (Far North Act, 2010, s. 9(1)). Once they have been approved by the community through a Band Council Resolution¹⁴ (Far North Act, 2010, s. 9(14)(b)), the Minister of Natural Resources approves and designates a planning area (Far North Act, 2010, s. 9.(4)(a)(b)(c)). Each plan must include a determination of the land use designations, approved activities within each designation, and at least one protected area throughout the planning area. The designation of the protected area(s) must also include a description of the type of protected area as “prescribed” in regulations (Far North Act, 2010, s. 9(9)(c)(d)). The Ontario Minister of Natural Resources also examines the plan to ensure that the four objectives of the Act (listed above) have been included. Once satisfied, the Minister approves the plan (Far North Act, 2010, s.9 (16)).

Methods

Primary data analysis was employed, and the primary sources used included verbatim transcripts of the Standing Committee on General Government and the verbatim transcripts of the Ontario Legislative debate on the subject of the Far North Act (2010) in the weeks prior to third reading and, ultimately, Royal Assent of the Act. Secondary data in the form of documents, reports, media releases, correspondence, PowerPoint presentations, and policy documents created by the Nishnawbe Aski Nation (NAN), Muskegowuk Tribal Council, and its member communities were also analyzed.

Ontario’s Far North area is represented politically by the NAN, which represents 49 communities that fall under Treaties 5 and 9. The NAN membership includes a number of independent bands, the Independent First Nations Alliance, Keeywinook Okimakanak, Mattawa First Nations, Shibogama First Nation Council, Wabun Tribal Council, Windigo First Nations Council, and Muskegowuk Tribal Council (NAN, 2010a). It should be noted that we will be limiting our analyses to First Nations signatories of Treaty No. 9 (e.g., Mushkegowuk Tribal Council, also known as Mushkegowuk Council), as Treaty No. 9 is the only numbered treaty that had a provincial

¹³ Reserve lands were typically created during the treaty making process and were for exclusive use by Indian signatories. Indian Reserve lands are now known as First Nations and are under the jurisdiction of the Government of Canada.

¹⁴ Band Council Resolutions are typically passed by a Band Council – the locally-elected First Nations’ government – and are enforceable laws on the First Nation passing the resolution.

government (Ontario) as a signatory, which is of particular importance in the present analyses, as the Province of Ontario passed the Far North Act (2010).

The framework we used to guide our evaluation of the Far North Act (2010) consultative process to determine whether this piece of legislation marked a new beginning or the reinforcement of an unacceptable relationship in Northern Ontario, Canada were taken directly from The James Bay Treaty – Treaty No. 9 (1964) and from scholarly interpretations of the Treaty No. 9 consultative and negotiation processes. Table 2 shows the framework derived from Treaty No. 9 (and scholarly interpretations of the process) used to inform our evaluation on whether the governmental consultative process with First Nations of the Mushkegowuk Territory has improved over the 100 years since the signing of Treaty No. 9 in 1905-1906. Data were coded and analyzed based on a deductive approach by the primary author and validated by one other author. Data coding and analysis were performed manually.

Results and Discussion

Community Consultation and Accommodation

In 2007, the Province of Ontario and NAN signed a Letter of Political Agreement establishing “Oski-Machiitawin” (or New Beginnings, formerly known as “The Northern Table”) to create a forum to discuss a number of issues flowing from development pressure within Treaties No. 5 and 9 traditional lands (NAN, 2010b). The mandate of the group was to discuss the implementation of the Provincial Parks and Conservation Reserves Act in the territory, create an Ontario Ministry of Natural Resources’ resource development protocol, and discuss the approach to land use planning that would integrate traditional and conventional activities in the region (Ontario Ministry of Aboriginal Affairs, 2007). The overarching goal of the forum from a First Nations’ perspective was to initiate a bilateral consultative process between the Province of Ontario and NAN with respect to First Nations traditional land and to discuss and negotiate development and protection protocol (NAN, 2010b).

Activities leading towards community-based land use planning were also concurrently taking place within NAN’s member tribal councils. For example, in 2008, in response to growing development pressure, the Mushkegowuk Tribal Council passed three Tribal Council Resolutions;¹⁵ Mining Activities in Muskegowuk First Nations Homeland (Mushkegowuk Council, 2008a); Resource Development Activities in Muskegowuk First Nations (Mushkegowuk Council, 2008b); and Mapping and Land Use Planning (Mushkegowuk Council, 2008c). The resolutions outlined criteria for future development in the Mushkegowuk Territory: First Nation consent was required; a land use plan needed to be completed and approved in the area under consideration; and all necessary regulatory requirements had to be fulfilled and agreed upon by each party. In addition, current and future projects would require the development of impact benefit agreements.¹⁶ The Mushkegowuk Council in outlining this strategic plan also requested that the Province of Ontario fund both mapping and the development of community-based land use plans.

¹⁵ When Tribal Council Resolutions are made by Tribal Councils (regional First Nations organizations) the resolutions are not enforceable at the community level.

¹⁶ Impact benefit agreements are private agreements between proponents of resource development and affected groups. The impact benefit agreements offer monetary and/or other forms of compensation to affected groups in compensation for development. Essentially, impact benefit agreements are a form of mitigation – within the context of the environment impact assessment process in Canada – as not all effects of development can be mitigated, so a mechanism is needed to deal with these environmental effects.

