CHIEFS OF ONTARIO
FINAL SUBMISSION
TO THE
IPPERWASH INQUIRY
PART II

July 2006

"*Those who cannot learn from history are doomed to repeat it.*"

George Santayana

Executive Summary of Recommendations

Revitalizing First Nation – Ontario – Canada Intergovernmental Relations

B. 1 The Government of Ontario must give meaningful and full recognition to Treaty and Aboriginal rights. Recognition and implementation of such rights must have particular regard for the spirit and intent of the Treaties as understood by the First Nation parties; fundamental to this understanding is the First Nation's oral history. All Ministers of the provincial Crown share responsibility for honouring Treaty obligations in the province of Ontario. This recognition must be reflected in all provincial legislation, policy and practice.

B. 2 To ensure the Government of Ontario understands its constitutional, statutory, treaty and fiduciary obligations, Ontario must institute mandatory awareness initiatives for all Ministers and all decision making levels of authority.

B. 3 To ensure that Ontario can meet its stated objective of building a constructive relationship with First Nations built upon mutual respect – as stated in its *New Approach to Aboriginal Affairs*, released in June 2005, the Government of Ontario must ensure that the Minister Responsible for Aboriginal Affairs is equipped with a clear Cabinet mandate and the requisite authority to give full effect to this stated objective.

B. 4 The Government of Ontario must commit and deliver sufficient human and financial resources to strengthen its institutional capacity in all concerned Ministries and offices to build a full and respectful partnership with First Nations. In order to accomplish this expeditiously, Ontario should give consideration to the establishment of Cabinet-level and Deputy-level committees to facilitate effective senior level attention and commitment to address First Nation issues.

B.5 As true partners, the Government of Ontario and First Nations must develop mechanisms together that facilitate constructive dialogue and support these mechanisms to address issues of mutual concern on a timely basis. The Government of Ontario should give consideration to the establishment of a Ministerial Advisory Committee with representation from the Chiefs of Ontario as one such mechanism. This Cabinet and/or Deputy-level committee could provide a forum for the Government of Ontario to bring together provincial departments and First Nations at the most senior levels to proactively meet to address First Nations issues.

Aboriginal Land and Treaty Rights in Ontario

C. 1 **To avoid conflicts in the future, the Government of Ontario must work with First Nations in an environment of mutual respect to resolve land claims in a more timely, efficient, fair process, and one that maximizes instruments of facilitated resolution wherever possible.**

C. 2 **The specific recommendations offered by Michael Coyle to the Inquiry and accepted by the Chiefs of Ontario should be immediately acted upon.**

C. 3 **The Government of Ontario should work with the Government of Canada to harmonize land claims resolution processes as much as possible, and it should seriously consider mechanisms for non-binding as well as binding arbitration of land claims.**

C. 4 **Furthermore, the Government of Ontario must commit to work with Canada and First Nations to ensure that land claims settlements are creative, forward-looking and result in restoration of lands to First Nations' communities on a timely basis.**

C. 5 **Public Education regarding Aboriginal rights, issues and history must be included in Ontario's primary and secondary school curriculum.**

Ontario's Regulatory Regime and Aboriginal and Treaty Rights

D. 1 **The Government of Ontario must build meaningful and full partnerships with First Nations for resource benefit sharing and joint management based upon shared stewardship arrangements, which enable First Nations' Treaty and Aboriginal rights to be respected and reconciled with public interests.**

D. 2 **The Governments of Ontario and Canada should be strongly encouraged to develop collaboratively with First Nations, guidelines and policies to provide for consultation and accommodation of First Nations treaty and Aboriginal rights and interests to avoid conflicts which may lead to protests.**

D. 3 While the Governments of Ontario, Canada and First Nations are developing guidelines and policies for consultation and accommodation referred to Recommendation D 2, the Government of Ontario must issue a moratorium on all hunting, fishing and trapping regulatory prosecutions of First Nations members to create an environment of mutual trust and respect.

D. 4 The Government of Ontario should build on the positive experiences of the Anishinabek/Ontario Fisheries Research Centre and the Anishinabek/Ontario Resource Management Council to expand such partnership initiatives with First Nations throughout the Province of Ontario and proactively mitigate the potential for conflict. A positive first step would be the creation of the Senior Level Advisory Committees referred to in Recommendation B 4.

<u>Sacred Sites</u>

E. 1 Ontario must undertake a complete review of all legislation and regulations relating to sacred sites and burial grounds. This review must be carried out in consultation with First Nations with a view to ensuring the proper protection of these objects and grounds.

E. 2 Appropriate Protocols should be negotiated between Ontario and First Nations political representatives to ensure peaceful protection of and access to burial grounds and other sacred sites where they are located within treaty territories.

E. 3 Ontario and First Nations should undertake a review of the 2002 Ontario Ministry of Northern Development and Mines' policy entitled *Withdrawing Land: Aboriginal Culturally Significant Sites in the Far North* with a view to assessing its approach and application throughout the province.

E.4 While the Chiefs of Ontario have called for meaningful consultation with the government of Ontario on all issues, as regards sacred sites, these consultations must be formalized. All consultations regarding sacred sites with the Chiefs of Ontario must be undertaken through the newly created *First Nations Burial Ground Archaeological Sites Committee*.

Aboriginal Occupations/Specifically First Nations Occupations

F. 1 The Governments of Ontario and Canada should be strongly encouraged to resolve fairly and expeditiously the underlying issues about First Nations' access to lands and resources to avoid conflicts which may lead to occupations and protests.

F. 2 The Governments of Ontario and Canada should each be encouraged to seriously consider the principles and best practices articulated by Professor John Borrows to this Inquiry.

First Nations and Police Services

G.1 The Chiefs of Ontario welcome the opportunity – at the appropriate time - to discuss further changes to the OPP policy "*A Framework For Police Preparedness for Aboriginal Critical Incidents"* **with the OPP in light of current and on-going events in Ontario.**

G. 2 Protocols should be negotiated between police services in Ontario and First Nations political representatives (at the community and regional political organization levels) in order to avoid and/or resolve conflicts without incident.

G. 3 Police services in Ontario should be strongly encouraged to:

a. establish an alternative complaint and investigation process in collaboration with First Nations to ensure fairness and transparency;

b. establish senior level liaison processes with First Nations' leadership to regularly address issues of mutual concern and to facilitate cooperative problem-solving;

c. develop and implement culturally-sensitive cross-cultural training initiatives in cooperation with First Nations, including regular First Nations community-based training sessions involving Elders and community leaders, First Nations constables, women, youth, etc.;

d. hire more First Nations members into and advancement through all levels of authority in Ontario police services.

G.4 There is a need for more recognition, support and financial resources from both Ontario and Canada for First Nations-directed police services in Ontario and for First Nations-based administration of justice systems.

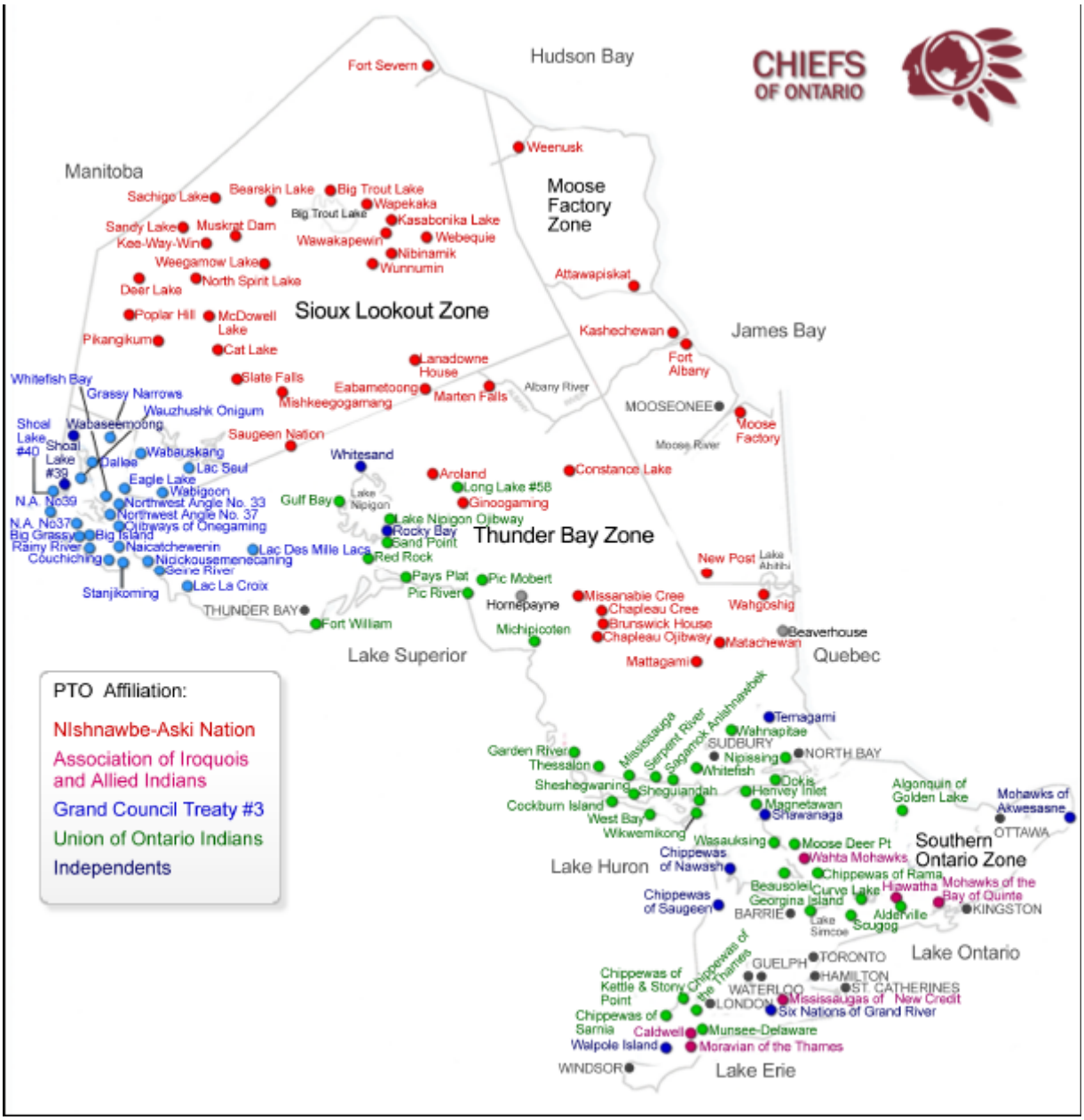
G.5 There is a need for greater recognition of First Nations' law and support for First Nation enforcement processes, together with a commitment to reciprocal arrangements for implementation of First Nations-based justice systems.

G.6 The Government of Ontario should act upon the recommendations of The Honourable Mr. Justice Patrick LeSage in his final report into the Police Complaints System in Ontario and create an independent civilian body, which would include First Nation representation, to administer the public (police) complaints system in Ontario.

A. Introduction and Overview

1. The Chiefs of Ontario*1* is a coordinating body for 134 First Nation communities located within the boundaries of the Province of Ontario. The purpose of the Chiefs of Ontario office is to enable the political leadership to discuss regional, provincial and national priorities affecting First Nation people in Ontario and to provide a unified voice on these issues. Politically, First Nations in Ontario have many political and tribal affiliations. All Chiefs convene in assembly at least once a year (or more often as needed), to debate and pass resolutions dealing with Ontario-wide and community-specific issues, and to elect the Ontario Regional Chief every three years – Angus Toulouse is the current Regional Chief.

1 For further information about the Chiefs of Ontario, please refer to their website at www.chiefs-of-ontario.org.



2. Ontario-wide affairs are governed by the "Political Confederacy" of Nations ("PC"), representing First Nations organizations across Ontario – the Union of Ontario Indians, Nishnawbe Aski Nation (formerly Grand Council Treaty #9), Grand Council Treaty #3, Association of Iroquois and Allied Indians, and 12+ Independent First Nations. In addition to these Political and Territorial Organizations ("PTO's"), there are 15 Tribal Councils. In some cases, individual First Nations act on their own politically.

