IN THE MATTER OF an Inquiry pursuant to the *Public Inquiries Act* R.S.O. 1990, c. P.41, as amended, into the events surrounding the death of Dudley George and the avoidance of violence in similar circumstances.

SUBMISSIONS OF THE PROVINCE OF ONTARIO

PART 1 – EVIDENCE

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PROLOGUE

The death of Anthony O'Brien (Dudley) George was a tragedy that deeply affected Mr. George's family, friends and community.

These submissions address the evidence as it pertains to the roles, responsibilities and actions of the civil servants. Although there is little mention of Mr. George, the submissions are not intended in any way to diminish the memory of Mr. George, or to minimize the loss suffered by his family and friends as a result of his death.

The Province hopes that the evidence given in Part 1 of this Inquiry has provided the parties, especially the family of Dudley George, with answers about the events surrounding the death of Mr. George.

SUBMISSIONS OF THE PROVINCE OF ONTARIO

The Province of Ontario has standing as a party with respect to both Part 1 and Part 2 of the Inquiry. These submissions are divided into two parts. Part 1 submissions are with respect to the evidence given at the Inquiry, and Part 2 submissions provide responses to the issues raised in the Discussion Papers circulated by the Commission.

PART 1 – SUBMISSIONS ON THE EVIDENCE

Background

1. In 1825, the “Chiefs and Principal Men of the Chippewa Nation of Indians” ceded over two million acres of land to the Crown. The Huron Tract Treaty of 1827 confirmed this transfer and granted the Chippewa a perpetual annuity and four reserves, including Kettle Point and Stony Point. The Department of Indian Affairs treated the signatories of the treaty as one band, known as the Sarnia First Nation until the 1860s, when the Walpole Island people separated from the group.

2. The Kettle Point and Stony Point people also pressed the Department of Indian Affairs to allow them to separate from the Sarnia First Nation but it was not until 1919 that the Department consented and the Kettle and Stony Point First Nation was constituted as a new Band under the *Indian Act*.

3. The community occupied two parcels of land, the Kettle Point Reserve and the Stony Point Reserve. Both Reserves were located on the shores of Lake Huron. The Stony Point Reserve was located at the mouth of the River Aux Sable, and was comprised of lands that are now known as Camp Ipperwash and Ipperwash Provincial Park. Kettle Point was situated to the West of this area.

Exh. P-503, Inquiry Doc. No.1011681, Fax from ONAS Aug. 2/95, pp. 3
Exh. P-7, Historical Background, Joan Holmes Expert's Brief

4. In 1927, the Kettle and Stony Point First Nation surrendered 83 acres of beachfront on the Kettle Point Reserve to the federal Crown in exchange for a monetary payment to be held in trust for the Kettle and Stony Point First Nation. This land is known as West Ipperwash Beach. The surrender was approved by Order in Council on May 11, 1927.

Exh. P-7, Historical Background, Joan Holmes Expert's Brief

5. In 1928, the surrendered land was sold by the federal Crown to private parties, A.W. Crawford and John White.

6. In 1928, the Band surrendered 377 acres of land at Stony Point, including the entire beachfront, to the federal Crown also in exchange for a monetary payment to be held in trust for the Kettle and Stony Point First Nation. The federal Crown then sold the 377-acre parcel to William J. Scott and a patent was issued to him in June 1929. This property included a 109-acre parcel described as Lot 8 Concession A, which is now known as Ipperwash Provincial Park.

Exh. P-7, Historical Background, Joan Holmes Expert's Brief, p. 43
Exh. P-551, Motion Record, Exh. "A" to the Affidavit of Les Kobayashi

7. The Province of Ontario purchased the 109-acre parcel in 1936 from Mr. Scott and others to whom he had transferred interests in the property. The Province began developing it as a Provincial Park in 1937. The property was officially opened as Ipperwash Provincial Park in 1938.

Exh. P-7, Historical Background, Joan Holmes Expert's Brief, pp. 5, 42-43
Inquiry Doc. No. 2002714, Memo Re: Ipperwash, p.10
Exh. P-768, Inquiry Doc. No. 1008306, Letter from Les Kobayashi to Michael George Re: Ipperwash Park Management Plan

8. Until the early 1990's, there was never any claim or statement, verbal or written, formal or informal of which the Province was aware, that suggested any member of the Kettle and Stony Point Band disputed the Province's right and title to the land comprising the Park.

9. In 1942, the Department of National Defence (DND) appropriated the Stony Point Reserve under the *War Measures Act*. The Department used the Reserve to build a military training camp named Camp Ipperwash. After the Second World War the DND indicated that they would be willing to return the Reserve, and at that point the evidence becomes divided. Joan Holmes states that the DND later withdrew the offer.

Exh. P-7, Historical Background, Joan Holmes Expert's Brief, pp. 5-6

10. There is other evidence to the effect that the DND, before returning the land, arranged for an environmental assessment to ensure the property was properly de-commissioned, and that the Kettle Stony Point First Nation sought an injunction to prevent the environmental assessment.

Inquiry Doc. No. 7000569, Brief on OP Maple Options, p. 10

11. Over the past several decades there have been discussions and negotiations between the Kettle and Stony Point First Nation and the DND regarding the return of the appropriated land, but the land has still not been returned by the federal government. This led, understandably, to considerable frustration on the part of the Kettle and Stony Point First Nation, and especially the Stony Point Group.

12. In May of 1993, a breakaway group of Stony Point descendants who are now known to the Commission as the Aazhoodena or Stoney Point Group occupied parts of Camp Ipperwash. The military continued to use the Camp while the Aazhoodena resided on the property away from the built-up area of the Camp.

13. On May 18, 1993, one of members of the Aazhoodena served the Ministry of Natural Resources (MNR) with a bailiff's order notifying them that the Stony Point Reserve was "Aushoodaana Territory" and of their intention to repossess the Reserve, including the Provincial Park.

Inquiry Doc. No. 3001774, House Book Note
Inquiry Doc. No. 2002619, Bailiff's order

14. In 1995, during the ongoing occupation of the non-built-up area of Camp Ipperwash, the DND was negotiating with the Kettle and Stony Point First Nation Council for the return of the Camp. As part of the negotiations, it was agreed that the military would vacate the Camp on August 16, 1995.

However, on July 29, 1995 the Aazhoodena unexpectedly took over the built-up area of the Camp and the military withdrew to prevent further confrontation.

Exh. P-7, Historical Background, Joan Holmes Expert's Brief, pp. 64-65
Inquiry Doc. No. 3001412, MSGCS Note: Camp Ipperwash,
Smith, Transcript of Evidence, June 26/06, p. 121
Howse, Transcript of Evidence, June 27/06, p. 130

15. In early August, 1995 the MNR heard rumors that the group might be planning to take over Ipperwash Provincial Park. As a result of the rumours, MNR staff notified the Ontario Provincial Police (OPP) who undertook surveillance within the Park and security checks in the vicinity of the Park.