Table 2. Framework Derived from Treaty No. 9.**1. Community Consultation and Accommodation**

P 21 “Signed at [location] on the [date], by His Majesty's commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained” (The James Bay Treaty – Treaty No. 9, 1964, p. 21).

The Treaty No. 9 Commissioners made “community” visits, but, in reality, these excursions were to Hudson’s Bay Company trading posts. As the text of Treaty No. 9 was in the English language, which Indian groups could neither read nor write, there have been questions raised whether the terms of the Treaty were actually or accurately translated.

2. Fixed Terms of Agreement

“THIS AGREEMENT made on the third day of July, in the year of Our Lord, 1905, between ... the government of Canada of the one part ... [and] the government of Ontario on the other part ... The government of the province of Ontario hereby gives consent and upon the following conditions concurs in the terms proposed to be entered into, made and agreed by the said treaty ... And the government of Ontario, subject to the conditions, aforesaid, further concurs ... (Agreement Between the Dominion of Canada and the Province of Ontario July 3, 1905, pp. 25-27).

The terms of Treaty No. 9 were fixed prior to negotiations with the Indian groups residing in the area covered in Treaty No. 9, so there was no chance for true consultation and negotiation, as there was nothing to negotiate.

3. Taken up Clause

“And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” (The James Bay Treaty – Treaty No. 9, 1964, p. 20).

The terms of Treaty No. 9 were not immutable in that land could be “taken up” for the greater good of Canada, but treaty rights became entrenched when the Constitution of Canada was repatriated in 1982.¹⁷

Thus, the NAN chiefs felt betrayed by the Province of Ontario and viewed the 2009 announcement of Bill 191 to have occurred despite the recommendations and concerns voiced through the forum provided by Oski-Machiitawin (NAN, 2009b).

NAN has been at the table for two years working on a framework agreement that MNR [Ontario Ministry of Natural Resources] claimed would guide the legislation. We didn’t agree on the [the exact] framework due to lack of time, and when we saw the legislation, it

¹⁷ The Constitution of Canada was repatriated in 1982 so that the British Crown would no longer hold legal power to amend the Constitution of Canada (Feldstein, 2001). In addition, the repatriation of the Constitution of Canada, entrenched Indian treaty rights, in that “Section 35(1) [of the Constitution of Canada] recognizes and affirms the treaty rights ‘of the Aboriginal peoples,’ not the treaty rights of the Crown. In other words, treaty rights of the Aboriginal peoples are constitutionalized, while the treaty rights of the Crown are not. The Sparrow decision held that, because Aboriginal rights are constitutional, they take priority over other rights which are not constitutional” (Macklem, 1997, p. 31).

was clearly not guided by the framework [issues discussed]. (Grand Chief Stan Beardy, Legislative Assembly of Ontario, 2009b, p. G-952)

In this climate of distrust, First Nations of the region demanded that, as Bill 191 moved forward, it must include adequate community consultation (NAN, 2009a). In response, the Government of Ontario described the greater opportunity for consultation that would occur throughout the development of this legislation, beginning with Standing Committee hearings following the first reading. Michael Brown, MPP Algoma-Manitoulin, described it as:

[A]n unusual but not totally unique process, but we usually as a legislature do not conduct public hearings after first reading. (Legislative Assembly of Ontario, 2009a, p. G-960)

Mr. Brown further added,

[T]his consultation is the consultation before the consultation, in other words, because after second reading it is common practice to have a set of public hearings on Bill 191. We understand the important ramifications of this bill and we want to, as much as possible, get that right. (Legislative Assembly of Ontario, 2009a, p. G-936)

The NAN delegation appeared before the Standing Committee on August 12, 2009 (see Table 2), under protest, because the hearing date fell during the NAN elections, which occur every three years. Frank Beardy, Grand Chief of NAN, expressed on behalf of NAN leadership a hope that this scheduling conflict was a result of a clerical error, rather than an attempt to disrespect or undermine the First Nation political process (Legislative Assembly of Ontario, 2009a).

The NAN delegation used the opportunity to outline the expected approach to consultation in the region:

[F]or the government to meet their legal obligation to consult with our people, they have to consult with our individual communities in the north. That is the position that we've come forward with, and we expect that consultation to take place with our individual communities. (Grand Chief Frank Beardy of NAN, Legislative Assembly of Ontario, 2009a, p. G-957)

Ontario has attempted to have discussions by bringing people together in urban centers [see Figure 3] thereby calling it consultation... We feel we have not been fully consulted, as we have put forward to the Premier [of Ontario] and to the various ministers right from day one – and that is for discussions to take place right in the community. (Grand Chief Stan Louttit of Mushkegowuk Tribal Council, Legislative Assembly of Ontario, 2009c, p. G-985)

Following the first clause-by-clause reading of Bill 191, the Bill was then debated on May 18 to 19, 2010, in the Ontario Legislative Assembly (Table 2). The Government of Ontario's position remained the same as it had been following the introduction of the Bill:

