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"Consultation and Accommodation in Nishnawbe Aski Nation"
Presentation to the Ipperwash Hearing

I am Stan Beardy Grand Chief of Nishnawbe Aski Nation. I would like to thank Commissioner Sid Linden for inviting us to speak at this hearing today.

Introduction

- Building effective intergovernmental relationships in the Province of Ontario is a major issue that has been longstanding and overdue. Relationship building is also a phenomenon occurring throughout the country between the Crown and First Nations. With progress happening in other provinces such as British Columbia, it becomes evident that the climate on relationship building in Ontario is in need of a major overhaul.

- In this document, I will review the approach of Nishnawbe Aski Nation (NAN) on the issue of consultation and accommodation, to determine (from the First Nations perspective) the Crown's response on this approach in Ontario, and to outline some key considerations for relationship building. It is hoped that this will provide an opportunity for meaningful dialogue on the topic of "building more effective relationships." In the hopes of taking an honest look and achieving a productive discussion it identifies not only the associated problems, but solutions on moving forward to overcome them.

- Over the past 5 years, NAN has been actively involved in engaging the Crown on the very issue of effective relationships. The core of these discussions has always been the issue of consultation and accommodation and associated rights. Although NAN has worked towards engaging a number of Ontario ministries, these efforts have not met with the intended success in terms of implementation of NAN consultation and accommodation standards. This may be attributed to the absence of a process or forum to address the issue specifically. It is hoped that the Intergovernmental Relations (IGR) process will provide the opportunity to make more substantive and comprehensive advances. Other processes such as that of the *Ipperwash Inquiry* may also yield some of the results we have been looking for.

- Although a daunting task, the issue of building relationships based upon mutual respect, recognition and reconciling Aboriginal and Treaty rights (as they interconnect with the current jurisdiction of the Crown) is a very necessary process that needs to happen. More and more, First Nations are asserting their rights on the land. Besides First Nations, industry is also increasingly becoming frustrated with the lack of certainty related to the

lack of agreement between First Nations and the Crown on consultation and accommodation.[1]

NAN Approach to Consultation and Accommodation

- On May 31, 2001 the First Nations in NAN unanimously adopted NAN Chiefs Resolution 01/75 on the issue of consultation and accommodation (now known as the "NAN Consultation Policy"). The purpose of establishing the policy was to ensure that a basic plan (and minimum standards) was developed with respect to meaningful consultation and accommodation in the territory. Other purposes included developing clarity, certainty and consistence about Aboriginal and Treaty rights for all parties so that conflicts related to impacts and infringements to Aboriginal and Treaty rights could be reduced, to protect the environment and First Nation way of life, and to help find ways to maximize sustainable economic growth and development in the NAN territory.

- The NAN Consultation Policy was developed not only for First Nations but also for the use of industry and government. As a show of self-governance, it was developed exclusively by First Nations leadership in NAN and legal counsel to ensure that it was based on fiduciary principles and constitutional requirements as interpreted by Canadian courts. It was developed as a "user-friendly" tool in which the scope of consultation and accommodation could be applied anywhere from 1 – 49 First Nations depending on a particular project. The policy also made two distinctions in how it is to be applied. These include fiduciary duties in relation to project-based resource development and the idea of policy/legislative development and/or reform.

- NAN has lobbied for the implementation of the Consultation Policy in many government policy areas and initiatives that have the potential to impact on our rights, and where the fiduciary duty to consult and accommodate is required, but this has been largely unsuccessful. The First Nations in NAN have been hugely dissatisfied with the government approach to consultation and accommodation and ultimately, the relationship with the Crown. The only type of consultation process that seems to exist within the Ontario government is the *EBR* process in which First Nations have expressed time and time again its inadequacy as it fails to recognize First Nations as rights holders and not just an interest group.

- The government has indicated that the inability to implement the NAN Consultation Policy is attributed to inadequate capacity and financial resources, but we believe the lack of a clear policy direction is another factor.

[1] More recently, the community of Kitchinuhmaykoosib Inninіwug in Northern Ontario have been vocal in their efforts to block mining exploration after a moratorium was placed on such activity by a number of NAN First Nations north of the 50th parallel. See Toronto's Globe and Mail, Wednesday February 22, 2006. *"Stakes are high as miners and natives square off."*

NAN Perspective on Crown Responses to Consultation and Accommodation in Ontario

- Consistent and effective approaches to consultation and accommodation in Ontario are non-existent. To date, no formal policy exists within the Ontario government. Given that the courts have been making rulings on the issue for over the past 15 years, this is disappointing to First Nations. In the spring of 2005, the Ontario Secretariat for Aboriginal Affairs announced that they would be developing draft consultation guidelines to assist ministries in fulfilling their consultation obligations as part of their "new approach" initiatives.

- Due to a lack of communication, openness and transparency, First Nations are not privy to what kind of attention the Crown has given to recent decisions of the Courts regarding the duty to consult and accommodate. What is also not clear is how the Crown's interpretation of these decisions is reflected in policy and legislation. When the *Haida* case was heard in 2004 the Province of Ontario did submit an Intervener Factum that concerned NAN because it made the argument that the Provincial Crown is not in a fiduciary duty with First Nations and does not have the same fiduciary duties as compared to the Federal Crown, citing the *St. Catherine's Milling* case in justification. Due to the fact that Treaty No. 9 is the only Treaty also signed by the Province the concept of a provincial fiduciary duty has yet to be tested or determined. However, Ontario's position as an intervenor in the *Haida* case is a good indication of the state of aboriginal relations with the Crown in Ontario.