P-646, Inquiry Doc. No. 1003358, Email re: Possible emergency at Ipperwash
Kobayashi, Transcript of Evidence, Oct. 24/06, p. 206

16. The MNR drafted a Contingency Plan for the purpose of securing Park facilities and evacuating the Park. The Plan was implemented in late August, and assets were moved out of the Park.

Kobayashi, Transcript of Evidence, Oct. 20/05, pp. 140, 141

Park Takeover

17. After the Ipperwash Provincial Park was closed for the season on September 4, 1995, the Aazhoodena occupied the Park.

Holmes, Transcript of Evidence, Aug. 19/04, p. 42 lines 14-17
Kobayashi, Transcript of Evidence, Oct. 20/05, pp. 284- 285
Korosec, Transcript of Evidence, Apr. 6/06, pp. 28- 29

18. At approximately 11 p.m. on September 4th, OPP Const. Vince George and then Park Superintendent Les Kobayashi attempted to serve the

occupiers with written notice of trespass, but they refused to accept it on the basis that there was no spokesperson for the group.

Kobayashi, Transcript of Evidence, Oct. 24/05, pp. 227-230

19. At no time after the takeover of Camp Ipperwash in July 1995 did a First Nation person or group raise any grievance or issue directly with the Province regarding a land claim or the existence of a burial ground within the Park.

20. When reports of a burial site surfaced, there was little, if anything, that the Ontario government could have done to prevent the takeover, for a number of reasons:

a) There was no spokesperson for the potential occupier group and the members of the group were not known to the MNR.

b) There were reports by members of the Military at Ipperwash of the presence of new people from the area who drove vehicles with U.S. licence plates, members of the Mohawk Warrior Society and radical members of the Aazhoodena. It is unlikely that these people would have engaged in meaningful dialogue with Ontario government officials.

c) There was no written complaint, or clear verbal complaint,that defined the problem and that could be followed up by government officials.

d) The Kettle and Stony Point First Nation took the position that there was no burial ground on the site of the Park, so they would not have been of assistance.

Exh. P-1802, Inquiry Doc. No. 7000242, OP Maple Int Report
Exh. P-1807, Inquiry Doc. No. 7000316, OP Maple Situation Report
Bressette, Transcript pf Evidence, Mar. 2/95, p. 92

21. At any given time, there may be rumours circulating of possible blockades or occupations in different parts of the Province. For example, in June

1995, there were also rumours that the bridge to Walpole Island would be blockaded and that the Pinery might be taken over.

Exh. P-1796, Inquiry Doc. No. 7000313, Situation Report, p. 1, Item 1D

22. The Province responds to rumours by doing a risk assessment and monitoring the risk. Where appropriate, the Province takes steps to address the risk and to engage in constructive processes with the Aboriginal community.

23. In June 1995, the DND was aware of the possibility that the built-up area of the Camp could be forcibly taken over. The military police took proactive steps in mid-July, 1995 to de-escalate tension between them and the Aazhoodena by:

a) conducting cross-cultural awareness training;

b) Meeting with members of the Kettle and Stony Point First Nation and Aazhoodena;

c) bringing in outside First Nations negotiators; and

d) developing a reasonable and responsible plan to develop trust and dialogue with the Aazhoodena.

Exh. P-1792, Inquiry Doc. No. 7000106, Message re: OP Maple, LFCA Operation
Exh. P-256, Inquiry Doc. No. 7000412, OP Maple Situation Report#012
Exh. P-271, Inquiry Doc. No. 7000321, OP Maple Situation Report

24. These efforts did not prevent members of the Aazhoodena from driving a school bus into the front gates of the Camp and physically taking over the Drill Hall in the Camp.

Exh. P-275, Inquiry Doc. No. 7000341, OP Maple Situation Report No. 026

25. Army Captain William Smith tried to de-escalate the situation following the takeover and negotiated an agreement as to which buildings could be occupied and which could not, but members of the Aazhoodena violated the agreement shortly thereafter.

Exh. P-275, Inquiry Doc. No. 7000341, OP Maple Situation Report No. 026, p. 2, par. g

26. Subsequently, the assistance of an elder was requested to engage in negotiations, but the Aazhoodena would not let him into the Camp.

Exh. P-275, Inquiry Doc. No. 7000341, OP Maple Situation Report No. 026, p.2, par. h
Smith, Transcript of Evidence, June 26/06, p.101

27. Two First Nations negotiators, Bob Anton and Bruce Elijah were then called to assist. They engaged in extensive negotiations, following which they concluded that the Aazhoodena had no intention of leaving, that they were armed and that increased confrontation was likely. This prompted the DND to evacuate the Camp.

Exh. P-275, Inquiry Doc. No. 7000341, OP Maple Situation Report No. 026, p.3,
Exh. P-1824, Inquiry Doc. No. 7000575, OP Maple LFCA Operation Order 02/95
Smith, Transcript of Evidence, June 26/06, p. 121

28. Prior to the takeover of Ipperwash Provincial Park, the OPP made considerable efforts to prevent the takeover, but they were also unsuccessful because the Aazhoodena refused to engage in constructive dialogue with them.

Conclusion –Background

29. The occupation of the Park appears to have been an escalation of the occupation of the Army Camp. The occupation of the Army Camp had occurred because of frustration with the long-standing promise made by the federal government to the Kettle and Stony Point First Nation that it would return the appropriated Stoney Point Reserve when it was no longer required for military purposes.

30. At Ipperwash, the military personnel tried many different strategies to avoid the takeover of the Camp, and the OPP tried many different strategies to avoid the takeover of the Park, but both were ultimately unsuccessful in preventing the occupations despite their best efforts.

31. It is doubtful in these circumstances that provincial officials would have been successful in preventing the takeover of Ipperwash Provincial Park, especially when there was no stated or apparent grievance against the Province.

32. The Province tries to address aboriginal grievances and claims through a process that was developed with the input of Aboriginal people. Information is made available as to how that process can be accessed, and how to present claims to ensure that they are dealt with as quickly a possible.

33. The reflections of DND and suggestions for future action in situations similar to Oka set out in a “Report – Aid of the Civil Power/Assistance to Civil Authorities” would be helpful for consideration in situations similar to Ipperwash.

Exh. P-1836, Inquiry Doc. No. 7000251, Message re: OP Maple – Tasking Order

Land Claim

34. The government of Ontario has always been committed, and remains committed, to fulfilling its legal obligations with respect to the negotiation of land claims.

35. It is important to note that there has never been a land claim filed against the Province of Ontario with respect to Ipperwash Provincial Park.

36. In 1985, Ontario developed a corporate land claims policy framework, the objectives of which were to meet lawful obligations, to conclude agreements that were fair and just, and to bring about greater certainty with respect to rights in land.

Exh. P-705, Inquiry Doc. No. 3001721, Briefing on Aboriginal Issues

37. In 1995, soon after the new Government took office, ONAS officials briefed government staff including Ministers Harnick and Hodgson, as well as staff from the Premier's Office, about Ontario's Land Claims Policy and the Provincial Government's obligations with respect to Aboriginal people.