The government is working hard on this bill, as has been stated this afternoon during debate. There's been a lot of consultation. My understanding is that this bill went out right after first reading, which is rather unique for this place, and will no doubt go out for more consultation after second reading. I think that's only helpful to all concerned: the opposition, the government and especially those people who would be affected by this bill... First Nations people need to be consulted, and will be consulted and listened to. (Pat Hoy, MPP Chatam-Kent-Essex, Legislative Assembly of Ontario, 2010a, p. G-1703)

On June 1, 2010, the Legislative Assembly of Ontario passed a motion allocating four days in the week of June 14, 2010 for hearings to be carried out in Slate Falls First Nation, Webequie First Nation, Sandy Lake First Nation, Attawapiskat First Nation, and Moosonee (across from Moose Cree First Nation). Final clause-by-clause reading was scheduled for September 13 and 15, 2010 (see Table 2). It should be emphasized that these community consultations were scheduled despite being informed that the Mushkegowuk and Mattawa Tribal Councils would be holding their general assembly in Chapleau, Ontario, during that period of time (Legislative Assembly of Ontario, 2010b). Alternately, the First Nation leadership suggested that a day before or a day after the NAN General Assembly – scheduled for June 8 and 9 in Sandy Lake, Ontario – would be a more appropriate date for community consultation. This suggestion was not considered in discussions in the public record (Legislative Assembly of Ontario, 2010b).

Bill 191 passed second reading on June 3, 2010 (see Table 2). The community-based meetings in the First Nations (and Moosonee) of the Far North region were cancelled and not rescheduled (see Table 2). Thus, on September 23, 2010, the Bill was advanced for third and final reading without community-based consultation in the actual First Nations to be impacted by the legislation. The government outlined its position following the failure to undertake formal community-based consultation as follows:

After second reading of the bill, plans were made to travel again, only this time to Slate Falls [First Nation], Sandy Lake [First Nation], Attawapiskat [First Nation], Moosonee [community across from Moose Cree First nation] and Webequie [First Nation]. Unfortunately, we learned shortly after the House rose that these First Nations were not able to host standing committee hearings on the dates set out by the Legislature. At first, I was disappointed by the news, but soon I saw this setback as a golden opportunity to personally visit more communities in the Far North and to engage community leaders on their own terms [no other communities were visited; Table 2], without time constraints, to carry out these in-depth discussions. (Ms. Jeffrey, Ontario Minister of Natural Resources, Legislative Assembly of Ontario, 2010c, p. G-2214)

The process outlined here shows a willingness by the Province of Ontario to undertake consultation as long as it follows an approach that is designed and carried out by the province. The Province of Ontario clearly considers the opportunity to participate in public hearings, as representing adequate consultation. In fact, all venues for consultation were outside the region to be affected (see Figure 3). It should be noted that even the Treaty No. 9 commissioners made “community”¹⁸ visits and they had to travel by canoe to the communities (James Bay Treaty, 1964).

In the limited opportunity provided for First Nations to participate in the consultative process for Bill 191, the expected form that effective consultation should take was clearly communicated. First, consultation would occur in communities that would be affected; second, adequate time would be provided to ensure that community members could be adequately informed and prepared to participate. These requests are consistent with the requirements that have been outlined in consultation guidelines across Canada (Métis National Council, 2007; Northern Secwepemc te Quelmucw Leadership, 2009; Union of Ontario Indians, 2003). The unwillingness to allow additional time to accommodate adequate consultation has meant that “free, prior, and informed consent before adopting and implementing legislation or administrative measures ...”(UN, 2007, Article 19) has not been carried out in this process, contrary to the UN Declaration on Rights of Indigenous Peoples (2007).

¹⁸ The Treaty No. 9 commissioners had to visit each community – which was, in reality, a Hudson’s Bay Company trading post as the First Nation people were nomadic at this time with no permanent community – to obtain signatures on the treaty document.

Fixed Terms of Agreement

My team listened to First Nation leaders, elders, and youths from every corner of the Far North. They spoke of their fears and the dreams they had for their communities, and we used these discussions to guide the way we crafted the amendments to this Bill.

I'm proud to say that, as a result of this outreach with First Nation communities, resource development stakeholders and environmental organizations, our government presented 43 amendments for the committee's consideration. These amendments, I believe, make Bill 191 a stronger, more inclusive piece of legislation. (Ms. Jeffrey, Minister of Natural Resources, Legislative Assembly of Ontario, 2010c, p. G-2214)

Despite great effort to contribute throughout the consultative process, and, contrary to the Minister of Natural Resources' assertion above, inclusion of recommendations provided by First Nations groups is difficult to identify in the Far North Act (2010). To the point, there was concern voiced with the way First Nations' recommendations were treated:

At the end of the day, if the acts go through, will things that have been most commonly heard and the various positions put forward by people, not only us as leaders – will it be heard and will it change things? Or is there, as we feel a lot of times, some preconceived notion by Ontario that in fact these things are already there; they're drafted by your technicians and you're going through this process for public perception ... So, I have concerns ... if, in fact, we are heard and there are legitimate changes based on our cries for help and input, then we will be satisfied, but right now I have questions. (Chief Stan Louttit of Muskeguk Tribal Council, Legislative Assembly of Ontario, 2009c, p. G-985)

Nevertheless, final amendments to Bill 191 included the addition of “joint bodies”; this amendment at first glance appears to reflect an effort to incorporate greater participation of First Nation representatives into the process at the regional level (Far North Act, 2010, s.7.1(a)(b)):

Any First Nation having one or more reserves in the Far North and any First Nation with whom the Minister has agreed to work to prepare terms of reference under subsection 9(2) may indicate an interest to the Minister to initiate discussions with respect to establishing a joint body to a) advise on the development, implementation and coordination of land use planning in the Far North in accordance with this Act and b) perform the other advisory functions to which the [Ontario] Minister [of Natural Resources] and the First Nations participate in the discussion agree.