- Nishnawbe Aski Nation did receive a response to the NAN Consultation Policy from the Province of Ontario in 2002.[2] At that time, NAN was not satisfied as it failed to address <u>how</u> consultation and accommodation would be implemented (just that it would be). First Nations would have been satisfied if the Crown was able to provide more substantive assurances that a process would be in place to engage First Nations. In addition, the absence of any kind of invitation for meaningful dialogue to further discuss the NAN Consultation Policy has also led First Nations in NAN to believe that the colonialist and paternalistic mentality still exists in the Ontario government today and has worked towards hindering any kind of progress that can potentially be made.

- Another issue that perpetuates the problem of implementing fiduciary obligations on consultation and accommodation is that of capacity. Lack of capacity is a problem for both the Crown and First Nations, in that First Nations are small and do not have the capacity to handle the potentially huge numbers of requests from government for consultation and similarly, the Crown does not have the capacity to handle and coordinate the volume of potential consultations that are legally required. This makes the need for a comprehensive approach all the more necessary. Although the Ontario

[2] Letter to NAN from Ontario General, Minister Responsible for Native Affairs, David Young dated August 2002.

Secretariat for Aboriginal Affairs exists as a central body to coordinate government departments on Aboriginal issues there is no capacity for OSAA to take on this kind of coordination role in a manner that First Nations would like. In addition, First Nations feel that OSAA has too many other unrelated responsibilities. Perhaps other mechanisms to address this kind of inter-ministerial collaboration with First Nations should be considered, for example, a newly created ministry specific to the issue of consultation and accommodation such as the one set up in B.C. in June 2005 called the "Ministry of Aboriginal Relations and Reconciliation".

The Process of Reconciliation

- How Ontario and First Nations choose to work together to rebuild relationships must be guided by, not only the leading Supreme Court of Canada decisions of *Haida*, *Taku River* and *Mikisew* , but also by upholding "the honour of the Crown" through a conciliatory approach, and by models and best practices that already exist in the country.

- On March 15, 2005 a Leadership Accord was signed, in which the Province of B.C. and First Nations were able to hammer out a "New Relationship Vision" with a $100 million dollar "Relationship Fund" which was incorporated in B.C.'s provincial budget. Soon they will be developing consultation and accommodation agreements and will be embarking on a policy review as part of their efforts to "close the gaps" between their citizens. The participation of the public is a major component of this exercise as part of their commitment to openness, transparency and accountability for results. They will be developing a 10-year plan for action. Of critical importance in these discussions is the recognition that Aboriginal and Treaty rights exist, the belief that negotiations are the chosen means for reconciling these rights, and that the new relationship be based on mutual respect and responsibility.

- One of the biggest factors that has contributed to the success of this process is the willingness of the B.C. government to work out a process to implement 35 (1) rights as affirmed in the *Canada Constitution Act, 1982*. While s. 35 (1) affirms that Aboriginal and Treaty rights exist, it does not provide definition or meaning. More and more, this is becoming a problem for First Nations. Provincial and federal leaders in Ontario have the responsibility, and must express willingness, to ensure that these rights are accommodated, given a meaningful expression, and not just merely recognized. This must be achieved through discussion and negotiation, just as it has in British Columbia.

- To understand what s. 35 (1) rights mean, a process must be undergone to understand the Treaty relationship. Given that Treaty No. 9 was signed 100 years ago by both the provincial and federal governments, this becomes ever more critical. There needs to be true understanding of the current applicability of the Treaty relationship. NAN has recognized this and hopes to address it with the Crown through a *NAN/Ontario Northern Table*. The same process needs to take place in the Ontario

Intergovernmental Relations process as First Nations feel they are being treated as mere interest groups, rather than special rights holders with a long history of a strong connection to the land. This mentality must change in order for the relationship to move forward and give s. 35 (1) rights meaning.

- The relationship building process must also recognize that it is not individual judges or Courts but political leaders, First Nation and non-First Nation, who have the capacity and legitimacy to forge new government-to-government relationships. New relationships cannot be resolved through the courtroom. Recent Canadian jurisprudence directs that reconciliation be achieved through negotiations with First Nations and not through unilaterally achieved legislative Crown action. It is important that relationship building be done together.

- More importantly, developing a relationship must be based on good faith negotiations. Both First Nations and the Crown must agree on what this means and be guided by good faith requirements that have been considered by the Courts. The absence of good faith negotiations must be avoided at all costs.[3]

- A good understanding of the requirements to good faith negotiations must be developed and committed to in the Ontario Intergovernmental Relations process through written agreements. Some of these also include the need for openness and transparency and adequate resources.

[3] Stuart Rush, Q.C. Materials prepared for the conference held in Vancouver, BC hosted by the Pacific Business & Law Institute on October 19th and 20th, 2000. During the Native Title Tribunal in Australia, in which they reviewed the *Native Title Act*, the tribunal was able to identify some indicators of the absence of good faith negotiations:

- Unusual delay in initiating communications
- Failure to make proposals
- The unexplained failure to communicate within a reasonable time
- Failure to contact one or more of the parties
- Failure to take reasonable steps to facilitate and engage in discussions
- Failing to respond to reasonable requests for relevant information within a reasonable time
- Stalling negotiations by unexplained delays in responding to correspondence or to telephone calls
- Unnecessary postponement of meetings
- Sending negotiators without authority to do more than argue or listen
- Refusing to agree on trivial matters
- Shifting position just as agreement seems in sight
- Adopting a rigid non-negotiable position
- Failure to make counter proposals
- Unilateral conduct which harms the negotiating process, and
- Refusal to sign a written agreement in respect to the negotiation process or otherwise

Conclusion

- First Nations in NAN believe that improved relationships with the Crown are possible and most of all, necessary. First Nations in NAN would like to see a major shift in the approach to relationship building and the issue of consultation and accommodation and look forward to helping define what this means. In order for this to succeed it must be accomplished through government willingness as opposed to Court direction.