3. At the Political Confederacy, members are assigned portfolios and carry out their work through committees which bring together Chiefs and technicians from the PTO's. The scope of the issues addressed include taxation, economic development, education and language, environment, fiscal relations, forestry, health, housing, international relations, justice, self-government, treaty and land rights, training and capacity building etc..

4. Today, the134 First Nation communities are located within the boundaries of the Province of Ontario; within these boundaries also exists a complex interrelationship of treaty obligations, federal-provincial division of powers, statutory regimes and constitutionally protected Aboriginal and Treaty rights; and a relationship where much reconciling must take place if peaceful coexistence is to be achieved.

5. The events at issue in this Inquiry raise serious questions in First Nations communities regarding the relationship between First Nations people and provincial policing authorities, as well as the relationship between Ontario's First Nations and the provincial government.

6. The Chiefs of Ontario were granted standing in Parts I and II of this Inquiry and organized their participation in Part II in coordination with the Inquiry's Research and Consultation Plan*2*. In this plan, the Inquiry identified the key issues and areas requiring further research. Once identified, the Inquiry then commissioned highly respected individuals in each key area to prepare a historical report for public consideration and comment.

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2 A copy of the Ipperwash Inquiry's *Research and Consultation Plan* is reproduced at Appendix 1.

7. The Chiefs of Ontario focused on seven key areas under investigation in Part II of this Inquiry and that were the subject of study by individuals preparing commissioned historical research reports. These areas are as follows:

    a) Land Claims in Ontario
    b) Sacred Sites in Ontario
    c) History and Comparison of Aboriginal Land, Treaty and Rights Disputes
    d) Policing and Aboriginal Occupations
    e) Role of Regulatory Agencies in Aboriginal Rights Disputes in Ontario
    f) Aboriginal/Police Relations
    g) Aboriginal Peoples and the Criminal Justice System

8. In February 2005 and again in November, 2005, members of the Chiefs of Ontario assembled in plenary and workshop sessions to review, consider and discuss the research reports commissioned on the above listed subjects and came forward with their own findings and recommendations which are presented in this submission.*3*

9. On March 8 and 9, 2006, the Ipperwash Inquiry invited the Chiefs of Ontario to publicly address the issues under investigation by this Inquiry that the Chiefs of Ontario wanted to draw particular attention to and to provide COO's response to the Ontario Provincial Police's Policy Document entitled *A Framework For Police Preparedness For Aboriginal Critical Incidents*, tabled with the Inquiry on January 27, 2006. This two day session with the Chiefs of Ontario has been preserved on DVD by the Ipperwash Inquiry.

3 A complete list of attendees and subjects considered is found in Appendix 2.

10. Throughout our collective history and with each successive generation, we have come face to face with our own extinction; living under a legal regime governed by "the rule of law" but not our law. We have been witness to the development of Canada and Ontario as each distorts our parallel governments exemplified in the Two Row Wampum*4*, the degradation of our Nation-to-Nation relationships documented in treaties, and legal regimes that supported the annihilation of our language, culture and traditions in the quest to 'civilize' the Indian.

11. Yet, we have survived. We are still here and waiting for our Treaty partner to honour its promises; certainly we have honoured ours. Today, in the Province of Ontario, by its legal and constitutional framework, our Treaty partners must collaborate in and amongst the complex constitutional landscape they have designed; a landscape that divides power between a federal and provincial Crown and a landscape that has not yet come to terms with the first peoples of this country.*5*

12. The Union of Ontario Indians have expressed the significance of the Anishinabek Nation's treaty relationship and summarized some of the current challenges faced by First Nations in their presentation to the Ipperwash Inquiry on March 8-9, 2006. This presentation was originally presented to the Inquiry by the Union of Ontario Indians in *Anishinabek Perspectives on Resolving Rights Based Issues and Land Claims in Ontario* (August 2005) and *Anishinabek First Nations Relations with Police and Enforcement Agencies* (August 2005).*6* Similarly, the Assocation of Iroquois and Allied Indians ("AIAI") spoke on March 8, 2006 of

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4 "When the Haudenosaunee [Iroquios] first came into contact with the European nations, treaties of peace and friendship were made. Each was sumbolized by the Gus-Wen-Tah or Two Row Wampaum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect." (excerpted from presentations to the Special Committee on Indian Self Government by the Haudenosaunee Confederacy, 1983, Queen's Printer) For a representation of the Two Row Wampum please see Appendix 3.

5 For a complete summary of the federal – provincial division of powers, please see M. Coyle, *Addressing Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future, pp. 33-39.*

6 The March 8 and 9, 2006 Union of Ontario Indians presentation has been reproduced at Appendix 4.

the need for governments to work with First Nations to *create* but not *prescribe* a better relationship. Further, the foundation for this relationship will forever be treaties to which the Honour of the Crown is always at stake. Both the Union of Ontario Indians and AIAI provided the Inquiry with recommendations during the March 8 and 9, 2006 session.*7*

13. The federal and provincial governments call us criminals when we seek to exercise our Treaty rights to hunt, fish and harvest. These governments force us to defend ourselves in a process that is lawyer-driven and adversarial rather than find meaningful ways of accommodating our interests with the larger public.

14. When we step out of this adversarial arena to address outstanding Crown obligations regarding lands and resources, these same governments offer us alternative processes to manage our "claims". Yet, the Government of Ontario would have us plod our way through its claims process an average of 19 years per claim.

15. In the decades since section 35 was enshrined in Canada's *Constitution Act, 1982,* great expectations have been raised and hopes dashed. Enshrining Aboriginal and Treaty rights into Canada's Constitution signaled the opportunity to chart a new course; to re-build a relationship of mutual respect. Instead, First Nations have been met by perpetual resistance. The Government of Ontario refuses to fully recognize Aboriginal and Treaty rights in its policies and practices and its pattern of refusal must be addressed if it is to signal a positive change in our relationship.

16. The Chiefs of Ontario want to be equal partners with the Government of Ontario and work together to put our relationship on stronger footing. The kind of change needed can be found most recently in British Columbia where the provincial government and First Nations have truly embarked on developing a new

7 The recommendations of the Union of Ontario Indians are found at Appendix 5. The recommendations of the Association of Iroquois and Allied Indians are found at Appendix 6.

relationship based on mutual respect and the principles of recognition and reconciliation. On November 25, 2005, the Government of British Columbia, First Nations and the Government of Canada signed the ***Transformative Change Accord*** to solidify how each government intends to implement the Kelona Agreement. Prior to this, the Government of British Columbia and the First Nations of that province, created a "vision document" entitled ***The New Relationship*** that sets out an initial work plan to move toward reconciliation of Aboriginal and Crown Titles and Jurisdiction with British Columbia. These documents find their genesis in the agreement that "new approaches for addressing the rights and title interests of First Nations are required if First Nations are to be full partners in the success and opportunity of the province." An important part of this endeavour is exemplified in the January 19, 2006 forestry agreements reached between the Government of British Columbia and 100 First Nations within the province which define shared revenue and access to the forests.*8*

B. Revitalizing First Nation – Canada – Ontario Intergovernmental Relations

17. Since the mid-1990s, there has been a proliferation of bilateral and multi-lateral initiatives with First Nations, Canada and Ontario; however, no significant changes have come to the relationship at the national or provincial levels of the kind that ensures respect, recognition and reconciliation. Individual PTO's have developed bilateral processes with Canada and Ontario. NAN, for example, has a Bilateral Protocol Table and an exploratory Treaty Discussion Table with Canada, and NAN has been pursuing negotiations with Canada on governance and education. The Union of Ontario Indians has had on-going self-government discussions since 1995 with Canada for "Restoration of Jurisdiction" in governance and education. The Union has also engaged in a number of bilateral natural resource initiatives with MNR and it has formed a Child Welfare Roundtable.

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8 ***Transformative Change Accord,*** November 25, 2005 (Appendix 7). News Release, Ministry of Forests and Range, Ministry of Aboriginal Relations and Reconciliation, January 19, 2006 (Appendix 8).

18. In his "Report on Revitalizing First Nation-Canada-Ontario Intergovernmental Relations (4th Draft)*9*", Grant Wedge provides an accurate review of First Nations relations with the province of Ontario over the last ten years; a relationship that was negatively impacted as a result of deep budget and staffing cuts across ministries, and a reduction in the provincial government's capacity to understand, coordinate response to and deal with First Nations' issues during Premier Harris' term in office (i.e. 1995-2001).*10*

19. In addressing the systemic issues that lie at the heart of the Part II mandate of this Inquiry, it is important to understand the interrelationship of the various government ministries and First Nations in the province. As Mr. Wedge explains, in Ontario the Minister Responsible for Aboriginal Affairs is supported by the Ontario Native Affairs Secretariat ("ONAS") now known as the Ontario Secretariat for Aboriginal Affairs ("OSAA"), and ostensibly the Minister and his staff have a mandate to lead in dealing with First Nations issues. Further, as Mr. Wedge points out, while the Minister Responsible for Native Affairs has the corporate lead for Aboriginal matters on behalf of the Government of Ontario, line ministries have responsibility for addressing Aboriginal matters within their respective mandates. The Minister Responsible for Aboriginal Affairs is consulted regularly by other provincial Ministers on Aboriginal policy, program and project issues.*11* The Chiefs of Ontario however, are of the view that a new and more creative advisory structure should be put into place at the most senior levels of government to signal the commitment necessary to address Aboriginal policy, program and project issues of mutual concern.

20. All Ministers of the provincial Crown share responsibility for honouring the

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9 See Appendix 9 for a copy of this report.
10 Appendix 9, Report on Revitalizing First Nation-Canada-Ontario Intergovernmental Relations (4th Draft), G. Wedge, pp. 13, 18-25. This report provides a useful synopsis of "lessons learned" from the Indian Commission of Ontario experience which was discussed during a symposium in December 2004.
11 Ibid, p. 13.

Crown's obligations. To ensure that the province of Ontario has equipped its Ministers with the knowledge and expertise necessary to address First Nation issues within their respective authorities, Ontario should give consideration to the establishment of Cabinet-level and Deputy-level committees to facilitate effective senior level attention and commitment to address First Nation issues. These committees must have First Nation political representation and should serve in an advisory capacity to the most senior levels of government decision making.

21. It is specific Ontario ministries which have mandates and resources to deal with First Nations – whether in Health, Community Services, Education, Natural Resources, Northern Development, Policing. As Mr. Wedge explains, the challenge for the Ontario government in rebuilding effective intergovernmental relations with First Nations is [to determine] who should have the lead and who should support, and how such efforts can best be coordinated to achieve meaningful results. Further, "[O]bviously, collegial activity across ministries, assisted by a secretariat, is a good model – but without strong commitment to make changes and additional resources to support activities, it is difficult to see how successful such efforts will be."*12*

22. What is fundamental to the workings of these relationships, across all ministries, is the capacity of First Nations to fully engage with other governments and organizations. Overall, Ontario does not provide direct resources to First Nations to prepare for and conduct intergovernmental relations, which weakens the First Nations' ability to develop and sustain effective working relationships with the province of Ontario.*13*

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12 Ibid., p. 14.
13 Ibid., p. 15 and during the presentation of Six Nations of the Grand River to the Ipperwash Inquiry on March 9, 2006, Chief David General emphasized the need for governments to adequately resource First Nations as a necessary prerequisite to resolving outstanding points of conflict. The complete presentation of Six Nations of the Grand River including their suggested recommendations, may be found at Appendix 10.

23. In the time since Grant Wedge prepared his draft report, the Ontario government shifted the responsibility for Aboriginal affairs from the Attorney General to the Minister of Natural Resources. This shift has the potential to signal a positive change if this shift results in less adversarial, lawyer-driven conduct and paves the way for more openness to relationship building.

24. In addition, on June 10, 2005 the first formal intergovernmental meeting in seven years was held with the Political Confederacy of the Chiefs of Ontario and Canada and Ontario Ministers. Following this initial meeting a "working group" was formed to develop terms of reference for the future work of this Intergovernmental Relations Process with a focus on two specific areas: Lands and Resources and Human Services. While the work of this process remains in its initial stages, the Chiefs of Ontario is hopeful that a commitment of the principals to revitalizing relations with the First Nations of Ontario remains a priority.*14*

25. To signal a positive change in relationship, the Chiefs of Ontario offer the following recommendations:

B.1 The Government of Ontario must give meaningful and full recognition to Treaty and Aboriginal rights. Recognition and implementation of such rights must have particular regard for the spirit and intent of the Treaties as understood by the First Nation parties; fundamental to this understanding is the First Nation's oral history. All Ministers of the provincial Crown share responsibility for honouring Treaty obligations in the province of Ontario. This recognition must be reflected in all provincial legislation, policy and practice.