Exh. P-705, Inquiry Doc. No. 3001721, Briefing on Aboriginal Issues
Jai, Transcript of Evidence, Aug. 30/05, p. 68

38. A new land claims policy was completed and publicly issued in 1998, which gave assurance that the Province will "meet its legal obligations in respect of Aboriginal people".

ONAS, "The Resolution of Land Claims in Ontario", p. 15

39. Ontario continues to enter into the negotiation of land claim settlements in light of these obligations. The Office responsible for land claims negotiations is the Ontario Secretariat for Aboriginal Affairs (OSAA), which was formerly the Ontario Native Affairs Secretariat (ONAS).

40. There is an established process for the settlement of Land Claims in Ontario. The province's current approach to land claims negotiation is set out in the ONAS paper entitled "The Resolution of Land Claims in Ontario", submitted in Part 2 of the Inquiry. There is also information available on the OSAA website about the submission of land claims see:

http://www.aboriginalaffairs.osaa.gov.on.ca/english/negotiate/approach.htm

Exh. P-641, Inquiry Doc. No.1003539, ONAS Fact Sheet – Steps to Negotiating a Land Claim Feb/95;
ONAS "The Resolution of Land Claims in Ontario",

41. A land claim is "a formal assertion by an Aboriginal community that it has a legal entitlement in respect of land." This definition has two aspects: 1) the claim must be presented by duly authorized representatives; and 2) the claim must assert the breach of a legal obligation owed by the Crown.

ONAS, "The Resolution of Land Claims in Ontario", p. 12

42. Aboriginal interests in land are communal in nature; therefore the legitimate representatives of the community must make the assertions of interest in land. It is typically the government of the First Nation that submits the claim in the form of a band council resolution. This is because

the Chief and Council are able to negotiate on behalf of the community and enter into binding agreements.

ONAS, "The Resolution of Land Claims in Ontario", p. 12-13
Hipfner, Transcript of Evidence, Sept. 15/05, p. 141

43. The occupiers of Ipperwash Provincial Park are not a group recognized as having any authority or mandate from the community to assert a land claim or to negotiate its resolution on behalf of the community.

44. The takeover of Ipperwash Provincial Park was unrelated to Ontario's land claims process, given that:

a) there had been no land claim filed in respect of the Park;

b) there was no grievance or claim filed by the Aazhoodena in respect of ownership of the Park; and

c) unlike Camp Ipperwash, there had been no negotiations on any issue in respect of the Park.

Conclusion – Land Claim

45. There may be value to considering improvements to Ontario's land claims process, but changes to Ontario's process will not necessarily prevent takeovers or occupations such as Ipperwash. The occupation of the Park was unrelated to Ontario's land claims process and may not have occurred but for the First Nations' frustration with the federal government over the return of Camp Ipperwash.

Colour of Right

The Law

46. An honest mistake concerning property rights, whether based on a mistake in fact or in law, may constitute a colour of right.

***Lilly v. The Queen* (1983), 5 C.C.C. (3d) 1 (S.C.C.)**

47. As a defence to a criminal charge, colour of right involves a lack of *mens rea*. In that sense, colour of right is "an honest belief in a state of facts or law which, if it existed, would be a legal justification or excuse." If upon all the evidence it may fairly be inferred that the accused acted under a genuine misconception of fact or law, there would be no offence committed because there is colour of right.

***R. v. Howson*, [1966] 3 C.C.C. 348 (S.C.C.) at pp. 356-357**
***R. v. De Marco* (1973), 13 C.C.C. (2d) 369 (Ont.C.A.) at p. 372**
***R. v. Pena* (1997) 148 D.L.R. (4th) 372 (B.C.S.C.)**
***R v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.) at p. 213**

48. There are three conditions to the application of the defence of colour of right:

1. The accused must be mistaken about the state of a private law, not a moral right;

2. That law, if it existed, would provide a legal justification or excuse;

3. The mistaken belief must be honestly held.

***R. v. Howson*, [1966] 3 C.C.C. 348 (S.C.C.) at pp. 356-357**
***R. v. Hemmerly* (1976), 30 C.C.C. (2d) 141 (Ont. C.A.), *per* Martin, J.A. at p. 145 and authorities cited therein.**
***R. v. Pena* (1997) 148 D.L.R. (4th) 372 (B.C.S.C.)**
***R. v. De Marco* (1973), 13 C.C.C. (2d) 369 (Ont.C.A.)**
***R. v. Creaghan* (1982), 1 C.C.C. (3rd) 449 (Ont. C.A.)**
***R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que.C.A.)**
***R. v. Billy* (2004), 191 C.C.C. (3d) 410 (B.C.S.C.)**

49. In cases arising from occupations or blockades of where the accused were charged with mischief for occupying what they thought were aboriginal lands, the Courts have focused on the issues of a whether there was a moral as opposed to legal right, and the accused's "honest belief".

> ***R. v. Pena*** **(1997) 148 D.L.R. (4th) 372 (B.C.S.C.)**
> ***R v. Penashue*** **(1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.)**
> ***R. v. Drainville*** **(1991), 5 C.R. (4th) 38 (Ont.Ct.(Prov.Div.))**
> ***R. v. Potts*****, [1990] O.J. No. 2567 (Q.L.) (Ont.Ct.(Prov.Div.))**

50. The case of *R. v. Drainville* dealt with a protest over the construction of a road over lands in the Temagami area that the accused believed belonged to aboriginal people. In rejecting the defence of colour of right, the judge addressed the issue of moral claims and the rule of law:

> "As noble and honourable his motives might be, they are really irrevelant in our considerations pertaining to "colour of right". Unless it can be demonstrated to this Court, that his honest belief in the existence of a state of facts, in this case title to the subject lands, is based on a mistake of fact or law, his defence cannot succeed on moral conviction alone. Moral convictions though deeply and honestly felt, cannot transform illegal actions into legal ones; only the "rule of law" must prevail."

> ***R. v. Drainville*** **(1991), 5 C.R. (4th) 38 (Ont.Ct.(Prov.Div.)) at pp. 12-13**

51. The test for the presence of an honest belief is subjective, but there must be an air of reality to the claim before the defence is put to the jury.

> ***R. v. DeMarco*** **(1973), 13 C.C.C. (2d) 369 (Ont. C.A.).**
> ***R. v. Robertson*** **(1987), 58 C.R. (3d) 28 (S.C.C.).**

52. In *R. v. Roche*, the Court considered the "air of reality" requirement in relation to an aboriginal protest over land at the Goose Bay Airport. The court found that denial of the fact of Canadian sovereignty over the land and jurisdiction of the Canadian courts was "not a reasonable or practical

assertion in the 1990's", and therefore did not assist the accused in asserting an air of reality.