The “joint body” as described can advance recommendations to the Minister of Natural Resources regarding land use strategies and policy statements and introduce a funding framework to support land use planning and processes to approach dispute resolution within the planning process (Far North Act, 2010, s. 7(4)). The “joint body” is to be composed of equal First Nation and Government of Ontario representation. This amendment aligns well with the requirements of the UN Declaration on Rights of Indigenous Peoples (2007, Article 18) that outlines the “right to participate in decision-making in matters which would affect them, through representatives chosen by themselves in accordance with their own procedure ...” However, the Government of Ontario retains ultimate decision-making power related to amendments, policy documents, and, in particular, exemption orders (see the Taken up Clause section). The Government of Ontario's ability to override community-based land use plans to permit various types of development is contrary to the UN Declaration on Rights of Indigenous Peoples (2007). Article 32 (2) stipulates,

That states shall consult and cooperate in good faith ... through their own representative institutions in order to obtain their free, prior, and informed consent ... particularly in connection with development, utilization, or exploitation of minerals, water, or other resources. (UN Declaration on Rights of Indigenous Peoples, 2007, Article 32(2))

Following the assent of the Far North Act (2010), the feelings relating to the degree that recommendations were incorporated into the legislation were expressed in a statement by the Deputy Grand Chief of NAN Mike Metatawabin:

The passing of Bill 191 today indeed shows how little regard the McGuinty Government [Government of Ontario] gives to the concerns of First Nations and other Northern Ontarians when it comes to decision making. It is a disappointing day for all of us who spent tireless hours opposing Bill 191 as our opposition was obviously ignored. As we have stated time and time again, NAN First Nations and Tribal Councils do not and will not recognize this legislation on our homelands. We will continue to uphold our Aboriginal and Treaty rights and jurisdiction over our land. The real fight is just beginning. (NAN, 2010c, para. 2)

In summary, the Far North Act (2010) was not informed by First Nations recommendations, and, even though “joint bodies” were added as an amendment to the Act, the “joint body” could be neutered by ministerial power. In present day Ontario, Canada, it would be politically unwise to push through a Bill with no amendments, especially a Bill as controversial as Bill 191; therefore, it was expected that amendments would be made. Amendments were made to Bill 191; however, any amendments made were merely paying lip service, in that Government of Ontario could push through any type of development. Although the terms of Bill 191 were not fixed – as with the terms of Treaty No. 9 – from one viewpoint, the terms need not be fixed in the Far North Act (2010), as the legislation accorded power to the Government of Ontario to do as it sees fits for the greater good of Ontarians.

Taken Up Clause

As briefly mentioned above, the Far North Act (2010) gives ultimate power to the Government of Ontario to describe, amend, and overrule the planning process through exemption orders and final decisions related to land use strategies:

Exemption Orders (12 (4)): A person may undertake a development described in subsection (1) (opening a mine, commercial timber harvest, oil and gas exploration, construction expansion of electrical generation facilities, associated infrastructure, all weather transportation infrastructure, other infrastructure, or any other activity that is prescribed) if the Lieutenant Governor [of Ontario] in Council, after taking into account the objectives set out in Section 5, by order determines that the development is in the social and economic interests of Ontario.

The similarity between the taken up clause of Treaty No. 9 (Table 1) and Exemption Orders of the Far North Act (2010) is undeniable: both agreements allow the government (“the government of the country” in the case of Treaty No. 9 [The James Bay Treaty – Treaty No. 9, 1964, p. 20] and “the Lieutenant Governor in Council” [Far North Act, 2010, Exemption Orders (12(4))]) to override terms of the document in question, when in the best interest of the general public (i.e., non-Native people). Although Treaty No. 9 is not as explicit as the Exemption Orders (12(4)) of the Far North Act (2010), the Government of Canada’s position on this issue was clearly articulated by Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs, when queried about the integrity of Indian lands:

When pressed in March 1906 by opposition leader Robert Borden on the question of large “unused” reserves [i.e., treaty lands] which were hindering development in the prairie provinces. Oliver responded sympathetically. He conceded that, while Indians rights ought to be protected, they should not be allowed to interfere with those of whites – “and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for.” (Tittley, 1986, pp. 20-21)

A point that has been missed in all the discussions of the Far North Act (2010) is that only “the government of the country” (i.e., the Government of Canada, not the Government of Ontario¹⁹) has the authority to interfere with “hunting, trapping, and fishing” with respect to development and the “taken up” clause of Treaty No. 9 (The James Bay Treaty – Treaty No. 9, 1964, p. 20; see Table 1). Moreover,