B. 2 To ensure the Government of Ontario understands its constitutional, statutory, treaty and fiduciary obligations, Ontario must institute

14 Chief Dr. Dean Jacobs, Bkejwanong Territory (Walpole Island) detailed the values and principles that will guide the Intergovernmental Relations Process and defined the various committees and sub-committees of the process in a presentation on March 9, 2006. This presentation has been reproduced at Appendix 11.

mandatory awareness initiatives for all Ministers and all decision making levels of authority.

B. 3 To ensure that Ontario can meet its stated objective of building a constructive relationship with First Nations built upon mutual respect – as stated in its *New Approach to Aboriginal Affairs*, released in June 2005, the Government of Ontario must ensure that the Minister Responsible for Aboriginal Affairs is equipped with a clear Cabinet mandate and the requisite authority to give full effect to this stated objective.

B. 4 The Government of Ontario must commit and deliver sufficient human and financial resources to strengthen its institutional capacity in all concerned Ministries and offices to build a full and respectful partnership with First Nations. In order to accomplish this expeditiously, Ontario should give consideration to the establishment of Cabinet-level and Deputy-level committees to facilitate effective senior level attention and commitment to address First Nation issues.

B. 5 As true partners, the Government of Ontario and First Nations must develop mechanisms together that facilitate constructive dialogue and support these mechanisms to address issues of mutual concern on a timely basis. The Government of Ontario should give consideration to the establishment of a Ministerial Advisory Committee with representation from the Chiefs of Ontario as one such mechanism. This Cabinet and/or Deputy-level committee could provide a forum for the Government of Ontario to bring together provincial departments and First Nations at the most senior levels to proactively meet to address First Nations issues.

Against this backdrop of bilateral relations, this submission will now address the systemic issues under investigation by this inquiry. The first such issue is the treatment of Aboriginal land and treaty rights in Ontario.

C. Aboriginal Land and Treaty Rights in Ontario

26. While this Inquiry was called by the Government of Ontario pursuant to provincial legislation and as such the federal government was not statutorily required to assist the Commission with its mandate, the constitutional and

statutory framework for the resolution of land disputes as between First Nations and the Crown necessitates the involvement of the federal government. At minimum, the federal government had a fiduciary duty to observe all proceedings of this Inquiry and its complete failure to do so further demonstrates to the Chiefs of Ontario the challenges inherent in seeing meaningful change in their Nation-to- Nation relationship with the Crown in right of Canada.

27.. For First Nations in the province of Ontario, the treatment of our efforts to ensure the Crown's compliance with its fiduciary, statutory and treaty obligations as regards lands and resources has represented a continuous cycle of hope and disappointment. For decades the Crown statutorily prevented us from using our own money to hire legal counsel to advocate on our behalf*15*. This prohibition however, did not mean our rights were not being debated in the courts. On the contrary, in perhaps the single most significant court decision affecting First Nations in Ontario, we were not parties to the proceedings, we were not represented and our evidence was not heard. Instead, in *R. v. St. Catherine's Milling and Lumber Company*16, the dispute was cast as one between the federal and provincial governments without any regard for the treaty interest held by the signatories to Treaty 3.*17*

28. The decision in *St. Catherine's Milling* rested on the interpretation of the *British North America Act, 1867* (the "BNA Act"). Under this Act, legislative powers were divided between federal and provincial governments. This division created (and continues to create) serious complications for the exercise of our land and treaty rights. By the BNA Act, the province of Ontario owns all "Crown land" within its borders at the time of Confederation. In 1873, the Ojibwe signed Treaty 3; six years after Confederation. The question then became, what was the land

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15 Indian Act, S.C. 1926-27, c. 32, s. 6. This section of the *Indian Act* statutorily prohibited every lawyer from representing any Indian or Indian Band in the recovery of any claim or money from 1927 until its repeal in 1951.
16 (1888), 14 App. Cas. 46 (P.C.) [*St. Catherine's Milling*].
17 The Grand Council Treaty #3 spoke to the perspective of Treaty # 3 to the *St. Catherines Milling* decision in their presentation to the Ipperwash Inquiry on March 8 and 9, 2006. This presentation has been reproduced at Appendix 12.

interest of the Ojibwe at the time of Treaty; was it "Crown land" or something else? In the end, the Privy Council decided that at the time of Confederation the territory covered by Treaty 3 belonged to Ontario and the Ojibwe interest "was a mere burden" upon Ontario's full ownership.

29. As Michael Coyle points out in his paper prepared for this Inquiry entitled *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*, what is as significant for First Nations in Ontario as the actual ruling in this case were the attitudes towards us as shown by many of the lawyers and judges involved in the case. The Premier of Ontario at the time, who argued the case personally, submitted at trial that treaties had been negotiated in Ontario, not because they were required, but "only out of endeavour to satisfy the Indians." Chancellor Boyd, the trial judge, in considering the property rights of Aboriginal people, described them as "heathens and barbarians" unqualified to own land. For him, Treaty 3 First Nations were "the rude red-men of the North-West". The "inevitable problem" created by the advance of settlers in Ontario was "how best to protect and encourage the individual settler, and how best to train and restrain the Indian so that being delivered by degrees of dependency and pupilage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship."*18*

30. While *St. Catherine's Milling* was decided 120 years ago, First Nations in Ontario continue to live with the legacy of the words of Chancellor Boyd and the so-called "inevitable problem". Without significant improvement over the 19th century, it does not occur to the federal government or the Government of Ontario to legislate *protection* of our rights to hunt, fish and trap. Instead, provincial game and fish laws are today, as they were in the past, written as if treaty promises do

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18 M. Coyle, *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future* p. 19, fn. 63

not exist and we are regularly prosecuted and convicted in the courts when we attempt to enforce our treaty rights.*19*

31. In Ontario almost all the land base within provincial boundaries is covered by treaty agreements. The outstanding obligations advanced by First Nation in Ontario usually concern the meaning of the original treaty agreements, the extent to which treaty commitments have been honoured and how to provide redress in cases where treaty commitments were breached. Most unresolved interests in land in Ontario are claims of improperly located reserve boundaries or insufficient land having been set aside for reserves, differing interpretations of treaty rights, and the expropriation, flooding or trespass on reserve lands without lawful authority or payment of adequate compensation. Other issues involve requests for compensation or the return to First Nations of reserve lands surrendered to the Crown for sale, where the lands have never been sold or the proceeds have not been used to benefit the First Nation. Finally, in Ontario some First Nations assert that they have never ceded title to land by treaty, or by any other means and therefore their legal interest in the land remains.

32. When it came to addressing our land and treaty interests, the federal and provincial governments chose to proceed on an *ad hoc* basis until 1974 and 1976 respectively. In 1974 the federal government established the "Office of Native

19 One current example of such persecution occurring involves the Batchewana First Nation;a signatory to the 1850 Robinson Treaty. This Treaty guaranteed to the Batchewana people "full and free privilege to hunt and fish as in the habit of doing" yet, from 1950 to 1983, the Ontario government imposed an annual commercial fishing license on the First Nation. In 1983 the First Nation formally rejected Ontario's annual fishing license and asserted its treaty right to commercially fish. This resulted in the 1998 Ontario Court of Appeal decision of R. v. Agawa where the court re-affirmed the First Nation's communal treaty right to commercial fish and the province had no jurisdiction to assign a commercial fishing quota. Since then, the First Nation held extensive discussions with the province of Ontario and the Ministry of Natural Resources from 1995 to 1998 to discuss co-management of the fisheries. These discussions ended in impasse. In 2003 the Ontario Ministry of Natural Resources began issuing warnings of charges to Batchewana First Nation fishermen if they continued to employ non-native persons within their business. Ontario formally referenced that this was a new policy direction as a result of the First Nation's continued operation of an unregulated fishery and the lack of acceptance of an Ontario license. In April 2004, Michael Hopkins, a non-native employee of the First Nation Commerical Fishing business was charged under the Fisheries Act for fishing without a license as a result of his employment with the company. On May 25, 2006 the charges were withdrawn when Ontario prosecutors conceded that that there was no reasonable prospect of a conviction in the case. For background information and press clippings, please see Appendix 20.

Claims". The Government of Ontario established its first claims process in 1976. Given the nature of the claims submitted and the interrelationship between treaty commitments and the federal-provincial division of powers for their resolution, some claims submitted by First Nations in Ontario will overlap between federal and provincial claims processes. Yet, it is impossible to determine from either process, when and how this overlap is triggered.

33. In fact there is a complete absence of information from either the federal government or the provincial government as to how one's determination to negotiate a claim will impact upon the other since each has designed and implemented a land claims process irrespective of the other. No where is this better exemplified than in the lack of federal and provincial policy as regards pre-Confederation specific claims.

The Specific Claims Policy

34. When the federal government introduced its specific claims policy in 1982, it expressly prohibited the submission of claims based on events prior to 1867. For First Nations in Ontario, like the Six Nations of the Grand River, whose numerous outstanding claims were almost entirely based on events prior to Confederation, this bar had the effect of preventing them from seeking resolution of their claims under the policy.

35. In 1982, the Government of Ontario was silent on how its specific claims process would address pre-Confederation claims.

36. For nearly a decade, First Nations across Canada objected to this prohibition of pre-Confederation claims on the basis that by this express bar, Canada was preventing an entire aspect of specific claims from being successfully resolved under its process. In 1991, the Government of Canada amended its policy to permit pre-Confederation to be submitted under its policy however, neither

Ontario nor Canada have developed a policy for how to address these claims and the related questions of joint or severable liability.

37. Further, to simply describe the number of claims that each government has received, processed and settled since the inception of their policies does little to explain the fundamental shortcomings of each process. On their face, what these numbers do tell us is that the number of claims in this province is increasing at a greater pace than they are being settled.

The Chiefs of Ontario Accept the Recommendations of M. Coyle

38. The Chiefs of Ontario considered the research paper prepared for the Inquiry by Michael Coyle entitled *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future* at a workshop held February 22, 2005 in Kenora, Ontario. The participants to this workshop came from each region of the province to address the urgent need for fundamental reform of Ontario's land claim policy and process.

39. Mr. Coyle has accurately set out the fundamental shortcomings of the Government of Ontario's approach to resolving outstanding land claims. The Chiefs of Ontario accept Mr. Coyle's description of the historical basis of land and treaty claims and why "claims" are outstanding both federally and provincially. Mr. Coyle has provided very concrete recommendations for change. On close consideration, the Chiefs of Ontario support the following conclusions and recommendations of Mr. Coyle's research:

a. *Although there have been some notable successes in individual cases, [federal and provincial] policies have not met their stated goals of resolving outstanding claims in a timely and cost-effective manner. The unresolved claims currently in the Ontario negotiation process have been in the system for an average of more*

than 19 years and that the Ontario claims process contains no mechanisms, other than further discussion, for resolving disagreements among the parties.20

b. *Any study of Aboriginal land rights in Ontario must also come to grips with the fact that the Constitution of Canada protects "existing Aboriginal and treaty rights." Yet, the ministries of the Ontario government have no policies, laws or regulations to guide them on how to ascertain what treaty rights may exist in lands affected by their decisions, or as to how and when those ministries should consult with Aboriginal peoples where government actions may interfere with their treaty rights.*21

c. *Generally, the province will review a land claim only if it receives a formal statement from a First Nation (together with supporting historical documents) alleging that Ontario has not fulfilled its obligations "with respect to Aboriginal or treaty rights pertaining to land". Ontario does not have a formal policy that dictates whether it will negotiate a land claim that alleges a past illegal act on the part of the province. Unlike the federal government, which will negotiate a land claim wherever it concludes that is has an outstanding "lawful obligation", Ontario considers several factors in reviewing a land claim. The factors are as follows:*

   1) *a historical review of the claim;*
   2) *a legal review to determine whether or not the province may have any legal obligations with respect to the claim;*
   3) *a review of what other parties might be affected by a claim, and what their interests might be;*

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20 M. Coyle, *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future* p. 1.