***R. v. Roche* (1990), 90 Nfld. & P.E.I.R. 199, [1990] N.J. No. 395 (QL) at par. 32**

53. In *R. v. Pena,* a case involving an aboriginal land occupation, the judge considered the following facts in determining whether there was an "air of reality" to the defence:

> a) the registered land owner had been approached by the accused for permission to use the land for ceremonial purposes and permission was granted;
>
> b) subsequent to the ceremony the accused and others entered into an agreement with the registered owner of the land agreeing to conditions as to its use for ceremonial purposes;
>
> c) subsequent to the ceremony the accused and others indicated they were investigating the possibility of advancing a land claim in respect of the land;
>
> d) during the occupation, there were numerous assertions by the occupiers to the effect that they were a sovereign nation on sovereign territory, so they could not be charged or disturbed.

54. The judge in *R. v. Pena* found that all the evidence was to the effect that the accused was well aware of the identity of the registered owner of the land that had been occupied, and there was no evidence of anyone asserting a belief that anyone else was the owner of that land, as recognized by the laws of the Province. Furthermore, there was no evidence that any accused harboured an honest mistake about the laws of this country as they exist, whether public or private; only a belief as to what the law should be if it were to reflect what they believed to be their just cause. The judge found there was no evidence to support any

conclusion other than that the accused held a belief in a moral right to the land despite the law. He therefore rejected the defence of colour of right.

R. v. Pena **(1997) 148 D.L.R. (4th) 372 (B.C.S.C.), at pars. 20, 23-26**

55. It is permissible for the Court to consider the objective legal status of an accused's claim. In addition, while an accused's claim does not need to be objectively reasonable, a trier of fact may consider the reasonableness of the claim as a factor in determining whether the belief was an honest one.

R. v. Hammerbeck **(1991), 68 C.C.C. (3d) 161 (B.C.C.A.)**
R. v. Billy **[2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at par. 21**

56. An aboriginal right does not exist merely because it has been asserted to exist. In the context of colour of right, there must be some basis for a belief in the existence of aboriginal title beyond a bare assertion.

R. v. Billy **[2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at pars.11, 15**

57. The case of *R. v. Billy* involved the blockade of the road to Sun Peaks, which had existed as a public highway for more than 20 years. The accused were convicted of intimidation at trial, and their appeal was dismissed. The appellate judge had this to say about the protesters' bare assertion of ownership:

> "Asserting aboriginal title on a roadway that has existed for some time, as the appellants in this case do, is not sufficient to raise a prima facie case as to their entitlement. The trial judge commented that the appellants' claim was based on a "presumed entitlement" and that they "posit an entitlement to….lands which, rather than having title, they claim title.
>
> …..The trial judge rightly concluded that a bare claim of ownership of the land was insufficient [to establish colour of right]."

R. v. Billy **[2005] B.C.D. Crim. 250.30.55.00-02 (B.C.S.C.) at pars.14, 15**

58. The case of *R. v. Penashue* also involved a protest at the Goose Bay airport by Innu. Aboriginal protestors gained entry to the airbase that had been in existence for over 40 years by rushing the gate and going under barriers, despite warnings by a security guard and a request by the R.C.M.P. that they leave the airbase. The trial judge reviewed the law with respect to colour of right and rejected the defence. In his decision, the learned judge observed that only legal means can be used to protest wrongs or assert rights:

> "It is clear from the evidence that the accused was involved in a protest. Furthermore, even using a subjective test, while he felt he and his people owned the land it is clear he also knew that by fences, signs, a barricade, etc., that he was not authorized or permitted to go inside the fence and to do so would likely mean he was committing a breach of the law. I do not feel the accused honestly believed he was not doing something unlawful when he went onto the base……
>
> If the acts of the accused amounted to a defence in this case this would basically mean that if one believes in a cause, no matter what surrounding circumstances exist, illegal means can be used to promote that cause. There are obviously lawful methods to reacquire property that has been improperly possessed including civil proceedings….
>
> Certainly no one can breach the criminal law even to protest a civil wrong committed against them. Only legal means can be used to protest such acts."

> ***R v. Penashue*** **(1991), 90 Nfld. & P.E.I.R. 207 (Nfld.Prov.Ct.) at pars. 27, 28, 38**

Facts Relevant to Colour of Right

59. Ipperwash Provincial Park had existed for approximately 57 years prior to the takeover by the Aazhoodena. During that time, no legal challenge had been brought to the Province's title to the Park.

60. The Kettle and Stony Point First Nation had requested permission to access the Park in order to use certain lands for ceremonial purposes, and permission had been granted.

61. The Band agreed with the MNR to terms and conditions for access by the Kettle and Stony Point First Nation for ceremonial purposes.

62. In 1993, the Province wrote to Maynard Travis George, a member of the Aazhoodena, and informed him of its position that the Province had title to the Park and was in lawful possession of the Park. According to Ms Jai's notes of a September 5th Interministerial Committee meeting, the Province had invited the Aazhoodena to submit a land claim if they believed they had a valid claim to the Park, but they did not produce anything.

> **Exh. P-215, Inquiry Doc. No. 1007820, Letter to Maynard T. George from MNR District Manager dated June 14/93**
> **Jai, Transcript of Evidence, Aug. 30/95, p. 258**

63. An action had been brought by the Chippewas of Kettle and Stony Point against the Government of Canada claiming that the 1927 surrender of the West Ipperwash Beach land was invalid. The defendant brought a motion for summary judgment. The Reasons for Judgment of Killeen, J. were released on August 18, 1995, granting the motion for summary judgment

and dismissing the claim that the surrender was invalid. Although this case did not include Ipperwash Provincial Park, the circumstances of the surrender were arguably similar to the surrender at issue in Justice Killeen's decision.

Exh. P-648, Inquiry Doc. No. 1004263, Chippewas of Kettle & Stony Point v. Attorney General of Canada et al: Reasons for Judgment – "Chippewas of Kettle and Stony Point & litigation involving Federal Government" Aug. 18/95
Inquiry Doc. No. 1010777, Reasons for Judgment of Killeen J. Aug. 18/95

64. The Park was clearly marked and fenced. It was protected by gates, which were at times closed and locked by MNR staff. When the occupation occurred, the gates were locked and signs were posted that clearly stated the Park was closed.

Consideration of Colour of Right by IMC

65. It was clear that the attendees of the Sept. 6th IMC meeting were aware of the issue of colour of right and that they may have discussed it, but they did not believe that it was a realistic claim.

Hutchison, Transcript of Evidence, Aug. 29/05, pp.194-195

66. Scott Hutchison, who provided legal advice to the IMC on September 6th, explained his understanding of the concept of colour of right:

> Ms. Perschy Q: [A] belief in a moral claim isn't sufficient, it has to be a belief in the state of affairs which, if it existed, would constitute a legal justification or excuse?
> A: Sure. It's got to -- I mean, the -- the person who seeks to rely on the defence has to be able to honestly say, I actually thought I had a legal right to do this. Not -- it's not enough for people to say, I honestly thought that I should have a legal right to do this, or that, In a more properly ordered legal system I would have a right to do this.

Hutchison, Transcript of Evidence, Aug. 29/05, p. 42

67. Lawyers involved at the IMC meetings were of the opinion that the existence of a burial site in the Park did not create a colour of right issue or affect the availability of legal remedies, particularly an injunction.

