# Final Submission to the Ipperwash Inquiry from the Chippewas of Nawash Unceded First Nation

24 August 2006

In our final time with the Ipperwash Inquiry, we would like to emphasize certain recommendations from our report to the Commissioner, "Under Siege". Chief R Paul Nadjiwan, former Chief Ralph Akiwenzie (who was Chief during the 1990s) and David McLaren (who authored the report) will also try to answer some of the questions the Inquiry poses in its recent discussion papers on Aboriginal-Police Relations and Rights.

### *Themes from "Under Siege"*

In "Under Siege", we document how different the culture of Turtle Island peoples is from that of Euro-Canadians. Euro-Canadian values are suffused throughout Ontario's and Canada's legislation, regulations, policies and practices. It has been our experience that the usual procedures for (for example) environmental and heritage assessments, reviews, and appeals are discriminatory and derogative of our rights and beliefs. For example, the *Cemeteries Act* requires that we desecrate our burial places before the Crown will protect them. In the mid 1980s the Ontario MNR created a regulatory regime for the commercial fishery in our traditional territories that the Judge Fairgrieve, in *Jones-Nadjiwon* clearly found was discriminatory and infringed on our aboriginal and treaty rights.

Simply put, there are 180 degrees of separation between First Nations ways and Euro-Canadian ways. So much so that the full expression of Turtle Island culture is only available outside the cultural and legal framework of Canada. It was not until we re-occupied our burial grounds in Owen Sound that we were able to express our beliefs and our determination to protect our ancestors. It was only by continuing to fish in the face of charges by the Ontario MNR that we were able to give full expression to our rights.

Turtle Island people are still being charged under Ontario's laws for hunting and fishing according to their own ways. Unfortunately, fully expressing our culture and our rights in these ways brings a backlash from Canadians and, in that backlash, racism is allowed to express itself.

Dealing with racism is not the job of First Nations. However, the burden falls on us. The impacts of racism are well documented. It leaves physical and psychological scars; it prevents the full understanding and acceptance of Native people in our own lands; it gives permission to those in authority to discriminate against us.

There is some hope to be found by examining the past; that is, the Covenant Chain consultations of the 18th Century. The Crown and First Nations met from time to time to "polish" the silver chain that served as a metaphor for their economic and military alliances. During those meetings each consulted the other about their intentions and their needs. If a breach in the relationship was identified, accommodation on the part of one side or the other was made.

Recent decisions by the Supreme Court of Canada regarding the Crown's duty to consult should be embraced by Ontario and First Nations alike as a way out of the current toxic relationship. If the same respect that infused the consultations of the 1700s can be rediscovered in 2006,

### *Recommendations from "Under Siege" (copies provided)*

In preparing our own recommendations to the Inquiry, we reviewed as many relevant recommendations from earlier inquires, commissions (including the Royal Commission on Aboriginal Peoples) and the United Nations as we could. They are listed and discussed in section D of our paper. Our own recommendations begin in section D5, on page 147.

Of all the inquiries and commissions, the Royal Commission on Aboriginal Peoples (RCAP) makes the most wide-ranging and comprehensive recommendations. We believe that if these were implemented, the ugly events in 1995 at Stoney Point, and the Bruce Peninsula, and the more recent events at Caledonia would not have happened.

However, the recommendations of the RCAP or of other inquiries have not been properly implemented. So resentment builds in First Nation communities and fear and loathing fester in non-Native communities. The threat of more Ippwerwashes, Bruce Peninsulas remains. Those of us who live and work in First Nation communities, who must deal with confrontations whose roots are far in the past, can only hope that this Inquiry makes far reaching recommendations that Ontario will be listen to and implement.

For the reasons above, our first recommendation is to implement the recommendations of the Royal Commission on Aboriginal Peoples.

The rest of our recommendations are designed to work together to:

- Improve the relationship between the Crown and First Nations in Ontario.
- Improve the viability of First Nations by access to and management of resources.
- Improve protection of Turtle Island peoples' heritage and culture.
- Improve the education of school children, law enforcement officers and the legal profession in the ways and cultures of First Nations' peoples.
- Improve the ability of the Crown to deal with racism against Native peoples.
- Ensure the Ipperwash Inquiry's recommendations do not languish on government bookshelves as so many others have.

Many of Nawash's recommendations echo those of other inquiries. But this only highlights needs that have not yet been addressed.