21 Ibid., p. 1.

4) *an assessment of the possibility of negotiations reaching a settlement acceptable to those affected in a timely and efficient manner, and one that fosters good relations among communities;*
5) *an assessment of the potential for a settlement to meet the government's policy directions which support Aboriginal self-reliance through economic development, and;*
6) *an assessment of risks, if any, involved in not negotiating the claim.*

The above factors do not commit Ontario to negotiate a formal land claim wherever its review indicates that Ontario has an outstanding legal obligation to the First Nation. Nor do they appear to prevent Ontario from entering negotiations where no legal obligation has been found. The final decision – after its historical, legal and policy reviews – is made by the Minister Responsible for Aboriginal Affairs.[22]

d. *If Ontario decides to negotiate a land claim, unlike Canada, it does not provide the First Nation with a letter indicating the basis on which is has accepted the claim for negotiation. In fact, it appears that in general the province does not formally confirm to the First Nation that it accepts that there is a valid grievance to be negotiated. Instead, it simply advises that it is prepared to enter into negotiations in an effort to resolve the issues. If, on the other hand, Ontario decides not to negotiate, the process is over.*[23]

e. *The land claim negotiations themselves are generally led by OAAS (Ontario Aboriginal Affairs Secretariat), although other ministries contribute their expertise and advice [Ministry of Natural Resources, Ministry of Transportation, Ministry of Municipal Affairs and Housing, Ministry of the Environment, etc.]. In*

22 Ibid., p.47.
23 Ibid., 48.

claims that involve provincial Crown land as part of a settlement, the province will seek to ensure that any settlement will minimize any impacts on existing users of the land. The province will never expropriate private landowners as part of a settlement. Throughout negotiations, ONAS will liaise with the public and with land users who may be affected by a possible settlement in an effort to identify and address their concerns.[24]

f. Ontario has a "fast-track process" for reviewing claims where Ontario's contribution to settlement would be less than one million dollars, and where the First Nation does not seek land as part of the settlement. Although the ONAS website indicates that the "fast-track process" "promotes efficiency in reaching settlements on small claims", thus far no claim has been filed with the province that qualifies for the process.[25]

g. *Under Ontario's existing process, the backlog of outstanding claims against the province is rising, not falling.*[26]

h. *If Ontario decides not to negotiate a claim that the First Nation believes is valid, court is the only alternative. Ontario has no equivalent of the federal ISCC [Indian Specific Claims Commission], an independent body that will review the government's decision and issue recommendations. Nor is there an administrative tribunal to review the decision.*[27]

i. *Ontario has never accepted a First Nation's request to arbitrate an issue or seek a non-binding independent review on any legal issue. If negotiations reach a*

24 Ibid, p. 48.
25 Ibid, p. 48.
26 Ibid, p. 49.
27 Ibid, p. 49.

point of impasse, then negotiations will either continue without progress or if the First Nation has sufficient resources, it may initiate court proceedings. In the latter case, the general policies of both the province and the federal government call for them [the First Nation] to suspend their involvement in negotiations.28

j. An effective process for resolving land claims in Ontario should satisfy six main criteria:

- *it should be timely;*
- *it should be fair and perceived by all parties to be fair;*
- *it should strengthen the relationship between First Nations and the Crown;*
- *it should take into account the division of responsibilities between the federal and provincial governments, without allowing that division to cause delays in the settlement of claims; and*
- *it should protect the interests of the general public.*29

k. Mr. Coyle has provided recommendations to achieve the above named criteria. Namely,

1. *adequate resources to resolve claims*
2. *binding deadlines at all stages of the process supervised by an independent body*
3. *refer legal issues to neutral experts to resolve impasse*
4. *mediation should be available on all claims*
5. *recreate a permanent facilitation body in Ontario*
6. *all parties must be involved in designing a new process*
7. *undertake a review of all cases in active litigation with a view to negotiating*

28 Ibid, p. 49.
29 Ibid, p. 49.

8. *joint research should be adopted in all cases*
9. *a public apology should follow the final settlement of a claim in each case*
10. *Ontario should provide more summary information to the public of the status of all claims at each stage of the process on its website*
11. *Litigation costs should be made publicly available with a description of the land claims in which Ontario is a party*
12. *more information and communication must take place between municipalities, the province and First Nations when settlement contemplates the addition of land to reserve and changes to land use is proposed*
13. *a centralized Ontario policy to protect First Nations' activities on traditional lands and treaty rights must be developed as soon as possible [and shared with all ministries]*
14. *Ontario should review its existing legislation and regulations to ensure such legislation and regulations accommodate the continued exercise of those rights.*30

40. The Chiefs of Ontario take the position that unless and until the above recommendations are acted upon, future conflict over lands and resources in the province of Ontario appears inevitable. Specifically, where a First Nation or its members act by colour of right*31* to take occupation of lands over which they also assert an Aboriginal or treaty right and/or an outstanding specific land claim and the validity of these claims cannot be expeditiously resolved, the tension may then shift to the citizens of Ontario who seek protection in the courts (i.e. sue for trespass and/or seek injunctive relief). Current examples of this exact

30 Ibid. pp. 54-67.
31 During their March 8, 2006 presentation, AIAI adopted the Ministry of the Attorney General's, 1996 applied definition of "colour of right" to mean "an honest belief in the existence of a state of facts which, if actually existed, would at law, justify or excuse the act done." The complete AIAI presentation can be found at Appendix 6.

circumstance in Ontario can be found at Grassy Narrows, Six Nations of the Grand River and Kitchenuhmaykoosib Inninuwug.

41. Further, this very tension creates its own dilemma in so far as a First Nation may take direct action as a result of its frustration with the claims process or stalled negotiations. Yet, experience has shown that the Government of Ontario will not negotiate if a First Nation initiates court proceedings, nor will it negotiate with a First Nation that takes "illegal action" such as occupying disputed lands. On the basis of its current approach, there seems to be little room for dialogue with the Government of Ontario.

The Response of the Ontario Native Affairs Secretariat (as it then was)

42. On April 27, 2005, the then Ontario Native Affairs Secretariat (now the Ontario Secretariat for Aboriginal Affairs) delivered a background paper regarding the resolution of land claims in Ontario. This paper was in part, a response to M. Coyle's submission to the Inquiry. Regretfully, rather than substantially address the numerous areas of concern highlighted in Mr. Coyle's paper and thereby constructively inform this Inquiry as to how best to address these concerns, ONAS simply described its current process; shortcomings and all.

43. Specifically, ONAS has chosen not to constructively address the lack of coordination between Ontario's claim review process and Canada's. ONAS has chosen to simply inform the Inquiry that "[R]ecently improved relations between the research staffs of the Ontario Native Affairs Secretariat (ONAS) and of the Specific Claims Branch (SCB) of the Department of Indian Affairs has led to better coordination, through joint projects, for example, of the historical research phase of the review process. However, the subsequent sections of the review process are more difficult to coordinate." *32*

32 Ontario Native Affairs Secretariat (as it then was, now the Ontario Secretariat for Aboriginal Affairs), April 27, 2005, pp. 29-30.

44. This response is disconcerting to the Chiefs of Ontario for two reasons. First, in the previous paragraph ONAS states that "[W]hile the idea of Ontario, Canada and a First Nation jointly commissioning such research has some attraction, and may be possible in some instances, the province does not have the financial resources to fund research into numerous claims, some of speculative nature." Thus, while informing the Inquiry that joint research initiatives as between Ontario and Canada's research stage of claim review is one area where coordination between processes has improved, Ontario has not committed the financial resources to ensure this is achievable. Second, by simply stating that "subsequent sections of the review process (as between Ontario and Canada) are more difficult to coordinate", the Secretariat avoided an opportunity to more thoroughly explain to this Inquiry why this is the case. There is no information as to what these respective processes are so that constructive solutions might be brought forward. To simply describe coordination as "difficult" is to state the obvious but does nothing to improve the process.*33*

45. In addition, ONAS failed to substantively address what is perhaps the most significant barrier to Ontario resolving claims in a timely manner; Ontario and Canada have different approaches to resolving land claims. Again, while ONAS describes current approaches, it offers no constructive advice on how best to mitigate the delay caused by these differences. ONAS quite rightly points out that this difference in approach results from Ontario's assessment of a valid claim based on the application of "legal principles" while Canada's assessment is based upon "policy criteria" to determine an "outstanding lawful obligation." While there may be subtle differences between a "legal" and a "lawful" obligation, the analysis is similar. Practically, what is often the result for Ontario First Nations is a process whereby they must sit and wait while either Ontario or Canada (and

33 Ibid, p. 29.

both where the claim raises pre-Confederation issues) determine their position on validity. Currently, there is no formal process of communication as between Canada and Ontario to coordinate those claims that raise issues where each should be involved prior to a determination of validity. Again, rather than provide constructive guidance as to how best to mitigate these differences, ONAS simply describes the problems that can result namely, "[I] t can result in disagreements among the parties concerning the nature of any breach of treaty complained of, the extent and location of lands affected by the breach, the nature and quantum of compensation owing to the First Nation, and the respective obligations of the province and the federal government to contribute compensation to resolve the claim."*34*

46. Finally, where ONAS concludes that "innovation is required to respond to disparate circumstances" in addressing third party concerns, responding to each claim on its merit having regard to the evolving case law and in a timely fashion, yet fails to provide this inquiry with recommendations for such "innovation" is truly a missed opportunity. In our view, it is a disservice to First Nations and the public of Ontario to conclude as ONAS' paper does, that claim settlements must discharge the Crown's legal obligations *and* advance the public good when they fail to hold themselves accountable for a process which they have designed and implemented but which so consistently fails to meet this stated objective.*35*

47. The Chiefs of Ontario propose that the kind of innovation required for example, might see Ontario and Canada create an independent review process of its decision making on claims in concert with the current Indian Specific Claims Commission.

34 Ibid, p. 33.
35 Ibid, p. 34.

48. The Chiefs of Ontario take the position that all recommendations advanced by M. Coyle should be acted on. Ontario and Canada must work to coordinate their respective review of claims submitted. As it stands now, each interprets their legal or lawful obligation irrespective of the other when in fact, a coordinated response will alleviate the delay caused by a each maintaining a "first in – first out" approach.

49. Experience has proven that it takes decades for a First Nation's land claim to be satisfactorily resolved. From the initial filing to getting it validated by one or both governments for negotiation, then negotiating and concluding the claim to having a claim settlement implemented. Experience has further proven that implementation of settlement can take as long, and sometime longer, than the negotiation of the claim itself. It is frequently the case that land (in addition to financial compensation) forms a component of a settlement agreement however, effecting the legal transfer of land from Ontario and adding this land to First Nation's reserve land base by Canada to fulfill settlement can take decades.

50. In 1996, Canada's Additions to Reserve Policy was evaluated and problems identified, yet many have not been corrected. In addition, the lack of a policy framework for Ontario respecting the transfer of lands to Canada in trust for First Nations for use as "reserve" lands translates into additional delays and serious implementation issues.

51. To mitigate these impediments the Government of Ontario should work with the Government of Canada to harmonize land claims resolutions processes as much as possible, and it should consider seriously, mechanisms for non-binding as well as binding arbitration of land claims.

52. To the extent possible, oral history must be a fundamental component of both the federal and provincial land claims processes.

53. Public education regarding Aboriginal issues and history must be included in Ontario's primary and secondary school curriculum. Further, all educational institutions need to examine how Aboriginal issues are approached in law, policy and public administration.

54. All settlement agreements must be available in the traditional languages of the First Nations.

55. The most current example in the Province of Ontario to demonstrate, yet again, the need for expeditious, collaborative and fair claims processes is the outstanding Treaty Land Entitlement claim of Kitchenuhmaykoosib Inninuwug First Nation (formerly Big Trout Lake). Filed in May, 2000 with the federal Specific Claims Branch, the First Nation alleges that it has not received the full amount of reserve land to which they are entitled under the terms of adhesion to Treaty 9. This Treaty covers nearly two-thirds of the province and is the only treaty to which the Government of Ontario is a signatory. Consequently, both Canada and Ontario will need to review the claim however, after 6 years, the claim remains in the research stage of the federal review process and it is not known whether Ontario has been made aware of the claim.