Hutchison, Transcript of Evidence, Aug. 29/05, pp. 74-76
Jai, Transcript of Evidence, Aug. 30/05, pp. 205-206
McCabe, Transcript of Evidence, Sept. 29/05, p. 231
Christie, Transcript of Evidence, Sept. 26/05, p. 75

68. Mr. McCabe, in his submissions to the Honourable Justice Daudlin, nevertheless raised the possibility that the Aazhoodena may want to make an argument about colour of right to the court. His cautious approach on the issue of colour of right reflected the emerging trend that there be a greater flexibility on the consideration of what might be an "honest belief".

Exh. P- 467, Inquiry Doc. No. 1011152, Transcript of proceedings before Daudlin, J.

Effect of Recent Cases

69. It is possible that in some cases outside the criminal law sphere, a bare assertion of a right may, depending on the nature and strength of the assertion, give rise to an obligation on the part of governments to consult before taking away land over which an aboriginal claim is asserted.

70. The law in this area is continuing to evolve. The colour of right issue might be given greater weight today, in some circumstances, in light of a series of decisions including those of the Supreme Court in *Haida Nation*, *Taku River* and *Mikisew.*

***Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73**
***Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69**
***Taku RIver Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74**

71. *Haida Nation and Taku River* stand for the proposition that aboriginal assertions must be considered if there is the potential for the government to infringe s. 35 rights under the *Constitution Act*, 1982. Similarly in *Mikisew*, the government is to consult with a treaty signatory on the management of a treaty interest to ensure that it is not compromised. According to these cases, the Crown may be required to take steps to accommodate an established or asserted right in cases where the following conditions occur:

- A proposed government action or decision will adversely impact an established right

  or

- A strong case exists for an asserted right, and a proposed government action or decision may adversely affect this right in a significant way.

72. *Haida Nation*, *Taku River* and *Mikisew* do not stand for the proposition that a colour of right assertion gives ownership or possessory rights over land.

Conclusion – Colour of Right

73. It is submitted that the Province was aware of the issue of colour of right when the Interministerial Committee met in September of 1995, and that

counsel fairly raised the possibility that the Aazhoodena might wish to argue they had colour of right when he appeared in court to seek an injunction.

74. There is no jurisprudence, even as it has evolved to date, that supports the view that the concept of “colour of right” entitled the Aazhoodena to act as they did in occupying Ipperwash Provincial Park in September, 1995.

Burial Site Assertions

75. Ontario is willing to protect aboriginal burial sites that are identified on provincial property.

76. The existence of a First Nations burial site does not, however, affect ownership of, or title to, the land on which the burial site is located. The jurisprudence relating to colour of right does not suggest that there can be a mistake about ownership of land based only on the existence of a burial site.

Information re Ipperwash Burial Site

77. There is evidence that, at different times prior to the occupation of the Park, there had been rumours or suggestions that there might be a burial site in the area of Ipperwash Provincial Park. Some government officials believed there could be human remains found in that area, just as in many other areas of the Province.

78. On the evening of September 4, 1995, after the takeover of the Park, Judas George indicated to then Park Superintendent Les Kobayashi that one of the factors motivating the occupation was “burial grounds or a sacred site and that it was theirs”.

Kobayashi, Transcript of Evidence, Oct. 25/05, pp. 34-35

79. Following the Park occupation, government staff, particularly those working at the MNR, commenced a series of investigations in an attempt to resolve the burial site allegation one way or the other.

Christie, Transcript of Evidence, Sept. 26/05, pp. 106–108
Vrancart, Transcript of Evidence, Oct. 26/05, p. 314,
Taman, Transcript of Evidence, Nov. 14/05, pp. 194–197
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 30–33, 112
Kobayashi, Transcript of Evidence, Oct. 25/05, pp. 35, 121-122

80. MNR staff determined that no burial site allegation had been asserted by anyone other than the Aazhoodena who, in May 1993, delivered the bailiff's "order" to Park staff notifying them that the Stony Point Reserve was "Aushoodaana Territory" and that they intended to "repossess" Ipperwash Provincial Park.

Inquiry Doc. No. 3001774, House Book Note
Inquiry Doc. No. 2002619, Bailiff's Order

81. At the time, Maynard T. George spoke to Park Superintendent Les Kobayashi and said that a burial site was beneath the maintenance shed. This was the first time that current Park staff heard an allegation that there was a burial site within the Park. Mr. Kobayashi did not believe this assertion could be true, because he understood the maintenance shed was built on bedrock, which would make it an undesirable location for a burial site.

Kobayashi, Transcript of Evidence, Oct. 20/05, pp. 248–249, 283
Kobayashi, Transcript of Evidence, Oct. 24/05, pp. 42– 46

82. The assertion by Maynard T. George does not appear to have been supported by evidence or particulars.

83. No occupation of the Park occurred following delivery of the Bailiff's order in 1993, because discussions ensued between MNR staff and members of

the Aazhoodena, and together they achieved a successful resolution of the threatened occupation.

84. MNR staff did not apparently follow up on Maynard T. George's allegation of a burial site at the time, perhaps because the issues that gave rise to the threatened occupation seemed to be resolved to the satisfaction of all concerned. There is no evidence that Maynard T. George or any of the Aazhoodena pursued the issue with the MNR.

85. It is significant that in the late 1980's and early 1990's, the Chief and Council of the Kettle and Stony Point First Nation were consulted about a proposed Park Management Plan and did not raise the issue of protection of a burial site.

> **Exh. P-768, Inquiry Doc. No. 1008306, Letter from L. Kobayashi to Michael George re: Ipperwash Provincial Park Management Plan**

86. Steps had been taken by MNR in previous years to acknowledge identified spiritual and cultural sites located within the Park. The Band was also permitted to carry out traditional ceremonies inside the Park.

> **Exh. P-771, Inquiry Doc. No. 1009919, Ipperwash Provincial Park Management Plan, July/92**
> **Exh. P-735, Inquiry Doc. No. 1011749, Elizabeth Christie's Handwritten Notes, Aug. 2 & 8/95,**

87. As part of the investigations carried out by MNR staff after the occupation of the Park, Les Kobayashi learned for the first time of an allegation that human remains had been found in Ipperwash Provincial Park in the early 1950's. He had not heard of this earlier. Mr. Kobayashi travelled to Cornwall, Ontario and interviewed the daughter of the former

Superintendent of the Park. He was provided with copies of photographs of human skeletal remains found during an excavation of the park bathhouse. (Although the remains were later lost, an anthropologist reported in November, 1996 based on his examination of the photographs, that the remains may be those of an aboriginal child.)

Kobayashi, Transcript of Evidence, Oct. 25/05, pp. 122–126, 273–282
Inquiry Doc. No. 3001558, Report of Dr. Spence

88. It is unfortunate that there is no information about whether the Park Superintendent in the 1950's communicated his discovery of human remains to the Kettle and Stony Point First Nation, the Indian agent or officials within the Provincial government in the 1950's. In any event, we know that no action was taken at that time with respect to the investigation of a possible burial site. This would be considered unacceptable today, but there may have been different expectations or evidence that is now unavailable that would explain this apparent lack of communication.