For example, recommendations to improve First Nation access to and management of natural resources were made by the RCAP, the Manitoba Justice Inquiry, and the UN in its Draft

Declaration on the rights of Indigenous Peoples. Access to resources and stewardship over the environment of traditional territories are twin activities that would revitalize both the economies and the culture of First Nations in Ontario.

Practically all of the other inquiries we reviewed made recommendations about improving non-Natives' knowledge and understanding about First Nations' peoples. While improved education will help, it will only work in the long run if the "bred-in-the-bone" racism carried by many is addressed directly. Therefore we included recommendations to do that through changes in the curricula for law enforcement officers, in the Criminal Code and in the mandate of the Ontario and Canadian Human Rights Commissions.

But of top priority must be efforts to improve the currently toxic relationship between First Nations and the Crown. To some extent all our recommendations, if implemented, would improve relations. However, we would like to draw special attention to the following:

No. 2: The Crown (both Ontario and Canada) and First Nations at all levels meet at least twice a year in "Covenant Councils".

The root of this recommendation lies in the complex but successful diplomacy of the Covenant Chain consultations between the Crown and First Nations in the Great Lakes region in the 1700s. The lessons of the Covenant Chain are important for current discussions around the Crown's duty to consult and accommodate.

No. 4: The Crown (both Ontario and Canada) and First Nations should develop and codify parallel ways of doing business.

One of the themes of "Under Siege" (and of other papers done for the Inquiry) is the vast difference between the ways of Turtle Island peoples and the ways of Euro-Canadians. In addition, the unique constitutional reality of First Nations must be recognized and accommodated. And finally, the Crown's usual ways of doing business often discriminates against First Nations' rights, claims and ways of life. Why not recognize and accept what has been reality for the past 500 years: that there are two very different cultures, each with its own way of doing things living side by side in Canada?

No. 5: The Crown (both Canada and Ontario) and First Nations should develop and codify best practices for negotiations and for dealing with confrontations.

This is a theme of other papers written for the Inquiry. In Appendix H of "Under Siege" we list a number of best practices for the Crown, the police and for First Nations. All are based on our own experiences of what worked and what didn't during the stormy years of the 1990s. Among the best of the best practices we would emphasize four: getting the right people from both sides talking to one another as soon as possible: adequate resources to research the origins of disputes; timely and carefully planned communications, and agreeing on the rules of engagement.

No. 8-10: Improving the knowledge and capacity of MPs, MPPs and Parliamentary Assistants to deal with First Nations matters.

MPs, MPPs and Parliamentary Assistants to Ministers can have a very beneficial role to play in dealing with crises. In our report we acknowledge the positive role played by Gus Mitges MP for the Owen Sound area during our vigil of the burial grounds on 6th Avenue. Ross Reid, the Parliamentary Assistant to Tom Siddon, then Minister of Indian Affairs under Prime Minister Mulroney was equally effective.

No. 12: The Provincial Crown should establish an independent office of the Legislature (such as the Provincial Auditor or the Environmental Commissioner of Ontario) that would oversee the relationship between the Crown and First Nations.

This we consider to be one of our more important recommendations. If implemented, it would give First Nations matters a higher political profile. It would also mean the Legislature as a whole would be more closely watching the actions of government as they relate to First Nations. This will be especially important as Ontario tries to get a handle on its duty to consult. We have found that, generally speaking, elected officials are more sensitive to the honour of the Crown (especially when it may be scrutinized by the media) than are bureaucrats.

### *Best Practices …*

Based on our experiences as we asserted our rights and claims in the 1990s, we have developed a number of "best practices" which are collected in Appendix H of "Under Siege".

However, given the Supreme Court's recognition of the Crown's duty to consult, the single "best practice" that the Crown could perform is to polish up its honour and come talk to us, face to face. Here are some of the things they need to bring with them:

- Good faith (an honest intention to consult fully and to accommodate infringements);
- Timeliness (talks at the "strategic planning phase" of matters);
- Resources (to give First Nations the capacity to investigate the impact of matters on their rights, claims and way of life);
- Compensation (if there is no other way of accommodating infringements).

For our part, we must bring a willingness to engage in meaningful consultation and be generous with our knowledge of our traditional territories and our very different ways of looking at things.