56. While the First Nation awaits a decision on the validity of their claim, a mining company has staked and leased a drilling licence over the land under claim and began drilling during the week of February 13, 2006. The First Nation and six other communities have called for a moratorium on all mining and logging in the area however, the company has decided to push ahead without the title dispute being settled. By their refusal to call off drilling operations, the Band leadership has become increasingly frustrated and tension is escalating.

57. The Ontario Provincial Police were called in to "keep the peace", leading many First Nations leaders to believe this increased police presence would contribute to

increased tension. Since February 2006, the mining company has filed a multi-billion dollar law suit against the First Nation for damages caused by the First Nations' protest of its operations and is also seeking an injunction restraining the First Nation from interfering with it business operations in the area.

Recommendations:

C. 1 To avoid conflicts in the future, the Government of Ontario must work with First Nations in an environment of mutual respect to resolve land claims in a more timely, efficient, fair process, and one that maximizes instruments of facilitated resolution wherever possible.

C. 2. The specific recommendations offered by Michael Coyle to this Inquiry and accepted by the Chiefs of Ontario should be immediately acted upon.

C. 3 The Government of Ontario should work with the Government of Canada to harmonize land claims resolution processes as much as possible and it should seriously consider mechanisms for non-binding as well as binding arbitration of land .

C. 4 Furthermore, the Government of Ontario must commit to work with Canada and First Nations to ensure that land claims settlements are creative, forward-looking and result in restoration of lands to First Nations' communities on a timely basis.

C.5 Public Education regarding Aboriginal rights, issues and history must be included in Ontario's primary and secondary school curriculum.

D. Role of the Regulatory Regime in Aboriginal Rights Disputes in Ontario

58. The Chiefs of Ontario considered the research paper prepared by Jean Teillet for the Ipperwash Inquiry entitled *The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario* at a workshop held February 22, 2005 in Kenora, Ontario. Ms. Teillet's paper focused on the role of the natural resources regulatory regime in Aboriginal rights disputes and while the operations of this ministry have a direct impact upon the management of resources in Ontario, the Chiefs of Ontario take the position that the province must ask itself

one fundamental question: does the regulatory regime fulfill your constitutional responsibilities and reflect our Treaty and Aboriginal rights?

59. In considering the role of the provincial natural resources regulatory regime, the twenty one (21) participants from each region of the province to this workshop addressed the urgent need for Ontario's regulatory regime to more fully understand, respect and accommodate the lands, resources and traditional economy of First Nations.*36*

60. Ms. Teillet has accurately set out the root causes of the current disparity in the relationship between First Nations and the government of Ontario as regards the exploitation of natural resources. Specifically, the Chiefs of Ontario support the following conclusions of Ms. Teillet's research:

b. *"Aboriginal rights disputes in Ontario" are always about dispossession from lands and resources. Aboriginal rights, as asserted by First Nations, are by definition, an assertion of ownership, access, use and occupation to land and resources.37*

c. *The regulatory regime has played a role in that dispossession because it is the multi-faceted mechanism that enforces state policies with respect to lands and resources. The regulatory regime was developed and implemented without any understanding, inclusion or accommodation of First Nations' history, land-based values, culture or legal and constitutional rights.*38

36 For a more detailed description of the values and culture associated with Aboriginal people's lands and economy, see Jean Teillet's paper entitled *The Role of the Natural Resources Regulatory Regime in Aboriginal Rights disputes in Ontario*, pp. 6-9.
37 Ibid, p. 5.
38 Ibid, p. 5.

d. *The regime is complex and many-faceted and it authorized and enforced by statute, policy and regulations. It is composed of several Ministries of both the federal and provincial governments and includes many advisory, regulatory or operational agencies created by those Ministries of both governments.*[39]

e. *In Ontario, there has always been conflict between the recognized users protected by the natural resource regulatory regime and the First Nations lands and economy protected by Aboriginal and Treaty rights. Indeed, for the most part, First Nations rights have been either ignored or seen as irreconcilable with conservation and management imperatives.*[40]

f. *While legal doctrine evolved to protect First Nation peoples, this protection in the minds of government, has limits – when it conflicts "with the peace and order of the country or proper settlement of it." History shows us that the Crowns have accepted their obligations only when it had to, in order to quell discontent, outright dissent or violence. History shows us that when "push comes to shove", it is the land- related interests of First Nation people that are sacrificed to majority interests.*[41]

g. *The limits of government protection are most clearly demonstrated in the area of First Nation harvesting.*

h. *In 1982, constitutional protection was given to Aboriginal and treaty rights of the Aboriginal peoples of Canada in section. 35 of the Constitution Act, 1982.*

39 Ibid, p. 6.
40 Ibid., p. 7.
41 Ibid., p. 13.

The ultimate purpose of s. 35 was reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. Section 35 did not give Aboriginal peoples the authority to protect their rights and interests themselves, because it did not alter the distribution of legislative powers. Nor did it insulate Aboriginal peoples from governmental actions by giving absolute status to Aboriginal and treaty rights.42

i. *Any movement within the natural resources regulatory regime since 1982 can be called 'timorous tinkering': it does not fundamentally realign the relationship between First Nation peoples and Ontario and it still does not accord First Nation peoples any room for full participation in our society.43*

j. *The thirty year conflict of the Tema-Augama Anishinaibai and Ontario serves as an example of Ontario's steadfast refusal to recognize Aboriginal rights and title and to proactively take steps to resolve conflicting interests. Instead, Ontario deals with these issues largely by means of crisis management.44*

k. *A considerable proportion of Ontario's Aboriginal peoples are involved in fishing in one way or another – either in the food fishery, the commercial fishery or the recreational fishery. Since Sparrow*45 *there has been an increase in user-group conflicts over both sport and commercial fisheries in Ontario. A stubborn refusal by the Ontario government to recognize that*

42 Ibid., p. 37, 39.
43 Ibid., p. 45.
44 Ibid., p. 50, 51.
45 [1990] 1 S.C.R. 1075.

First Nation peoples in Ontario possess treaty or Aboriginal rights has exacerbated the conflicts.[46]

l. *Both the sport and commercial fishery are regulated by the Ministry of Natural Resources. Increasingly, First Nation members are being charged with regulatory offences contrary to Ontario Fishery Regulations and only by defending these charges in the courts are First Nations being vindicated.*[47]

m. *The courts have set out positive obligations to enact fair and effective processes concerning the recognition and protection of Aboriginal rights to lands and resources. It is to the implementation of those fair and effective processes that the natural resources regulatory regime must turn its attention. Aboriginal peoples must be allowed into the natural resources regulatory regime in a way that allows meaningful participation and in a way that allows them to feel that they are able to protect their lands and resources.*[48]

n. *Although it is the Crown that bears the new consultation and accommodation duties set out in* ***Haida Nation*****[49]** *and* ***Taku River*****[50]**, *fulfilling them requires the cooperation and participation of Aboriginal peoples. The current practice of government, which is to develop and manage the natural resources regulatory regime unilaterally, must change*[51].

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46 *The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario,* J. Teillet, p. 53.
47 Ibid., pp. 55-56.
48 Ibid., pp. 68-70.
49 ***Haida Nation v. B.C.(Minister of Forests),*** **2004 SCC 73.**
50 ***Taku River Tlingit First Nation v. British Columbia,*** **2004 SCC 74.**
51 *The Role of the Natural Resources Regulatory Regime in Aboriginal Rights Disputes in Ontario*, J. Teillet, p. 71.

61. The Chiefs of Ontario take the position that Treaties continue to be the primary instruments that define intergovernmental relations. Ontario's steadfast refusal to recognize the rights of First Nations guaranteed by the treaties make future confrontations likely.

62. Given recent decisions of the Supreme Court of Canada (*Haida, Taku* and *Mikisew Cree*52*)* Ontario must act now to develop a Consultation Policy, with First Nations, to guide the decision making of all provincial ministries. Further, the duty to consult is qualitatively different from the common law and statutory obligations of natural justice and procedural fairness. Such policy must at minimum strike a balance between First Nations' constitutional rights over traditional and treaty territory and provincial responsibilities pursuant to ss. 92(5) and (13) of the *Constitution Act of Canada, 1867* 53.

63. In the absence of a clear and coordinated provincial policy recognizing and facilitating the exercise of Aboriginal and Treaty rights of the First Nations in Ontario and ensuring their protection, regulatory enforcement agencies consistently exercise discretion not to protect these rights but to criminalize First Nation members for their implementation.*54* In many instances, this has led to

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52 Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388.
53 Section 92 reads:

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> > 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon …
> > …
> > 13.Property and Civil Rights in the Province

54 On June29, 2006, the Chiefs of Ontario passed resolution 06/45 addressing the government of Ontario's continued prosecution of First Nation people within inter-tribal territories, despite the Minister of Natural Resources' support for "inter-tribal hunting, fishing and harvesting arrangements between First Nations. The Chiefs of Ontario resolved to continue to practice Manito Aki Inakkoniagaawin (The Great Earth Law) and will seek a meeting with the Ontario Premier and Minister of Natural Resources to commit to participating in an Ontario Nation Resource User Rights Conference.

the Ontario Provincial Police providing support to enforcement officers. We will address the role of police services later in this submission.

64. Some First Nation communities individually and three of the PTOs*55* have been engaged in bilateral discussions with Ontario regarding trapping, fishing and harvesting rights. For the First Nations involved, this dialogue has centered on the province's need to change its thinking regarding the extinguishment of harvesting and hunting rights and find ways to reconcile interests of mutual concern.

65. The need to reconcile our interests is not solely about fish, moose, deer or traplines. Fundamentally, this is about life and the land and resources that support our existence and well being. We want to be full partners in a plan that fairly and equitably manages the great wealth that the natural resources of this province provide. We will not continue to be made the poorest of the poor while all around us people use and exploit our resources to enrich themselves at our expense.

66. The Government of Ontario and First Nations have shared positive experiences with joint management of natural resources in the past. In 1992 for a period of 5 years, the Windigo Planning Board ("WIPB") in Northwestern Ontario was created. The objectives of the WIPB were to develop a land use plan, review development proposals, recommend consultation methods in the north and identify economic opportunities in the region.

67. The Ontario-Windigo–Shibogama Planning Agreement was signed by Cat Lake First Nation, the Weagamow Lake First Nation, the Kingfisher Lake First Nation, the Wunnumin Lake First Nation, the Windigo Tribal Council, the Shibogama First Nations Council and the Government of Ontario on 13th February, 1992.

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55 The three PTOs include the Nishnawbe Aski Nation, the Union of Ontario Indians and the Grand Council Treaty # 3.

Under the Planning Board Agreement, Ontario established the Boards for a period of five years. After three years, the effectiveness of the Boards was to be assessed with a view to establishing more permanent arrangements for the management of lands and resources in the Far North. No review was conducted by Ontario, although the First Nations pressed for it because that was their understanding of the Agreement they had signed with Ontario. The Planning Boards were to provide advice to the Ministers (MNR, MNDM, MOE and ONAS) a) develop a plan for land-use and resource development in the planning area b) identifying potential opportunities for resource-based economic development c) develop community participation models suitable for use in the Far North with the understanding that the recommendations arising from the Planning Board work would lead to more permanent arrangements for involvement in the development of land use policy and regulations for the far north. During the winter of 1998 a cover letter and a copy of *Pemachihon: Sustained by the Land* was sent to all the signatories to the Planning Board Agreement. To date no response has been received from any of the above noted Ministries.