Section 35(1) of the Constitution Act, 1982, recognizes and affirms existing treaty rights of the Aboriginal peoples living in the area covered by Treaty 9. According to the Sparrow decision, such rights can be infringed only by legislative enactments and regulations which meet certain justificatory standards. Accordingly, governments and third parties cannot undertake economic development in the area which would infringe treaty rights without specific legislative authority to do so. Such legislation would have to be federal due to the fact that treaty rights are shielded from provincial legislation by section 88 of the Indian Act. Moreover, such legislative initiatives would only be valid if it passed the justificatory test established by the Court in Sparrow and Badger. The party seeking to meet this test would have to prove that the particular proposal for economic development at issue is a valid legislative objective, and that there are no other viable alternatives for meeting that objective without infringing treaty rights. If other alternatives exist, the party in question must pursue them first so that treaty rights are given the priority to which they are entitled under the Constitution. (Macklem, 1997, p. 132)

Nevertheless, the Government of Ontario’s position on Bill 191, prior to passing, narrowly defined their intent to include only the activities directly associated with community-based land use planning:

I would like to take some time today to set the record straight about what Bill 191 will and will not do. First and foremost, Bill 191 is about land use planning in the Far North. The subject matter of the bill is not about First Nations’ jurisdiction over the land, nor does the bill address treaty interpretation. These issues are substantial in nature and are clearly part of a much larger conversation outside the scope of this bill and would more properly require the involvement of the federal government (Minister of Natural Resources, Linda Jeffrey, Legislative Assembly of Ontario, 2010c, p. 2215).

¹⁹ “The term ‘the government’ obviously refers to only one body. Had the words ‘a government’ been used then the meaning would have been different. Furthermore, I have not been directed to any authority, historical or otherwise, where any province after Confederation was referred to as a “country.” In 1905 the only *Government of the country* was the federal Government, and this distinction between federal and provincial authorities was well known to all including the Indians. Indeed, the very fact that the federal Government was referred to in two other non-identical terms confirms my view that the drafters of the treaty were not very careful with the technical terms used throughout the document. If the makers of the treaty intended to delegate authority to regulate the Indian hunting and fishing rights to the Government of the Province of Ontario, they would have specifically said so. I note, for example, that in the Agreement between the provincial and federal Government (to which the treaty specifically referred), there was no hesitation in using the term ‘the government of the province of Ontario’ when referring to that body” (R v. Batisse, 1978, p. 383).

Clearly, Minister Jeffrey is erroneous in her assessment; the Far North Act (2010) will impact Treaty No. 9 traditional pursuits, hunting, trapping and fishing (among other things), which are constitutionally entrenched rights. These issues should have been addressed concurrently, not sequentially, because any development that could impact treaty rights should have been addressed prior to the passing of Bill 191. It appears that by being a “have-not” province, expediency with respect to resource development is now a priority in Ontario.

Treaty Context Perspective

The discourse that surrounds First Nations’ opposition to the Far North Act (2010) relates to its potential impact on treaty and Indigenous rights and a lack of acknowledgement of jurisdictional responsibility related to traditional territories. The Far North Act (2010) includes a clause that provides for a “joint planning process” between the province and First Nations. The objective is to carry out community-based land use planning based on “environmental, social, and economic objectives for the people of Ontario” and ensure that it “is done in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in Section 35 of the Constitution Act, 1982, including the duty to consult” (Far North Act, 2010, s.1(a),(b),(c)).

In contrast to the official Government of Ontario’s position, as voiced by Minister Jeffrey in the Taken Up Clause section, First Nation representatives believe that historical and contemporary policy documents should be used to inform the process. In the view of NAN leadership, historic documents (treaties) and the UN Declaration on the Rights of Indigenous People (2007) form the basis of consideration related to Bill 191, as described by Chief Randy Kapashesit of the MoCreebec Council (Legislative Assembly of Ontario, 2009b):

The reality is many of us are actually coming at this from a totally different perspective – it’s like we’re speaking two different languages – on the indigenous viewpoint on development and how we should be seeing the future. There is a great opportunity for you [Government of Ontario] to actually lead the world and show that you understand that, by becoming familiar with that piece of legislation [UN Declaration on the Rights of Indigenous People], by indicating that you’re willing to recognize, there are, in fact, human rights that are being violated here and you are concerned about that. It’s a dialogue and principle that I’m sure you probably haven’t even heard before this committee ... the key point is, we have that right to choose. In the course of developing this document, the Far North Act, I’ve seen no initiative to actually be engaged with our communities, to say, “What is it that you’re interested in?” I see this more as an imposition, a continuation of a higher power at work, if you will, telling us that this is the way it has to be. “Never mind your human rights, never mind your historical rights; we’re not interested in that”: That’s what you’re saying by producing this kind of document and expecting us to participate, meaning that you haven’t actually spent any time to even develop an approach that achieves free, prior and informed consent. (p. G-957)

Treaties form the cornerstone of the relationship between First Nations and the government, especially in the case of Treaty No. 9, where both the provincial and federal governments were signatories of the agreement. An exercise that outlines the way traditional territories will be developed and preserved requires a consideration of the treaties, policy documents, and case law²⁰ that has defined and characterized Aboriginal rights. However, in this case, the Province of Ontario presents a position that considers historic agreements, like treaties, to be outside the scope of this exercise. This position is at odds with the Canadian Constitution Act (1982) and the UN Declaration on the Rights of Indigenous People (UN Declaration on the Rights of Indigenous People, 2007,

²⁰ For example, *Delgamuukw v. British Columbia* (1997).