We are willing to be consulted. Some First Nations in Ontario have already devised their own consultation protocols to make themselves ready. The Saugeen Ojibway Nations are preparing our protocols. We attend on the honour of the Crown…

***[Sit down with the Chiefs and review the questions]***

## *Questions posed by the Ipperwash Inquiry in its discussion papers*

We will not comment on the questions raised in the June 2006 Inquiry Discussion paper in Government-Police Relations. The values, norms, legislation, protocols, legislation, polices and regulations that govern that relationship belong to the Ontario Crown. The Ontario government and its police force should know best how they are supposed to relate to one another.

Following are comments on the discussion papers on aboriginal-police relations and on aboriginal and treaty rights.

### Our comments on Aboriginal-Police Relations Discussion Paper

In its June discussion paper on Aboriginal-Police relations, the Inquiry poses a number of questions. Our review of the principles and protocols suggested (some of which are being employed, such as the RCMP's Framework) shows they are reasonable ways of dealing with confrontations. They compare well to our "Best Practices for the Police dealing with Confrontations" on page 11 of Appendix H of "Under Siege". However, as our recommendations indicate, we would go further.

In our view, the police have a major role in keeping the peace, which they can do best by leading by example and maintaining a cool, calm, patient presence. The OPP, in discussion with leaders and peacekeepers on both sides of a dispute, can help set the boundaries of a confrontation (areas that can be occupied, areas that should not, *etc*). It would be wise for the OPP to develop officers who show talent for such a role, by further training and then deploying those officers who demonstrate, in the words of Best Practices for Police in our Appendix H,

> an appreciation for the complexity of Native rights and claims, experience in dealing with confrontations involving Native people, the authority to use discretion, and a talent for striking up relationships with leaders on both sides of the dispute

They also have a role in facilitating a resolution by helping the parties bring the right people to the table as soon as possible. Finally, since they are talking to all parties involved, they have a major role to play in ensuring lines of communications are kept open.

The crucial role of communications during confrontations is an aspect of Aboriginal-Police relations that the Discussion Paper does not discuss. The police have the communications tools (*eg*, mobile radios, cell phones, internet access) to keep negotiators in the field in touch with one another and with their political leaders. In the fog that envelopes some confrontations, fast, accurate communications are vital.

Section B of the Inquiry's Discussion Paper on Aboriginal-Police Relations tackles the question of on-going relations, including the thorny problem of racism of some law enforcement officers.

In "Under Siege" we recommend legislative change and broadened powers for the Ontario and Canadian Human Rights Commissions to tackle expressions of hatred against aboriginal peoples. [See recommendations 14, 17 and 35, 36.] These measures would apply to law enforcement officers (including MNR Conservation Officers) as well.

Thus the hateful emails mocking aboriginal victims of crimes that were circulated among OPP and MNR offices in 2000 or 2001 could be subject to Criminal Code prosecution, or failing that, to sanction by Human Rights Commissions. In our attempt to obtain copies of those emails as part of our research for the Ipperwash Inquiry, we appealed a decision of the Information and Privacy Commissioner of Ontario. The Assistant Commissioner, in his ruling refusing their release, characterized the emails this way:

> Having reviewed the record [photos and captions written by government employees], I consider its content to be highly offensive and racist. [page 10, IPC Order PO-2477, June 9, 2006]
>
> In my opinion, racist actins and comments such as the one revealed in the record at issue are matters of grave concern to all citizens of Ontario and not just a matter of concern to the Aboriginal people of this province. Attitudes and behaviours reflected in the record at issue erode the trust and confidence that the entire public has in the institutions that they fund by the payment of taxes. [page 14]

How can law enforcement officers who hold that sort of hatred against aboriginal people be expected to be cool, calm and patient in a confrontation involving First Nations peoples? Similarly, we cannot believe that such officers will have the good judgment and discretion that is needed when dealing with aboriginal rights cases. As our recommendation 38 states:

> **38) The Crown (Ontario and Canada) should implement a policy of zero tolerance for hateful remarks, actions, and correspondence at all levels of its organization. Proven cases of racist attitudes should result in immediate and irrevocable dismissal of the staff who promote or communicate them.**

On one side of the racism coin is sanction; on the other is education. We make several recommendations concerning education, not only for police officers, but also for other members of the justice system, especially Justices of the Peace. [See recommendations 31-32.] Relevant to this discussion is 31:

> **31) A full year course in the traditional practices of aboriginal peoples and in aboriginal and treaty rights as they are expressed in the constitution and being defined by the courts should be mandatory for all students seeking employment in law enforcement, especially for those who would be Conservation Officers.**