68. In March 2006 Mr. Frank Mckay, Council Chair/CEO of Windigo First Nations Council asked Minister Ramsay at the NAN Winter Chief's Assembly (March 2006) for a written response to the WIPB document. At that time Minister Ramsay assured Mr. Mckay that he would provide Windigo with a written response. To date Windigo has not received any response from Minister Ramsay.*56*

69. In 1995 the Government of Ontario and the Anishinabek Nation collaborated to create the Anishinabek/Ontario Fisheries Resource Centre and serves as an independent source of information on fisheries conservation and management in traditional harvesting areas in the Anishinabek Territory. The A/OFRC is a not

56 For further information on the Windigo Planning Board please contact the Windigo Tribal Council at www.windigo.on.ca.

for profit corporation controlled by a Board with equal representation from Native and non-Native Directors. The roles of the Centre are to report on stock status, evaluate stresses on fish populations and habitats, promote the use of state of the art science and technology, and provide a forum for information sharing and participation with stakeholders.*57*

70. The creation of the resource centre is a positive step however, in Ontario it may be more the exception rather than the rule. The management and protection of Ontario's fishery is a concern which First Nations and the Province of Ontario share yet, experience has proven the Government of Ontario's reluctance to *proactively* include us in any co-management regime of this valuable resource as a matter of practice. The Saugeen Ojibway Nation's experience as described by Jean Teillet is just one of many examples where the Ministry of Natural Resources has, without consultation, imposed quotas on those First Nations who have exercised authority to issue their own licenses.*58*

71. There are other ways of working together which the Government of Ontario should willingly duplicate. In 2000 for example, the Anishinabek Nation and the Government of Ontario created the Anishinbabek/Ontario Resource Management Council, an advisory body to the Minister of Natural Resources and the Grand Council Chief. Since its creation, the Council has facilitated discussions between the Anishinabek Nation and the Ministry of Natural Resources in the areas of enforcement policy, forestry, lands, water-power management, fish and wildlife.*59*

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57 The work of the Resource Centre is on-going. For a list of current activities please see www.aofrc.org.
58 As J. Teillet summarizes at p. 55 of her report, in the summer of 1989, two members of the Chippewas of Nawash First Nations were charged with offences contrary to the Ontario Fishery Regulations. At trial, the accused argued that the 1984 quota system imposed by MNR and managed by the Band Council constituted an unjustified infringement of their Aboriginal and Treaty right to commercial fish. The trial judge agreed and dismissed all charges. Soon thereafter, the Saugeen Ojibway Nation took steps to manage and protect the use of its fishery.
59 For more information on the activities of the Anishinabek/Ontario Resource Management Council please see the 2004/2005 Annual Report of the Council found at www.anishinabek.ca.

72. What is clear is that First Nations not only want to be included in determining new approaches to the growth and development of Ontario – they need to be. What is critical is for the First Nations and Ontario to set about to design a new strategy for addressing development while not prejudicing the aboriginal and treaty rights of the First Nations.

Recommendations:

D. 1 The Government of Ontario must build meaningful and full partnerships with First Nations for resource benefit sharing and joint management based upon shared stewardship arrangements, which enable First Nations' Treaty and Aboriginal rights to be respected and reconciled with public interests.

D. 2 The Governments of Ontario and Canada should be strongly encouraged to develop collaboratively with First Nations, guidelines and policies to provide for consultation and accommodation of First Nations treaty and Aboriginal rights and interests to avoid conflicts which may lead to protests.

D. 3 While the Governments of Ontario, Canada and First Nations are developing guidelines and policies for consultation and accommodation referred to Recommendation D 2, the Government of Ontario must issue a moratorium on all hunting, fishing and trapping regulatory prosecutions of First Nations members to create an environment of mutual trust and respect.

D. 4 The Government of Ontario should build on the positive experiences of the Anishinabek/Ontario Fisheries Research Centre and the Anishinabek/Ontario Resource Management Council to expand such partnership initiatives with First Nations throughout the Province of Ontario and proactively mitigate the potential for conflict. A positive first step would be the creation of the Senior Level Advisory Committees referred to in Recommendation B 4.

E. "Sacred Sites"

73. The Chiefs of Ontario considered the draft research paper considering the issue of sacred sites and burial grounds prepared by Professor Darlene Johnston for the Ipperwash Inquiry as this document stood in November 2005. At a workshop held November 22, 2005, our consideration of the issues under examination in this document was limited to the nature of draft however, the participants to this workshop focused on the use of the term "sacred" and mainstream society's lack of understanding of the relationship between the First Peoples*60* and the land; particularly those areas where their ancestors are buried.

74.. Today, what is defined as the province of Ontario was at one time the traditional territory of the First Peoples of this great land. Despite the creation of provincial boundaries, we have an on going and living relationship with our ancestors. Specifically, it is the obligation of the living to ensure that our relatives are buried in a proper manner and in the proper place and to protect them from disturbance and desecration.

75. The greatest challenge to the protection of our ancestors' burial sites, and other spiritual places, is that these sites are often located on lands outside reserve boundaries. Being located off-reserve, these burial sites and sacred places are under threat of disturbance - both real and potential.

76. Our relationship to the land defines who we are; we are the caretakers of Mother Earth. What is sacred then is more than a single burial location. The location of medicines, ceremonies, stories, burial sites, traditional harvesting and hunting

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60 The term "First Peoples" is used here to refer to the Haudenosaunee, Anishnaabeg, Cree and Odji Cree inclusively and to emphasize the fact that our respective values and culture as regards what is "sacred" and the location of sites of significant spiritual value pre-date the creation of "Bands" (First Nations) and "reserves" as defined by the *Indian Act*.

grounds, villages and trading areas are all locations that are "sacred". The location of these sites are living; they are not "artifacts" relegated to antiquity. As well, instruments created to celebrate stories and ceremonies, protect medicines and honour our ancestors are sacred. Most importantly, the definition of what is "sacred" is determined by the First Nation community itself and reflective of the community's values of what is sacred.

77. The Chiefs of Ontario reject any attempt by the province of Ontario to adopt a pan-Aboriginal approach to defining what is sacred. Respect for the diversity of First Nation communities and what we define to be sacred is paramount. Any attempt therefore to create a policy or legislative approach to the handling of sacred objects and locations must proceed on a case by case basis in direct consultation with the First Nation communities of this province.

78. The Chiefs of Ontario reject the creation of an "inventory" of sacred sites. Any attempt to do so would in our view, not only serve to draw attention to areas that ought not be exposed and brought to the attention of the larger public and thereby put these areas at real risk of exploitation, but may have the illusory affect of placing limits on the number of areas to be included in such an inventory.

Burial Grounds

79. If we focus the dialogue is to gain a greater understanding of the relationship between First Peoples and burial grounds specifically, this is a narrower class of what is "sacred" and the language must be specific to burial grounds.

80. The Chiefs of Ontario accept the presentation of origin stories, sacred landscapes and spiritual beings by Professor Darlene Johnston in Part I of her draft paper entitled "*Understanding the Sacred from an Intercultural Perspective"*. Further, the Chiefs of Ontario accept Professor Johnston's presentation on the patterns of disrespect and desecration at the hands of Euro-Canadians.

81. The focus of our submission is on the subject of protecting burial sites in Ontario. As the First Peoples traditional land base diminished in Ontario, so too did our ability to protect the burial grounds of our ancestors. Not all burial sites could be or were protected by reserve boundaries. It is precisely because the location of these burial grounds lie within traditional and/or treaty territories- but outside reserve boundaries- that the potential for conflict arises.*61*

Ontario's Legislative Framework

82. In our view, current provincial legislation does not adequately protect the burial grounds or other sacred sites of the First Peoples.

83. At the time of our November 2005 workshop to discuss Darlene Johnston's draft report for the Inquiry, her consideration of Ontario's legislative framework was not complete. The Chiefs of Ontario are aware however, that there are five separate Acts that directly or indirectly effect burial and/or sacred sites. These Acts are: *The Environmental Assessment Act, the Planning Act, the Aggregate Resources Act, the Ontario Heritage Act* and the *Cemeteries Act.*

84. With the exception of the *Cemeteries Act*, which is overseen by the Ministry of Consumer and Business Services, all of the above listed legislation is the responsibility of the Ministry of Culture.

85. The Chiefs of Ontario take the position that the very term "cemetery" and various provisions within the *Cemeteries Act* (such as commissioning and decommissioning) illustrate the profound difference between our understanding of our relationship with our ancestors and that of the dominant Euro-Canadian culture. This legislation in our view, is wholly inadequate and cannot be relied upon as the instrument to protect a territory we would describe as "sacred".

61 The experience of the Chippewas of Nawash best exemplifies the nature of this conflict.

86. The *Cemeteries Act* for example, requires scientific proof that there are human remains in the area. This means that potential burial grounds must be disturbed first before protective action can be taken.

87. In our view, the current legislative framework does not protect the burial grounds of our ancestors in the face of development or over land which we exercise existing treaty rights but that lie outside our reserve boundaries. In addition to falling short to protect our burial grounds, the legislative framework is silent on the matter of continuous access to sacred sites, particularly where these grounds are in the hands of private owners.

88. There may however, be one example in Ontario of a current policy that could frame the foundation for further discussion between First Nations and the Province of Ontario on the issue of burial sites located off-reserve.

89. In November 2002 as part of a pilot project "to support the protection of aboriginal culturally significant sites", the Ontario Ministry of Northern Development and Mines introduced a policy entitled *Withdrawing Land: Aboriginal Culturally Significant Sites in the Far North* giving discretion to the Minister to withdraw from prospecting, staking out, sale or lease a site that is determined by the Minister to be "aboriginal culturally significant" on Crown land located north of the northern limit of current commercial timber operation in the Province of Ontario. Under the policy, a First Nation must first apply for a withdrawal of mining and surface rights for a site and explain why the site meets the policy definition of an "aboriginal culturally significant site" which has been interpreted to mean "geographically defined areas supporting current or past human use such as community meeting area (example Pow Wow site), spiritual sites, places of worship or cemeteries and **burial sites**." The site under consideration can be no larger than 200 metres by 200 metres in size unless the Band explains why a larger size should be considered.

90. Under the policy, the Band's application must satisfy the following criteria:

    a. Does the First Nation meet the definition of Band under the *Indian Act*?
    b. Does the site meet the definition of aboriginal culturally significant site?
    c. Is the site larger than 200 metres by 200 metres? If yes, what is the reason?
    d. Is there existing land tenure on the site?
    e. What is the mineral potential of the site?

91. Where there is existing land tenure on the site (such as a mining claim, mining lease, mining licence of occupation, or exploratory licence of occupation, mining location or patent issued under the *Mining Act*), the Minister may facilitate cooperation of the claim holder and discussions with the First Nation.

92. If the surface rights do not belong to the Crown, the policy suggests that the Band negotiate with the owner of the surface rights.

93. The policy is silent however, on how this Ministry should respond or coordinate with other line Ministries where cooperation between a claim holder and First Nation cannot be achieved.

94. Further, this policy applies only to lands in the "far north" and does not apply to lands that fall outside of the geographic limits of this territory.

95. Since the policy was introduced in 2002, no applications for withdrawals have ever been submitted by a First Nation.

96. The Chiefs of Ontario therefore make the following recommendations:

E. 1 Ontario must undertake a complete review of all legislation and regulations relating to sacred objects and burial grounds. This review must be carried out in consultation with First

Nations with a view to ensuring the proper protection of these objects and grounds.

E. 2 **Appropriate Protocols should be negotiated between Ontario and First Nations political representatives to ensure peaceful protection of and access to burial grounds and other sacred sites where they are located within treaty territories.**

E.3 **Ontario and First Nations should undertake a review of the 2002 Ontario Ministry of Northern Development and Mines' policy entitled *Withdrawing Land: Aboriginal Culturally Significant Sites in the Far North* with a view to assessing its approach and application throughout the province.**

E.4 **While the Chiefs of Ontario have called for meaningful consultation with the government of Ontario on all issues, as regards sacred sites, these consultations must be formalized. All consultations regarding sacred sites with the Chiefs of Ontario must be undertaken through the newly created *First Nations Burial Ground Archaeological Sites Committee*.*62***

F. Aboriginal Occupations/Specifically First Nation Occupations

97. The Chiefs of Ontario considered the research paper of Professor John Borrows entitled *Crown and Aboriginal Occupations of Land: A History & Comparison*, in concert with Professor Johnston's research into burial sites, during the workshop held November 22, 2005 in London, Ontario. It has been precisely the result of the Crown's failure to protect our traditional and/or treaty territory and in some cases, our burial grounds that has resulted in some of our members choosing to physically occupy these lands in protest.

98. The Chiefs of Ontario accept Professor Borrow's presentation of the great diversity of our people in this country. Further, we accept Professor Borrow's presentation of the numerous ways in which we exercised diplomacy first amongst ourselves and later, following the arrival of Non-Aboriginal peoples.