Article 37) by failing to consider the interpretation of the Treaty, the Province of Ontario cannot have effectively ensured that the treaties or the rights of Aboriginal peoples have been respected.

Conclusions

The lack of adequate consultation with First Nations people with respect to the Far North Act (2010) has contributed to ongoing opposition to the legislation as a whole. The expected form of consultation described by First Nations' representatives throughout the consultative process represents a minimum standard when compared to national and international protocols, yet the Province of Ontario failed to meet that standard. The requirements to consult is further limited, within the legislation, through the exemption order that provides the Government of Ontario with power to override community-based land use plans and permit development with no mention of the consultation that would typically be required.

According to the Government of Ontario, the creation of the Far North Act (2010) was to mark the beginning of a new and improved relationship with First Nations of Northern Ontario. The passing of this piece of legislation, however, was not a new beginning, but rather the continuation of an unacceptable relationship. Even though more than 100 years have passed since Treaty No. 9 was signed, there has been little improvement in the relationship between the Government of Ontario and the First Nations of Northern Ontario. The similarities between consultative and negotiation process for the Treaty No. 9 (James Bay Treaty, 1964) and the Far North Act (2010) are striking: there was inadequate community consultation and accommodation; the terms of both agreements were essentially fixed (although some amendments were made to the Far North Act (2010)); and clauses were built into both agreements whereby First Nations' rights to a traditional lifestyle (e.g., hunting and fishing) could be compromised for the greater good of Canadians, as a whole.

Indeed, the frustration of First Nations leaders with the consultation and negotiation process is understandable. Grand Chief Stan Beardy of NAN clearly indicated the position of his people on the then proposed Far North legislation during the Province of Ontario's Standing Committee meeting on Bill 191:

As it is with this committee's process, so it is with these pieces of legislation – a fiasco, an utter failure, an opportunity lost, a promise broken. The plan from the start, as directed by the Premier [leader of the Government of Ontario], was that this would be a true partnership, a new relationship, creating a land use planning law that would put First Nations in the driver's seat on a government-to-government basis. We keep repeating this context to you because it is fundamentally important. It is the key to everything that has gone wrong ... what did we get instead? The same old thing, the old relationship; not a partnership but a wardship. (Legislative Assembly of Ontario, 2009a, p. 952)

Adding further, Grand Chief Louttitt (2010b) of Mushkegowuk Tribal Council states,

At every Omushkego Mamohitowin [gathering] in recent times and as well as at Chiefs meetings, the matter of resource development in our territories is almost always a topic of discussion ... Bill 191, the Far North Act ... Unless, things change between the period of writing of this report and this week, we will have a law that basically will have government largely control OUR lands and will largely dictate the manner in which our territory is developed. As well, there is very little in the Act that will respect the Omuhshkego [Cree] and our unique status as treaty people. At a recent meeting of NAN Chiefs, the Chiefs were united in their opposition to this bill ... I say we develop our own laws, we stand by them, we stand in unity and we ignore this law and we do things our way. Does this sound impossible? I don't think so. It will mean strategizing, using our Treaty as the tool to create

the vision and implementing in unity, our collective rights in our territories. Nation building, creating Laws, being United, speaking with one voice, helping one another; these are all elements of a strong Cree Nation. (p. 2)

Unfortunately, when the consultation and negotiation process fails, the only recourse is litigation (Lawrence & Macklem, 2000) and/or civil disobedience.

References

- Bird, L. (2005). *Telling our stories. Omushkego legends and histories from Hudson Bay*. Peterborough, ON: Broadview Press Ltd.
- Cain, W. C., & Awrey, H. N. (1930). *Report of the commissioners re adhesion to Treaty No. 9, for the year 1930*. Retrieved from http://www.collectionscanada.gc.ca/indianaffairs/020010119.01e.php?page_id_nbr=31877&&PHPSESSID=ae2us0aq8760g7i7uvde0e37b5
- Cauchon, J., & Cockburn, J. (1867). *Rupert's Land and North-Western Territory –Enactment No. 3 (Schedule A)*. Retrieved from <http://www.justice.gc.ca/eng/pi/const/lawreg-loireg/p1t3-2.html>
- Canada endorses Indigenous rights declaration. (2010, November 12). *CBC*. Retrieved from www.cbc.ca/news/canada/story/2010/11/12/indigenous-declaration.html
- Constitution Act (1982). Schedule B to the Canada Act 1982 (UK), 1982, c 11.
- Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.
- Department of Finance. (2011). *Equalization program*. Retrieved from <http://www.fin.gc.ca/fedprov/ecp-eng.asp>
- Dragland, S. (1994). *Floating voice: Duncan Campbell Scott and the literature of Treaty 9*. Concord, ON: House of Anansi Press Limited.
- Eversole, R. (2010). Empowering institutions: Indigenous lessons and policy perils. *Society for International Development*, 53(1), 77-82.
- Far North Act. (2010). *Bill 191 An Act with respect to land use planning and protection in the Far North*. Legislative Assembly of Ontario, 39th Legislature, 2nd session.
- Feldstein, R. (2001). *Repatriation of the constitution and alternative dispute resolution. Civil Law Section*. Ottawa, ON: Faculty of Law, University of Ottawa.
- Henry, J. (2006). *The Proclamation of 1763. A model for the establishment of treaties*. Retrieved from <http://www.lac-bac.gc.ca/publications/002/015002-2010-e.html>
- Hibbard, M., Lane, M. B., & Rasmussen, K. (2008). The split personality of planning: Indigenous peoples and planning for land and resource management. *Journal of Planning Literature*, 23(2), 136-150.
- Holden, M. (2008). *Canada's new equalization formula*. Retrieved from http://dsp-psd.pwgsc.gc.ca/collection_2008/lop-bdp/eb/prb0820-e.pdf
- INAC. (2007). *Historic treaty information. Timeline and maps – Indian and Northern Affairs Canada*. Retrieved from http://www.ainc-inac.gc.ca/pr/trts/hti/site/mpindex_e.html
- INAC. (2009). *Canada's position: United Nations draft declaration on the rights of Indigenous peoples*. Retrieved from <http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp>
- INAC. (2010). *Canada's statement of support on the United Nations declaration on the rights of Indigenous peoples*. Retrieved from <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>