Elsewhere in “Under Siege” we suggest a system of secondment between government and First Nations. A few months before negotiations are to begin on a land claim or on a rights-based activity we suggest that the First Nation and the government exchange key people to work in the other’s offices and to live in the other’s community. Allow us to make a new recommendation:

> **As part of their deployment to a new area, an OPP officer or an MNR Conservation Officer will be seconded to the First Nation in their area for a period of six months.**

In summary, police officers, if properly screened, educated, trained and deployed, can help stage-manage demonstrations and confrontations in a way that will lead to a reasonably quick and peaceful resolution of the immediate conflict. It will be up to the diplomats and politicians on both sides to ensure a lasting reconciliation is found.

In day-to-day policing matters, law enforcement officers who understand and respect Native claims, rights and ways of life will do much to reduce the tensions and resentments that build up in a Native community and that frequently fuel the anger that leads to confrontation.

## Our comments on Aboriginal and Treaty Rights Discussion Paper

Much of this paper talks about re-energizing old institutions such as the Indian Commission of Ontario or established processes such as the comprehensive claims process. With all due respect to the good work of the ICO and some people at ONAS[1], these bodies have failed to teach fair resolutions of land claims and rights issues more than they have succeeded.

ONAS points to the resolution of claims to unsold lands on Manitoulin Is. But it is our understanding the First Nations there regret signing the final agreement. Nawash and Saugeen rejected a similar offer for unsold lands in the Bruce Peninsula, partly because the government would not consider compensation for loss of use of those lands. We notice, with irony, that Ontario has agreed to compensation to businesses and citizens at Caledonia (the tally is somewhere around $50 million). But we have heard of no such compensation for Six Nations who, after all, had lost the use of that land (or the taxes the Crown has derived from it) for 200 years. That is another problem with the old processes—compensation for loss of use was never considered.

We have had discussions with the Crown on land claims, burial grounds and fishing rights. None of these were resolved through any established process—the land claims had to go to court, the burial ground issue on 6th Avenue in Owen Sound was resolved by direct action on the part of Nawash and by discussions directly with the Parliamentary Assistant to the Minister of Indian Affairs. The fishing rights matter was resolved by talks directly with Ontario and Canada but mediated by Judge Stephen Hunter, a man who had the respect of all parties.

Direct discussions with the political arm of the Crown, or discussions with senior staff mediated by a prominent member of the judiciary seems to result in resolutions satisfactory to all parties.

In a sense this is not unlike the process the Supreme Court of Canada has mapped out for the Crown in *Haida* 2004 SCC 73, *Taku* 2004 SCC 74 and other court decisions. They tell the Crown that at the strategic planning phase of a matter, the Crown must inform themselves about a First Nation's rights and claims; ensure they provide the First Nation with timely and full information; provide capacity funding if that is what is required for the First Nation to assess the impact of the matter on its rights and claims and culture; and consult with the First Nation in good faith. If infringement is likely, accommodation (which may include compensation) must be made.

Rather than rethinking old institutions, we should be thinking about new relationships. In "Under Siege", we suggest that the place to start is in the past, with the Covenant Chain protocols of the 1700s. In this respect, the Inter-Governmental Relationship process undertaken by Ontario, Canada and the Chiefs of Ontario is a good start and, at the initial meetings much hope was

[1] Racism, or at least an atmosphere profoundly prejudicial to First Nations' rights and claims, existed at ONAS in the late 1980s and early 1990s according to David McNab who worked there as a claims negotiator. See David McNab, *Circles of Time*, Wilfred Laurier University Press, 1999, chapters 5, 6 and 7.

expressed by the new beginning. Minister Ramsay even dropped by to speak about his desire for a "new relationship".

The problem was there were too many people around the table trying to come up with a new relationship but stuck in the old way of thinking:

- Ontario would not share its draft guidelines for consultation;
- The Chiefs of Ontario allowed itself to be used by the Crown as spokesperson for all First Nations;
- Ontario and Canada nixed the suggestion that we learn from the lessons of the Covenant Chain (in spite of an enlightening presentation from Professor Darlene Johnston about the 1764 consultations);
- The Crown kept bringing issues to the IGR table (such as source water protection) that they should have been talking to First Nations about. Neither the PTOs nor the Chiefs of Ontario who were at the table hold the rights and claims that might be infringed by the Crown's initiatives.