89. There was no legislated requirement to report the discovery of buried human remains in the 1950's.

90. In 1975, an MNR staff member found the 1937 correspondence regarding the burial site stored in the Ministry's archives. He forwarded the letters to the then Park Superintendent, who is now deceased. There is no known information within the Ontario government as to what the Superintendent might have done with respect to the burial site issue.

91. Prior to the Park occupation, the Province did have an archaeological report concerning Ipperwash Provincial Park that had been undertaken by Peter Hamalainen in 1972. That report revealed no evidence of a burial site or cemetery within Ipperwash Provincial Park and concluded that no further archaeological investigation was warranted. In addition, the observed absence of any burial ground was consistent with the fact that a formal cemetery already existed within Camp Ipperwash.

Inquiry Doc. No. 14000062, Hamalainen Report
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 28–29
Kobayashi, Transcript of Evidence, Oct. 25/05, pp. 265–268

92. Prior to September 12th, 1995, provincial government officials who were involved in the Ipperwash events were not aware of the 1937 correspondence relating to an alleged cemetery within Ipperwash Provincial Park. It was only on September 12th that federal government officials made the province aware of the 1937 correspondence. Notwithstanding searches of archival records, the Province has been unable to find any other documents flowing out of the exchange of correspondence in 1937.

93. The 1937 correspondence does not identify the location of any burial site. The sequence of the correspondence is as follows:

a) Band Council passed resolution regarding alleged cemetery, but does not refer to any location;

b) the Indian agent at the time sent the resolution to the Department of Indian Affairs which in turn wrote to the then Minister of Lands and

Forests for Ontario asking that something be done pursuant to the resolution to protect and preserve the alleged burial ground ;

c) the Minister of Lands and Forests wrote seeking more information but at the same time, indicating a willingness to do what was required to honour and respect the burial site.

Exh. P-674, Inquiry Doc. Nos. 1001593, 1001594, 1001596, 1011140, 1010892, Documents re: Indian Burial Grounds, August, 1937

94. There is no record of any response to the Minister's letter ever having been written or received. There is no evidence that the Kettle and Stony Point First Nation followed up on the request at a later date or that any further action was taken. Had any action been requested or taken, surely one of the witnesses would have given evidence to that effect.

95. Without more information about what happened between 1937 and the Hamalainen report in 1972, it would not be fair to conclude that the Province failed to take appropriate action. Following the Hamalainen report, there was no reason for the Province to have taken any action regarding the burial site issue without further information or a request from the Kettle and Stony Point First Nation.

96. It appears that there was no follow-up by the Kettle and Stony Point First Nation or the Aazhoodena to alert the Province of the history and location of the alleged burial site within the 58-year interval between the 1937 Band Council Resolution and the occupation of the Park.

97. The Province does not suggest that the Kettle and Stony Point First Nation and Aazhoodena were solely responsible for communication and follow up; rather, the “information gap” reveals the importance of both the government and aboriginal communities maintaining communication with one another about unresolved issues.

Evidence of Burial Site

98. The evidence at this Inquiry with respect to the existence and location of any alleged burial site is inconclusive.

99. The testimony of First Nations witnesses on this issue at the Inquiry may be placed in three categories – those who had no recollection of ever hearing about a burial site in the Park, those who heard of the existence of burial grounds in the Park but did not know the location, and those who had heard of burial grounds existing in the Park and who claimed to be able to locate them on Park maps.

100. Seven First Nations witnesses testified about where they believed the burial ground was located, but the persons who were the sources of their information did not always confirm the site location, which casts doubt on the reliability of some of the evidence. In addition, the evidence varied among the witnesses as to the location of the burial site.

101. Only three witnesses were able to indicate on a map at the Inquiry where they thought the burial sites were located. They were consistent in identifying the area of the maintenance shed and the bathhouse.

102. Clifford George referred to a finding of human remains in 1949 and testified that others had claimed that there were burials in various locations throughout the Park. David George said there were graves all over the Park grounds.

C. George, Transcript of Evidence, Sept. 10/05, pp. 135-138
D. George, Transcript of Evidence, Oct. 20/04, pp. 51, 52

103. Immediately following the occupation of the Park, Chief Bressette made his own enquiries of community elders including the former Chief, Charles Shawkence, who rejected any suggestion of burials within the park.

Bressette, Transcript of Evidence, Mar. 2/05, p. 92

104. In addition, Victor Gulewitsch, a historical researcher retained by the Kettle and Stony Point First Nation, was quoted in the London Free Press in an article dated September 7, 1995 as saying that he had been unable to find any evidence of a burial ground in the Park. The Province has not been provided with any information pertaining to Mr. Gulewitsch's investigations.

Exh. P-1763, Inquiry Doc. No. 1009635, London Free Press article "Burial Ground Claim Questioned"

105. Mr. Kobayashi confirmed that the locations of all alleged burial sites within Ipperwash Provincial Park are not set aside for day uses or camping. The areas are mostly natural and there never was any impediment to fencing such areas or memorializing them without impacting upon the public's use

of the Park and its recreational facilities. Mr. Kobayashi was not cross-examined on this point.

Kobayashi, Transcript of Evidence, Oct. 26/05, pp. 271–285
Exh. P-915, Aerial photograph of Park

Conclusion – Burial Site

106. To this day there is still conflicting evidence about the existence and location of one or more aboriginal burial sites within Ipperwash Provincial Park.

107. Ontario remains willing to do what is necessary to secure and preserve any aboriginal burial site within Ipperwash Provincial Park. This can only be done with the cooperation of those asserting the existence of the burial ground.

Government Structure

108. It is very important to understand the decision-making process and reporting relationships within the Provincial government.

109. Scott Hutchison outlined the process in detail, and other government witnesses gave evidence that was consistent with his outline (Jai, Hipfner, Taman, Todres).

General

110. Civil servants are employees appointed under the *Public Service Act*. They report to their Deputy Ministers through Managers, Directors and Assistant Deputy Ministers. Civil servants may make decisions within the scope of their positions, but must otherwise seek instructions from more senior officials.

111. Deputy Ministers are the most senior civil servants within the various ministries. They report to both the Secretary of Cabinet, who is the most senior civil servant within the government, and to their Ministers.

112. Ministers are elected politicians who, in addition to their roles in the Legislature and Cabinet, provide direction to ministry officials through the Deputy Ministers. Ministers employ non-civil service staff to provide them with advice and support of a political nature. Political staff involved in the events at Ipperwash were primarily Executive Assistants to the Ministers and to the Premier.

Lawyers

113. Lawyers in government report through Legal Directors or Crown Attorneys to an Assistant Deputy Attorney General who in turn reports to the Deputy Attorney General. Lawyers provide advice and take instructions from the government, subject always to the ultimate direction of the Deputy Attorney General. The level to which legal advice is given and from which instructions emanate depends on the nature of the issue. Advice on important and high-profile matters may be channelled through the Deputy Minister to the Minister, and instructions are given by the Minister to the Deputy Minister who relays them to counsel. Sometimes, counsel may be present when instructions are given by a Minister.