- James Bay Cree Society. 1979. *Project "Wetamakawin" (to inform) by the James Bay Cree Society*. Moose Factory, ON: Royal Commission on the Northern Environment.
- James Bay Treaty – Treaty No. 9: Made in 1905 and 1906 and adhesions made in 1929 and 1930. (1964). Ottawa, ON by: Roger Duhamel F.R.S.C. Queens Printer and Controller of Stationary. (Reprinted from the edition of 1931).
- Lawrence, S., & Macklem, P. (2000). From consultation to reconciliation: Aboriginal rights and the Crown's duty to consult, *Canadian Bar Review*, 79, 252-266.
- Legislative Assembly of Ontario. (2009a). *Bill 191: An Act with Respect to Land Use Planning and Protection in the North*. 39th Legislature, 1st Session (First Reading June, 2, 2009).
- Legislative Assembly of Ontario. (2009b, August 12). *Official report of debates Mining Amendment Act, 2009 and Far North Act, 2009*. Legislative Assembly of Ontario, 39th Parliament, 1st Session. Retrieved from http://www.ontla.on.ca/web/committee-proceedings/committee-transcripts_current.do?ParlCommID=8856&locale=en
- Legislative Assembly of Ontario. (2009c, August 13). *Official report of debates Mining Amendment Act, 2009 and Far North Act, 2009*. Legislative Assembly of Ontario, 39th Parliament, 1st Session. Retrieved from http://www.ontla.on.ca/web/committee-proceedings/committee-transcripts_current.do?ParlCommID=8856&locale=en
- Legislative Assembly of Ontario. (2010a, May 19). *Official report of debates*. Legislative Assembly of Ontario, 39th Parliament, 2nd Session. Retrieved from http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2010-09-23&Parl=39&Sess=2&locale=en
- Legislative Assembly of Ontario. (2010b, June 1). *Official report of debates*. Legislative Assembly of Ontario, 39th Parliament, 2nd Session. Retrieved from http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2010-09-23&Parl=39&Sess=2&locale=en
- Legislative Assembly of Ontario. (2010c). *Bill 191: An Act with Respect to Land Use Planning and Protection in the North*, 39th Legislature, 1st Session (Second Reading June 3, 2010).
- Legislative Assembly of Ontario. (2010d, September 22). *Official report of debates*. Legislative Assembly of Ontario, 39th Parliament, 2nd Session. Retrieved from http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2010-09-23&Parl=39&Sess=2&locale=en
- Legislative Assembly of Ontario. (2010e, September 23). *Official report of debates*. Legislative Assembly of Ontario, 39th Parliament, 2nd Session. Retrieved from http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=en&Date=2010-09-23&detailPage=%2Fhouse-proceedings%2Ftranscripts%2Ffiles_html%2F23-SEP-2010_L046.htm&Parl=39&Sess=2# PARA394
- Long, J. (1978a). *Treaty No. 9: The negotiations, 1901-1928*. Cobalt, ON: Highway Book Shop.
- Long, J. (1978b). *Treaty No. 9: The Indian petitions 1889-1927*. Cobalt, ON: Highway Book Shop.
- Long, J. (1989). *No basis for argument: The Signing of Treaty Nine in Northern Ontario, 1905-1906*. Unpublished report.