62 This committee of the Chiefs of Ontario was created by Resolution 06/72 on June 29, 2006.

Further, we accept the *sui generis* approaches to diplomacy that developed as our ancestors and Non-Aboriginal people attempted to peacefully co-exist.*63*

99. Most significantly however, the Chiefs of Ontario accept and agree with Professor Borrows' characterization of the increasing pressures of settlement on our land and Ontario's early history of *non-Aboriginal occupations of land* and *non-Aboriginal peoples blockading* our access to our traditional territory. Further, these non-Aboriginal occupations and blockades were contrary to our traditional indigenous law and to the constructed common law during this time in history.*64*

100. The Chiefs of Ontario accept Professor Borrows' characterization of these early "blockades" to our traditional territories at the hands of non-Aboriginal people; blockades which were sanctioned by colonial legislation of the 1760s through the 1780s. Further, that these non-Aboriginal occupations and blockades have been used against us in Ontario (and through out Canada) as the primary instruments of settlement and in far greater number than by us throughout our history.*65*

101. The Chiefs of Ontario accept Professor Borrows' description of contemporary events as "passing ironic" that it is our occupations and blockades that have received the lion share of attention in the past two dozen years when the past two hundred years of history reveal the predominant use of this device has been by non-Aboriginal people throughout our history.*66*

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63 Crown and Aboriginal Occupations of Land: A History & Comparison, J. Borrows, pp. 3-12.
64 Ibid., pp. 16-19.
65 Crown and Aboriginal Occupations of Land: A History & Comparison, Consultation Forum, August 19, 2005.
66 Ibid.

102. The Chiefs of Ontario accept the following conclusions regarding best principles and practices for peaceful and constructive resolution and prevention made by Professor Borrows:

a. As long as Aboriginal peoples feel that their rights are being denied or inappropriately diminished they will continue to take direct action when they are not heard.*67*

J. Borrows, p. 104

b. Infringe Aboriginal interests as little as possible. If the infringement is proposed in a situation where Aboriginal rights are involved, this is the legal obligation of the Crown. *68*

c. Consultation has become an important principle for alleviating tension with Aboriginal peoples when decisions will potentially impact their interests. Some elements of consultation cited by Professor Borrows include:

> a. Engage Aboriginal people in Consultation before a decision-making process is underway
> b. Where a decision-making process is conducted in Aboriginal territories, agreements must be reached on the conduct of the decision-maker with the affected Aboriginal groups. Such involvement should provide roles for Aboriginal groups that are equal to those of other governments and stakeholders.
> c. Aboriginal groups should be given statutorily protected rights for consultation to appoint a majority of panel members in a decision-making review where their rights would be substantially affected.

67 Crown and Aboriginal Occupations of Land: A History & Comparison, J. Borrows, p. 104.
68 Ibid., p. 115.

d. The definition of the problem or issue addressed should be changed to include Aboriginal perspectives on the problem or issue.

e. Aboriginal knowledge should be given full consideration.

f. There should be a set of regulations or guidelines for Panels, Responsible Authorities and Proponents on the ethical use of aboriginal knowledge.

g. There should be options for governments or proponents to support communities who wish to contribute their knowledge directly to the process, instead of having it incorporated into the proponent's own research program, as many proponents either lack the trust of the communities, or simply don't have a clue what they're doing in this regard.

h. Financing for Aboriginal consultation should be considered and a general fund should be available for Aboriginal groups to participate in the consultation process.

i. Decision-making procedures should be amended to provide opportunities for more community meetings and provide for less formal meeting opportunities.

j. Decision-making proceedings should be amended to provide for community meetings after the panel report has been released.

k. Putting forward proposals which are not finalized

l. Informing of all relevant information

m. Not promoting an outcome

n. Showing a willingness to change plans

o. Making every ‘reasonable effort’ to accommodate Aboriginal rights, interests and perspectives in the making of a decision

p. Establishing Reasonable timelines for Aboriginal people to be able to respond

q. Allow for flexibility and changes in response to consultation process to avert or minimize harm

r. Finding a new status quo where proven Aboriginal rights would be affected

s. Accommodating the results of Aboriginal consultation through compensation, recognition and or allocation of resources or land to Aboriginal people

t. In the case of Aboriginal people raising unproven rights decision-makers could find an interim accommodation pending final resolution.*69*

d. Balance Aboriginal concerns reasonably with other societal interests.*70*

e. Compensation in accordance with lawful obligations.*71*

f. Research including the use of oral history to best understand the Aboriginal peoples distinctive perspective and understandings.*72*

102. Further to the issue of "consultation" addressed by Professor Borrows, on March 8, 2006, Chief Dean Jacobs of Bkejwanong Territory (Walpole Island) spoke to the Inquiry about the current barriers that exist in Ontario to "meaningful consultation" with First Nations. What is paramount to the First Nations' definition of consultation is to understand that First Nations are not "stake holders" to consultation but rather possess unique rights and responsibilities that must be recognized where their traditional lands and rights are impacted by development.*73*

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69 Ibid., pp. 117-118.
70 Ibid., p. 118.
71 Ibid., p. 124.
72 Ibid., p. 125.
73 Chief Dean Jacobs' March 8, 2006 presentation to the Ipperwash Inquiry has been reproduced at Appendix 13.

Recommendations:

F. 1 The Governments of Ontario and Canada should be strongly encouraged to resolve fairly and expeditiously the underlying issues about First Nations' access to lands and resources to avoid conflicts which may lead to occupations and protests.

F. 2 The Governments of Ontario and Canada should be strongly encouraged to develop collaboratively guidelines and policies to provide for consultation and accommodation of First Nations treaty and Aboriginal rights and interests to avoid conflicts which may lead to protests. Furthermore, each should be encouraged to more seriously consider the principles and best practices articulated by Professor John Borrows to this Inquiry.

G. Policing Aboriginal Occupations and Protests

103. The Chiefs of Ontario considered the research paper prepared by Don Clairmont and Jim Potts entitled *For The Nonce: Policing and Aboriginal Occupations and Protests* for the Ipperwash Inquiry at a workshop held November 22, 2005 in London, Ontario. The participants to this workshop came from each region of the province to address the police response to the various historical events highlighted by Professor Borrows and the examples researched by Mr. Clairmont and Mr. Potts.

104. All of the cited examples highlight the need for First Nations' governments, First Nation police services, the RCMP, provincial and municipal police forces and the federal and provincial governments to build more respectful relationships. Historically, First Nations and non-Aboriginal peoples used various instruments to achieve diplomacy and resolve inter-societal disputes. The best examples of such instruments are the Treaties and Wampum Belts.

105. Today however, federal, provincial and municipal police services are too quick to respond to the pressures of non-Aboriginal governments and the public to "restore

order". With a few recent exceptions, neither the police nor governments have resorted to diplomacy in resolving disputes. In fact, what many of the cited case examples demonstrate is the escalation of tension when the police are called in to "restore order". This escalation is inevitable when the police refuse to establish clear lines of communication with the leadership of the community involved in the dispute.

106. What experience has shown is the police lack an awareness and respect for First Nations' communities' values and culture. This lack of knowledge and respect has proven itself when police respond with racism and perpetuate racist attitudes. This lack of respect was most recently made known to this Inquiry with the disclosure of OPP celebratory T-shirts and souvenir pin.

107. Until the fundamental issues that give rise to conflict are resolved, future protests are a certainty. How then do we each work together to avoid future tragedies? The Chiefs of Ontario submit that all levels of government would be wise to learn from past mistakes.

108. The past has demonstrated that the province of Ontario (and Canada) has been slow to resolve the underlying issues regarding First Nations' access to lands and resources. Unless and until these issues are addressed to the satisfaction of all parties, future conflict is inevitable.

109. Typically the location of protests have been outside the boundaries of a First Nation community and outside the jurisdiction of the First Nation directed or regionally directed police services. The response of the police service called in to "restore order" is seen to be representative of non-Aboriginal governmental authority. The police are therefore seen to be enforcing the laws of one party to treaty and have no interest in protecting the constitutional rights of the First Nations. When agencies other than the police are involved –such as the Ministry of Natural Resources- the police often provide back-up to these enforcement

agencies and are seen to have taken sides against First Nations' people who have constitutional rights.

110. Typically, there is no effort made to communicate with the leadership of the community involved. In some cases, the leadership within a community may not be unanimous in their support of the civil disobedience by its members. Rather, the leadership with a community may be wholly against such activity or alternatively, divided in their support. The issue for the police services in these circumstances is to communicate with all sides.

111. Where First Nations-directed police services are available, they are not systemically included in the resolution of a conflict. With a few exceptions, there is no formal collaboration amongst the police services when such collaboration is essential to peaceful resolution. At present, there are some field and management level relations between the OPP and First Nations police services but no special protocols exist.

112. Until more recent concerted efforts were put into place by police services like the OPP, police lacked the training and knowledge of First Nations' culture, values and constitutional place in Canadian society. Even still, the Chiefs of Ontario encourage the OPP to intensify its Native Awareness Training Program beyond the current one- week training course curriculum and to mandate this course to all ranks within its force. This is consistent with the OPP's own post course evaluation results which recommended that the [Native Awareness Training] course "be made available or mandatory for all OPP members with a priority given to our front line members working with First Nations communities."*74*

74 First Nations Awareness Course Post Course Evaluation, OPP, p.3. Further, by resolution 06/66, the Chiefs of Ontario have mandated their Justice Initiative be expanded to include the capacity to support First Nations in all OPP related matters, including working with the OPP to enhance its training course to reflect the diversity of First Nations within Ontario.

113. Worse, without proper training and supports, junior officers are often posted in isolated First Nation communities and immediately put on the 'front line'.

114. On January 27, 2006 the Ontario Provincial Police ("OPP") made public its new policy entitled *"A Framework For Police Preparedness for Aboriginal Critical Incidents"*. Originally a draft Operations Document available within the OPP, this new policy seeks to establish an operational approach within the OPP toward resolving conflict and managing an "Aboriginal- related critical incident".

115. Admittedly, when tabled by the OPP on January 27, 2006, the OPP expressed their openness to hearing from the Chiefs of Ontario on this new framework. The Framework is intended to prepare officers in the event of an Aboriginal protest or crisis by emphasizing proactive measures to avoid the escalation of incidents. The Framework operationalizes other initiatives the OPP have developed to build better relationships with Aboriginal communities across the province such as creation of the Aboriginal Liaison, Operations Officer and the Aboriginal Relations Teams. The Framework is intended to provide incident commanders, detachment and regional members with resolution techniques at three stages of conflict: the pre-critical incident, the critical incident and post -critical incident stages.

116. On March 9, 2006 the Chiefs of Ontario presented its response to the OPP policy framework.*75* The OPP indicated when they tabled this document that it was open to amendment. In light of even more recent circumstances at the Six Nations of the Grand River, the Chiefs of Ontario fully expect large portions of

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75 The Chiefs of Ontario response delivered on March 9, 2006 is reproduced at Appendix 14. Chief Isadore Day's presentation to the Ipperwash Inquiry on March 9, 2006 is reproduced at Appendix 15.

this policy document to be amended and welcome the opportunity to discuss these changes with the OPP at the appropriate time.