Solicitor General and OPP Commissioner

114. Subject to the Solicitor General's direction, the Commissioner of the Ontario Provincial Police has the general control and administration of the OPP and the employees connected with it.

***Police Services Act*, R.S.O. 1990, c. P- 15, s. 17(2)**

115. The Commissioner is responsible for directing all employees of the OPP, and all police officers ultimately report to the Commissioner. The Commissioner reports to the Solicitor General pursuant to the *Police Services Act*, and also reports to the Deputy Solicitor General, who acts as a buffer between the political authority and the Commissioner.

116. The Solicitor General's responsibilities are set out in s. 3 of the *Police Services Act*. The Solicitor General's role with respect to the OPP is to set policing policy and to deal with issues such as the OPP budget, complement size, infrastructure plans, policy issues and professional standards.

117. The Solicitor General is entitled to receive information about police operations, but does not become involved in decisions pertaining to specific police operations or give direction regarding specific police operations.

118. The role of the Deputy Solicitor General is, in part, to ensure that the Solicitor General is screened from receiving detailed information about ongoing police operations in specific cases and that neither the Solicitor General nor the Deputy gives any direction to the Commissioner or to members of the OPP regarding police operations in specific cases. This is important to avoid the possibility of any actual or perceived political or government influence over ongoing police operations.

Special Advisor, First Nations – Roles & Expectations

119. In late February 1995, Ron Fox was seconded to the office of the Deputy Solicitor General as the Special Advisor, First Nations. Although he remained a provincial police officer with the rank of Inspector, Mr. Fox reported directly to the Deputy Solicitor General and Deputy Minister of Correctional Services regarding his duties during the period of his secondment.

Fox, Transcript of Evidence, July 11/05, pp. 14-17, 19
Exh. P-497, Inquiry Doc. No. 2005480, OPP Memorandum to the Director Training Branch
Todres, Transcript of Evidence, Nov. 30/05, pp. 122-123

120. Mr. Fox did not have any policing responsibilities and reported to the OPP only for administrative purposes such as attendance and vacation but not with respect to any OPP operational matters. In order to avoid any possible conflict with his duties as a Special Advisor to the Deputy Solicitor General while still a police officer, Mr. Fox tried to stay away from operational information and refrained from getting involved in OPP operational matters.

Fox, Transcript of Evidence, July 11/05, pp. 14-17, 19
Carson, Transcript of Evidence, June 2/05, p. 84
Coles, Transcript of Evidence, Aug. 18/05, pp. 238, 253-254

121. Mr. Fox's primary role as Special Advisor was to act as negotiator for the government of Ontario in the negotiation of policing agreements with various First Nation communities.

Fox, Transcript of Evidence, July 11/05, p. 17

122. His secondary role was to provide advice to the Deputy Solicitor General on ongoing matters involving First Nations communities that might have a direct impact on the Ministry of the Solicitor General and on issues involving the police in these communities. During the events at Ipperwash in August and September 1995, Dr. Elaine Todres was the Deputy Solicitor General.

Fox, Transcript of Evidence, July 11/05, p. 17
Todres, Transcript of Evidence, Nov. 29/05, p. 290-291
O'Grady, Transcript of Evidence, Aug. 23/05, p. 182

123. Both OPP Chief Superintendent Coles and Deputy Minister Todres had the highest regard for Ron Fox and considered him to be an astute individual with good judgment. He was an excellent person for the position of Special Advisor, First Nations because he had knowledge, respect and admiration for Native culture and supported aboriginal policing.

Todres, Transcript of Evidence, Nov. 29/05, pp. 292, 294
Coles, Transcript of Evidence, Aug. 16/05, p. 74

124. Mr. Fox was the Solicitor General's delegate on the Interministerial Emergency Planning for Aboriginal Issues Committee ("IMC").

Fox, Transcript of Evidence, July 11/05, p. 35
Todres, Transcript of Evidence, Nov. 29/05, p. 321

125. As Special Advisor on First Nations and as a member of the IMC, it was Mr. Fox's role to be a conduit between the OPP and the IMC to enable them to exchange appropriate information. Similarly, he acted as the liaison between the Ministry of the Solicitor General to translate the

Ministry position to the OPP and take OPP issues and concerns back and translate them to the Ministry.

Fox, Transcript of Evidence, July 11/05, pp. 35, 55, 72
Carson, Transcript of Evidence, May 12/05, p. 128
Coles, Transcript of Evidence, Aug. 15, p. 162
Hutchison, Transcript of Evidence, Aug. 29/05, p. 191, 193
Jai, Transcript of Evidence, Aug. 30/05, p. 261

126. There were no written protocols regarding the nature of the policing information Mr. Fox could receive or regarding the type of information he could relay to the other members of the IMC. Mr. Fox testified that he sought only the information necessary to do his job. He used his judgment to filter and interpret the information from the OPP before disclosing it to the IMC. Information that he thought would or could be considered confidential was not passed along.

Fox, Transcript of Evidence, July 11/05, pp. 35, 55

127. According to Mr. Fox, information about something that occurred that is generally in the public knowledge is field information that can be passed along. He considered it his duty to provide the IMC with information about what had occurred, what was occurring at the time and what might occur. He thought that unconfirmed information should be validated; otherwise it was not particularly helpful. In Mr. Fox's view, how the police respond or what tactics they use to respond to the information is operational in nature.

Fox, Transcript of Evidence, July 11/05, p. 161, 162

128. Just as it was important for the IMC to know the status of the situation on the ground in order to assist the Committee in trying to formulate

recommendations aimed at resolving the situation, it was equally important for the Incident Commander to be kept up to date about plans for an injunction.

Fox, Transcript of Evidence, July 11/05. pp. 54-55, 72, 161, 189
Carson, Transcript of Evidence, May 16/05, p. 184; May 17/05, p. 228
Todres, Transcript of Evidence, Nov. 29/05, p. 325

129. Deputy Solicitor General Todres was not concerned at the time that Mr. Fox was communicating directly with OPP Incident Commander John Carson or with Julie Jai, the Chair of the IMC because it was part of his job to obtain from the OPP information needed by the IMC and *vice versa.* The Deputy Solicitor General was confident that the information was being distilled and that Mr. Fox would have exercised judgment as to what information was obtained and shared with the IMC.

Todres, Transcript of Evidence, Nov. 29/05, pp. 325, 326;
Nov. 30/05, pp. 34, 37, 40

130. Mr. Fox and Inspector Carson had had dealings professionally for a number of years and knew each other quite well. They had a mutual respect for each other.