- Long, J. (1993). *The government is asking you for your land: The Treaty made in 1905 at Fort Albany according to Cree oral tradition*. Moose Factory, ON. Unpublished report.
- Louttit, S. (2010a, December). *Treaty #9 and oral promises of the Treaty*. Paper presented at Mushkegowuk Senior Management and First Nations Senior Management Meeting.
- Louttit, S. (2010b). *Report to the 25th annual Mamobitowin of the Omushkegowuk*.
- Louttit, S. (2011). *The James Bay Treaty – Treaty No. 9. The real agreement as orally agreed to*. Power Point Presentation, Fort Albany, ON.
- Macklem, P. (1997). The Impact of Treaty 9 on natural resource development in Northern Ontario. In M. Asch (Eds.), *Aboriginal and treaty rights in Canada: Essays on law, equity, and respect for difference* (pp. 97-132). Vancouver, B.C: UBC Press.
- Métis National Council. (2007). *A guide for Métis on consultation and accommodation*. Retrieved from <http://www.metisnation.ca/press/07-sep13b.html>
- Meyers Norris, P. (2009). *Best practices for consultation and accommodation*. Retrieved from www.newrelationship-trust.ca/.../consultation-and-accommodation-report.pdf
- Morrison, J. (1986). *Treaty research report, Treaty No. 9 (1905-1906)*. *Treaties and Historical Research Centre, Indian and Northern Affairs Canada, Ottawa, ON*. Retrieved from http://www.ainc-inac.gc.ca/pr/trts/hti/t9/tre9_e.pdf
- Morrison, J. (1988). *The poet and the Indians. Duncan Campbell Scott woos the muse and negotiates Treaty Number Nine*. *Beaver* 68(4), 4-16.
- Mushkegowuk Council. (2008a, November 14). *Mining activities in Mushkegowuk First Nations homelands*. Resolution No. 2008-11-25.
- Mushkegowuk Council. (2008b, November 14). *Resource development activities in Mushkegowuk First Nations*. Resolution No. 2008-11-29.
- Mushkegowuk Council. (2008c, November 14). *Territorial mapping and land use planning*, Resolution No. 2008-11-13.
- NAN. (2009a). *Grand Chief clarifies NAN's position on Far North Land Use Planning Bill*. Retrieved from <http://www.nan.on.ca/article/2009-archive-646.asp>
- NAN. (2009b, July 22). *Our homelands: Ontario introduces the Far North Act, Bill 191 and an Act to amend the Mining Act, Bill 173* (pamphlet).
- NAN. (2010a). *NAN First Nations*. Retrieved from www.nan.on.ca/article/nan-first-nations-164.asp
- NAN. (2010b). *Oski-Machiitawin (New Beginning)*. Retrieved from <http://www.nan.on.ca/article/oskimachiitawin-new-beginning-488.asp>
- NAN. (2010c, September 23). *NAN releases statement on passing of third reading of Bill 191 – The Far North Act*. Retrieved from www.nan.on.ca/articl/news-releases-187.asp

- Northern Sechwepemc te Quelmucw Leadership. (2009). *2009 NstQ Consultation Guidelines: A guide for government and third parties*. Retrieved from http://www.nstq.org/Photo_Pages/nstc/naturalresources.htm
- Office of the Premier. (2008). *Protecting a northern boreal region one-and-a-half-times the size of the Maritimes*. Retrieved from www.ontario.ca/opo/en/2008/07/protecting-a-northern-boreal-region-one-and-a-half-times-the-size-of-the-maritimes.html
- Ontario Ministry of Aboriginal Affairs. (2007). *Government and Nisbwanbe-Aski Nation Chiefs create new political forum: Northern table will help build prosperity for northern First Nations*. Retrieved from http://www.aboriginalaffairs.gov.on.ca/english/news/2007/apr18nr_07.asp
- Ontario Ministry of Natural Resources. (2010). *The Far North Ontario*. Retrieved from <http://www.mnr.gov.on.ca/en/Business/FarNorth/2ColumnSubPage/266514.html>
- Posey, D. A., & Dutfield, G. (1996). *Beyond intellectual property: Toward traditional resource rights for Indigenous peoples and local communities*. Ottawa, ON: International Development Research Centre.
- Regina v. Batisse. (1978). 84 D.L.R. (3d) 377 (also reported: O.R. (2d) 145, 40 C.C.C. (2d) 34). Retrieved from <http://library2.usask.ca/native/cnlc/col09/429.html>
- Rickard, A. (1977). *Basic issues and priorities of Grand Council Treaty #9. Summary of activities*. Timmins, ON: Grand Council Treaty #9.
- Royal Proclamation of 1763. (1763). Retrieved from http://www.ainc-inac.gc.ca/ch/rcap/sg/sga4_e.html
- Rupert's Land and North-Western Territory – Enactment No. 3 1870. Part 1. (1870). Retrieved from <http://www.justice.gc.ca/en/ps/const/loireg/p1t3-1.html>
- Scott, D. C. (1947). *The Circle of Affection and other pieces in prose and verse*. Toronto, ON: McClelland and Stewart.
- Supreme Court of Canada (British Columbia Court of Appeal). (1999). *Halfway River First Nations v. British Columbia*.
- Titley, E. B. (1986). *A narrow vision*. Duncan Campbell Scott and the Administration of Indian Affairs in Canada. Vancouver, BC: University of British Columbia Press.
- Union of Ontario Indians. (2003). *Reaching effective consultation: A guide on how to get there! "When in doubt, check it out"*. Retrieved from <http://www.anishinabek.ca/union-of-ontario-indians.asp>
- Union of Ontario Indians. (2008). *Union of Ontario Indians*. Retrieved from <http://www.anishinabek.ca/union-of-ontario-indians.asp>
- United Nations (UN). (2006). *Study of the problem of discrimination against Indigenous populations*. Retrieved from <http://www.un.org/esa/socdev/unpfii/en/spdaip.html>
- United Nations (UN). (2007). *United Nations declaration on the rights of Indigenous peoples*. Retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>