Gustafsen Lake, British Columbia

117. During the November 22, 2005 workshop, the Chiefs of Ontario invited key individuals involved in the Gustafsen Lake dispute who, by their involvement, were able to bring about a peaceful resolution for all parties involved. In the summer of 1995, at the same time as events at the Ipperwash Provincial Park were unfolding, members of the Esketemc First Nation in northern British Columbia took up occupation of lands traditionally used for sundance ceremony that were now in the possession of a cattle rancher. During the course of this occupation, the Royal Canadian Mounted Police ("RCMP") were called in to restore order. Given the similarities between Ipperwash and Gustafsen Lake, the Chiefs of Ontario sought information from the officers involved in the resolution of the occupation at Gustafsen Lake as the outcomes of these events were so tragically different.*76*

118. From the perspective of the RCMP officers involved, the key to the peaceful resolution of events at Gustafsen was ***communication*** between third party intermediaries from the community and the RCMP. In addition, the RCMP broke from a classic tactical response to a negotiated one. By their own admission, the Gustafsen "standoff" resulted in a $7.1 million dollar operation involving 400 plus police officers. Yet, employing Esketemc First Nation strategies involving traditional ceremonies brought a peaceful resolution to the conflict.*77*

119. Since 1995, the RCMP have intensified their cross- cultural training and have been actively involved in healing circles to educate their ranks about the issues of

76 The power point presentation outlining the Gustafsen Lake presentation to the Chiefs of Ontario on November 22, 2005 is reproduced at Appendix 16.
77 Ibid.

concern to First Nation people. As regards "critical incidents", the RCMP and the Assembly of First Nations entered into a *Public Safety Cooperation Protocol* in 2004. This protocol defines the role of the RCMP and First Nation leadership in reciprocal relationships with the goal of either preventing situations involving conflict or resolving disputes which do develop at the earliest possible opportunity.*78*

120. As Jim Potts pointed out in his paper, this protocol has been successfully applied in Nootka Sound British Columbia in 2004 to resolve the Luna whale conflict and again in Manitoba in 2005 regarding the Norway House shooting.. This protocol however, has been entered into between the RCMP and a political organization (i.e. AFN) and not First Nations governments directly. More importantly, the protocol has no application in Ontario as First Nation communities are not serviced by the RCMP directly but may be supported by the RCMP Integrated Support Services Unit. As such, it is incumbent upon both the police services and First Nations governments to develop appropriate response protocols with the Ontario Provincial Police, Municipal Police services, self-directed and regionally directed police services where necessary.

Police Complaints Process*79*

121. During the Chiefs of Ontario workshop in Kenora, Ontario on February 22, 2005, many participants or their families shared the experience of being discriminated against within Canada's justice system. Together they described a system where they are more likely to be arrested than non-Aboriginal people; they are less likely to have adequate representation and are less likely to understand court procedures;

78 Ibid.
79 The participants to the Chief of Ontario workshop in Kenora, Ontario expressed particular concern regarding the police complaints process in Ontario and wanted to draw specific attention to the report of the Honourable Mr. Justice Patrick LeSage.

they are less likely to be granted bail; and are more likely to be given jail sentences.

122. Perhaps more than any other theme explored and shared amongst all participants however, was the general picture of institutionalized racism within municipal and provincial police services, particularly in northern Ontario.

123. Many participants described municipal and provincial police services within the Treaty # 3 territory as "brutal" and "painful". Whether participants recounted delayed response times, assaults while in police custody, over-policing within their communities all agreed that "we need to do more than talk about this. The police are supposed to serve and protect, but time and time again these things happen to our people."

124. Further, many believe that there is little point in speaking directly with the police services as individuals. Instead, communities and leaders must come together and speak with one voice to direct change.

125. During the time of this workshop, a wholly separate investigation was being carried out by the Honourable Mr. Justice Patrick LeSage on the Police Complaints System in Ontario. On April 22, 2005, Mr. Justice LeSage delivered his final report. Upon closer inspection, we believe the Government of Ontario should seriously consider and act upon the recommendations of Mr. Justice LeSage.

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126. Mr. Justice LeSage addressed Aboriginal communities specifically in his report and stated:

> "*Access to the system was one of the concerns that was most heavily emphasized. It was stressed that many Aboriginal persons, particularly those from Northern Ontario do not have an understanding of the current systems in*

> *place and that many do not speak English. Information and services should be made available in a number of Aboriginal languages.*
>
> *I was also informed that many Aboriginal persons choose leaders from their community as their first source for information and assistance when they have a problem. Despite this, there appear to be systemic barriers to the recognition of this role of community leaders. It was suggested that a community leader should be accepted as the agent of a complainant if the complainant has asked for this assistance, and should be kept apprised of developments in an ongoing investigation. A recommendation was also made that formal lines of communication should be opened between police services andleadersofAboriginalcommunities.."*80

80 Report on the Police Complaints System in Ontario, The Honourable Patrick LeSage Q.C., April 22, 2005, p. 53.

127. The primary recommendation of Justice LeSage is to create an independent civilian body to administer the public complaints system in Ontario. While Justice LeSage did not specifically address the question of whether there should be a separate body for self-directed or regionally directed police services in Ontario, the Chiefs of Ontario accept this recommendation of Justice LeSage and urge the province of Ontario to begin its implementation which should include input from the First Nations leadership. At minimum, a First Nation person should hold a position on this new body.

128. Based upon the above considerations, the Chiefs of Ontario propose the following recommendations:

G.1 The Chiefs of Ontario welcome the opportunity – at the appropriate time - to discuss further changes to the OPP policy *"A Framework For Police Preparedness for Aboriginal Critical Incidents"* with the OPP in light of current and on-going events in Ontario.

G.2 Protocols should be negotiated between police services in Ontario and First Nations political representatives (at the community and regional political organization levels) to avoid and/or to resolve conflicts without incident.

G. 3 Police services in Ontario should be strongly encouraged to:

a. establish an alternative complaint and investigation process in collaboration with First Nations to ensure fairness and transparency;

b. establish senior level liaison processes with First Nations' leadership to regularly address issues of mutual concern and to facilitate cooperative problem-solving;

c. develop and implement culturally-sensitive cross-cultural training initiatives in cooperation with First Nations, including regular First Nations community-based training sessions involving Elders and community leaders, First Nations constables, women, youth, etc.;

d. hire more First Nations members into and advancement through all levels of authority in Ontario police services.

G.4 There is a need for more recognition, support and financial resources from both Ontario and Canada for First Nations-directed police services in Ontario and for First Nations-based administration of justice systems.

G.5 There is a need for greater recognition of First Nations' law and support for First Nation enforcement processes, together with a commitment to reciprocal arrangements for implementation of First Nations-based justice systems.

G.6 The Government of Ontario should act upon the recommendation of The Honourable Mr. Justice Patrick LeSage in his final report into the Police Complaints System in Ontario and create an independent civilian body, which would include First Nation representation, to administer the public (police) complaints system in Ontario.

H. Aboriginal People and the Criminal Justice System

129. On February 22, 2005, members of the Chiefs of Ontario participated in a workshop to discuss and consider the research paper prepared by Jonathin Rudin for the Ipperwash Inquiry entitled *Aboriginal Peoples and the Criminal Justice System*. Mr. Rudin explores the over-representation of our people in prison, the over-representation of our people as victims of crime, the over and under policing of our communities and the provincial government initiatives that have been created to address some of these issues.

130. For the Chiefs of Ontario, Canada's system of justice perpetuates systemic and institutionalized racism with every failed attempt to come to terms with its own history; a history that applied its laws to the displacement of our own and dispensed its "justice" by the force of its own police services.

131. For First Nation people, Canada's system of laws and courts continue to ignore significant cultural factors (like language) and often subjects our people to incomprehensible proceedings. On March 8, 2006, Deputy Grand Chief Alvin Fiddler detailed to the Inquiry the circumstances surrounding the October, 2000 death of Max Kakegamic in Kenora, Ontario and the August, 2003 death of Geronimo Fobister during an OPP standoff. Both cases raise serious issues of mistrust and racism while at the same time leaving open unanswered questions of dishonest and deficient police conduct.

132. The need for change is obvious when example after example is presented of policing that is unresponsive at times and abusive at other times, throughout our communities.

133. On March 9, 2006 Chief Simon Fobister of the Grand Council Treaty # 3 could not have stated things more clearly when he said:

> *How do a people move forward when there are too many unanswered questions, no apologies for the appalling treatment they have experienced at the hands of the justice system and the city of Kenora? It is one thing to forgive and move forward but when unnecessary deaths of our people continue to happen in this day and age, there is never any moving forward, just the recurring memories of seeing our parents humiliated and our sense of helplessness as children of how society view the 'original people of this land'. But, we are survivors of our nation, and while we still have many struggles to overcome, we are prepared to work together with you to make the changes that are necessary so we can all live together in peace and harmony.*[81]

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81 Grand Council Treaty # 3 Presentation to the Ipperwash Inquiry, March 8 & 9, 2006, paragraph 55, pp. 16-17 (reproduced at Appendix 12). A complete list of recommendations offered by Grand Council Treaty # 3 is found at p. 17 of their presentation. The Grand Council Treaty # 3 also presented to the Ipperwash Inquiry a copy of their *Institutional Analysis Report: Systemic Racism in the Justice System*. A copy of this report is reproduced at Appendix 17.

134. One example of a First Nation community that has exercised its inherent right to determine its own justice system is the Mohawk Council of Akwesasne. The development of their justice system is based upon their efforts to "harmonize traditional methods [of justice] with the conventional ones but it does not mean bringing in a provincial court system." To achieve this, the Mohawk Council of Akwesasne has taken a 'Nation Building approach' to the exercise of its justice jurisdiction and development of its own community based justice systems. Since the 1970s, Akwesasne has developed 5 distinct justice programs which include the Akwesasne Mohawk Court, Mediation Services, The Legislative Commission, the Community Justice Program and the Probation and Parole Service.*82*

135. Based upon their decades of experience, the Mohawk Council of Akwesasne offer a number of recommendations to this Inquiry. These include:

(a) There is a need for the government of Ontario to examine the RCAP [Royal Commission on Aboriginal Peoples] recommendations and open a dialogue with First Nation people to jointly explore how these recommendations can improve the relationship between First Nations peoples and Ontario.

(b) Protocols with government agencies, enforcement agencies and consulting with First Nation people on their traditions need structure. The protocols should reflect harmonization of First Nation interests with provincial ones to develop common ground and foster healthy relationships.

(c) There needs to be some oversight over potential areas of conflict between First Nations peoples and Ontario in order to be in a better position for conflict management (for example an Ombudsman).

(d) Aboriginal interpreters should be a part of the legal process at all stages to ensure the First Nation member and his/her family understands what is happening.

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82 A more detailed explanation of each of these programs is set out in the Mohawk Council of Akwesasne March 8-9, 2006 presentation to the Ipperwash Inquiry, pp.3-4 which has been reproduced at Appendix 18

(e) Transfer of authority to aboriginal community at certain stages of court proceedings for an aboriginal offender to be dealt with by his/her community.*83*

136. On March 8, 2006 Grand Chief Louttit of the Mushkegowuk First Nation addressed the Inquiry to emphasize key issues raised by First Nation leaders and Elders regarding the justice system. At the core of the issues lies the fundamental lack of recognition and respect for First Nation Laws. In our communities, Grand Chief Louttit reminded the Inquiry, justice was administered by our families and leaders assisted and dealt with the underlying problems. Today, Canada's justice system, which includes the police, direct their attention only to the symptoms. Even still, there is a lack of responsiveness by the police, a lack of public awareness for service providers, a lack of services provided in the south and a need to create better linkages between police and other social service agencies in the north.*84*

137. As Grand Chief Louttit summarized, First Nations need to exercise their right to administer justice in their territories; as in any self-governing Nation, governance includes the development and implementation of culturally congruent judicial systems. Unless and until this happens in the province of Ontario, the justice system will continue to be perceived as intrusive, intimidating and impatient.

I. Conclusion

138. In our view, the answer to the question of how would circumstances similar to the events that lead to the death of Dudley George be avoided in the future requires a

83 A complete list of recommendations offered by the Mohawk Council of Akwesasne in their March 8-9, 2006 presentation to the Ipperwash Inquiry, can be found at pp.4-5 of Appendix 18.

84 For a detailed outline of Grand Chief Louttit's remarks to the Inquiry on March 8, 2006, please see Appendix 19. Grand Chief Louttit's complete presentation can also be viewed on the March 8 and 9, 2006 DVD created by the Inquiry.

fundamental change in the relationship between all levels of government and First Nations.

139. Such change begins not only with the federal and provincial government's *affirmation* of our Aboriginal and Treaty rights in this province but progresses to the steadfast commitment of governments to work with us to create an environment that secures our peaceful coexistence - not as adversaries competing for resources - but as Treaty partners.

140. Further, as Treaty partners, where we may differ in the interpretation of our rights to land and resources in particular, our relationship should translate into a greater willingness to find mutually acceptable solutions as quickly as possible lest our differences be allowed to fester for decades.

141. Tragically, recent history has revealed to us through action and more often than not – omission - that our Treaty partners have been unwilling or unable to see their way through to a different and better relationship with us. Unless and until they are prepared to seriously consider and act upon the numerous recommendations we offer within this submission to signal a desire to create a more positive relationship with us, built upon mutual respect – future conflict is inevitable.