The IGR table was becoming a surrogate for proper consultation. So first Treaty 3 withdrew, then we withdrew, then Nishnabe Aski Nation withdrew. We have all told the Crown that we are willing to enter into consultations with them about matters they are contemplating for our traditional territories. The IGR process is discredited. It cannot be viewed as a viable process.

In numerous letters to Ministers of the Crown our message has been consistent and clear: "Come up to our traditional territories and talk to us about your plans for out traditional territories." To date, our invitation has gone unanswered.

To assist the development of new relationship as defined by proper consultation, our first thirteen recommendations speak directly to improving relations between the Crown and First Nations. For example:

- The establishing of "Covenant Councils" in the traditional territories of First Nations (# 2).
- Develop parallel ways of doing business together (# 4).
- Develop and codify best practices for negotiations and confrontations (# 5).
- Before negotiations, agree on a mediator, on research needs, on staff secondments and other things designed to level the playing field and maintain good relations during negotiations (# 6).
- Capacity funding for First Nations to research impacts of clams, rights and way of life (# 7).
- Staff in MPs' and MPPs' offices should become familiar with Native issues in their ridings (# 8).
- Staff in Ministers' offices should become familiar with Native issues as they pertain to their Minister's mandate (# 9)
- Enhance the role of Parliamentary Assistants to deal with aboriginal issues, especially the impact of the plans of the Crown on First Nations (# 10).
- Each Ministry to develop a Policy Statement with Respect to Aboriginal Peoples (# 11).
- The Ontario Legislature to appoint an independent "First Nations Commissioner" with duties similar to those of the Office of the Environmental Commissioner of Ontario (# 12).

- Ontario make it a high priority to recruit aboriginal police and conservation officers (# 13).

The rest of our recommendations, when viewed in the light of establishing a new relationship, are designed to keep the old processes and ways of thinking from sinking the new. They are recommendations to deal with racism, misinformation, prejudicial policies and practices. Resource access and management would help ailing economies and recognize First Nations as a planning authority in partnership with the Crown.

We've stated that a new way of doing business, one based in the honour of the Crown and the desire of First Nations to protect their rights, claims and culture. And we have summarized our own recommendations as a step in this direction. Now we can say that we agree with much of the Discussion Paper on aboriginal and treaty rights.

*Question 2: How to "Rebuild Canada-First Nations-Ontario Inter-Governmental Relationships"?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 4: What processes will meet long-term objectives for land claims?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 5: Lessons from confrontations?* Need to start proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 6: Independent office of the Legislature?* Yes, as soon as possible.

*Question7: Institutional processes to achieve resource management?* Proper consultation, done in good faith, directly with the First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 8: How to improved relations at the local level?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown. During that consultation, there may be agreement to hire more aboriginal law enforcement officers.

*Question 9: How to improve transparency for MNR polices?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown. And yes, ministries should develop a statement of principles or values regarding First Nations that would be scrutinized by the independent First Nations' Commissioner.

*Question 10: Bringing together various expertises to share resources?* Yes, but primarily at the treaty level as part of proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 11: Is there a need for dedicated aboriginal heritage legislation?* Yes as long as it was flexible enough to accommodate different scenarios and practices and could be adjusted in proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 12: How can other organizations promote consultation?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by

actions of the Crown should not need “promotion”. The Supreme Court of Canada has already told the Crown they are honour-bound to do it. What is needed is a little political will power.

*Question 14: What lessons from BC?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 15: What is needed for First Nations to improve First Nations’ capacity to consult?* A little political willpower to allocate resources to First Nations to research the impact of government policies, practices, legislation and projects on their rights, claims and way of life. In other words, a decision on the part of the Crown to implement the Supreme Court’s rulings on the duty to consult in Ontario.

*Question 16: How can Ontario meet its obligations to protect aboriginal and treaty rights, claims and way of life?* Proper consultation, done in good faith, directly with First Nations who hold the rights and treaties that may be infringed by actions of the Crown.

*Question 17: How can curricula be developed that better reflect First Nations?* See recommendations 29-34 in “Under Siege”.

*Question 20: Should a Treaty Commission have a public mandate?* Ontario should not have a Treaty Commission, especially if there is an Independent First Nations Commissioner appointed by the Legislature. That office should have a public education mandate, just as the Office of the Environmental Commissioner has.