Fox, Transcript of Evidence, July 11/05, p. 52
Carson, Transcript of Evidence, May 12/05, p. 52

131. On September 5, 1995, Inspector Carson telephoned Mr. Fox for an update on the status of the injunction application. During this telephone call Mr. Fox expressed his concern about the approach he thought was being taken by the IMC with respect to the occupation. Mr. Fox also informed Inspector Carson about his impressions of some of the

discussion that had occurred at the IMC meeting earlier that day. There is no evidence that Mr. Fox shared any of his concerns or impressions with the Deputy Solicitor General.

Fox, Transcript of Evidence, July 11/05, pp. 192-233
Exh. P-444A, Transcript of Audio Logger, Sept. 5-7/95, Vol. 1

132. It was Mr. Fox's evidence that the purpose of the conversation with Inspector Carson was to clarify some information that had been given to the IMC by the MNR, and to advise the Inspector that an injunction would be sought and likely an affidavit would be required from the police. No information relating to police operations was sought by Mr. Fox or imparted by Inspector Carson.

Fox, Transcript of Evidence, July 11/05, pp. 232-233

133. Mr. Fox testified to the effect that the comments he made, and the intemperate language he used, to describe his impressions of the government were not relayed for the purpose of instruction or direction to the OPP.

Fox, Transcript of Evidence, July 13/05, pp. 120

134. Inspector Carson made it clear several times during his testimony that Mr. Fox's information about the Premier's views had no effect on decisions made by him as the Incident Commander. Inspector Carson continued to follow the approach he had taken from the outset – to work with MNR to obtain an injunction.

Carson, Transcript of Evidence, May 17/05, pp. 269-275

135. At the September 6, 1995 IMC meeting, the MNR reported that automatic gunfire had been heard in the Park the previous night. The information had been given to Mr. Sturdy by Park Superintendent Les Kobayashi, who had received it from the OPP. It was Mr. Fox's view that this report was important and significant information for the IMC that he had not received from Inspector Carson during an earlier telephone briefing. Accordingly, Mr. Fox left the IMC meeting and telephoned Inspector Carson to verify MNR's report of the automatic gunfire. Inspector Carson confirmed the accuracy of the information.

Fox, Transcript of Evidence, July 12/05, pp. 41-44
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 64-65;
Oct. 20/05, pp. 161-163
Kobayashi, Transcript of Evidence, Oct. 25/05, pp. 44-45, 59-61

136. Following the September 6th IMC meeting, Mr. Fox was paged to attend a meeting in the Premier's dining room at the Legislature. After the dining room meeting Mr. Fox telephoned Inspector Carson at the Command Centre and relayed to the Inspector his impressions of the meeting and his understanding of what was being communicated by the Premier. Mr. Fox also told Inspector Carson about a conversation he had with Minister Hodgson, and about what he (Mr. Fox) had said during the dining room meeting regarding the automatic gunfire.

Carson, Transcript of Evidence, May 19/05, pp. 186-208
Fox, Transcript of Evidence, July 12/05, pp. 78-101

137. At the end of the conversation with Inspector Carson, Chief Superintendent Chris Coles spoke to Mr. Fox on the telephone and expressed his concern that police operational information was being

provided to either the bureaucratic or political arm of government, and that this could have undesirable results.

Fox, Transcript of Evidence, July 12/05, pp. 122-123
Coles, Transcript of Evidence, Aug. 16/05, pp. 73-77

138. During their September 6th telephone conversation, Mr. Fox understood that Chief Superintendent Coles was cautioning him not to be a conduit of police operational information to the government. While he agreed with Chief Superintendent Coles' concern about operational information being disclosed, Mr. Fox informed Chief Superintendent Coles that MNR was a source of much of the information that was being provided to the IMC and to MNR politicians and their staff.

Fox, Transcript of Evidence, July 12/05, pp. 122-123

139. Deputy Solicitor General Todres was unaware that Mr. Fox had telephoned Inspector Carson about the meeting. Dr. Todres considered it a "lapse of judgment on Mr. Fox's part" if he reported to Incident Commander Carson his view of what the Premier believed, or what he said to Ministers and Deputy Ministers at the meeting.

Todres, Transcript of Evidence, Nov. 30/05, pp. 123-125

140. Mr. Fox attended only a portion of the dining room meeting. It is not surprising, given his level of seniority within the government and the fact that he was not present for the entire meeting, that his perception of the meeting would be different from that of the Ministers, their staff and the Deputy Ministers who were accustomed to interacting with one another and who were present throughout the meeting.

141. Incident Commander Carson considered Mr. Fox's phone call about the September 6th dining room meeting to be a personal conversation between the two men. Inspector Carson thought it was simply an opportunity for Mr. Fox to vent his frustration, and testified that it had no effect on his (Inspector Carson's) operational plans.

Carson, Transcript of Evidence, May 18/05, pp. 222, 225-226; May 31/05, p. 177

142. Although Inspector Carson was adamant that none of his conversations with Mr. Fox had any impact whatsoever on Inspector Carson's handling of events on the night of September 6th, including the deployment of the Crowd Management Unit, Mr. Fox acknowledged that his conversation with Inspector Carson about the Premier and Minister of Natural Resources was inappropriate, and he quite properly apologized for the language he used.

Fox, Transcript of Evidence, July 12/05, pp. 102, 107; July 13/05, pp. 47, 108

143. It was entirely necessary and appropriate for Mr. Fox to communicate to Inspector Carson government decisions that were important to the work of the OPP, such as the decision to seek an injunction. However, consistent with Mr. Fox's own evidence about his role as Special Advisor, First Nations, he should not have revealed the content of, or his impressions of, deliberations at internal government meetings.

Fox, Transcript of Evidence, July 11/05, p. 55; July 12/05, p. 122

Conclusion – Special Advisor, First Nations – Roles & Responsibilities

144. It appears that the real issue was not the attendance of Mr. Fox at government meetings, or his conversations with Inspector Carson after the meetings, but rather the content of the telephone conversations. Without the language and commentary provided by Mr. Fox in the course of the conversations, there would have been no perception of political interference in police operations.

145. Mr. Fox's conversations with the Incident Commander about political and bureaucratic discussions appear to have been lapses in judgment by an experienced officer who otherwise exhibited discretion and good judgment. Given the rank and experience of both Mr. Fox and Inspector Carson and their collegial relationship, Mr. Fox was confident that Inspector Carson's operational decisions would not be influenced in any way by their conversation.

MNR Communications

146. During the days leading up to the occupation of Ipperwash Park and after the Park was taken over, Park Superintendent Les Kobayashi and other MNR staff such as Ron Baldwin had regular contact with Incident Commander Carson and members of the OPP on the ground.

Carson, Transcript of Evidence, May 12/05, pp. 79, 112-123

147. The contact between the OPP and MNR was necessary in order to co-ordinate issues of public safety and because the OPP needed to know MNR's position regarding title to the Park and whether and when an injunction would be sought. As landowner, MNR needed to be kept apprised of developments relating to the occupation of the Park.

Carson, Transcript of Evidence, June 2/05, p. 57

148. It was Inspector Carson's evidence that MNR was just one of the stakeholders with which that the OPP tried to maintain contact. The OPP also liaised with provincial MPP Marcel Beaubien, municipal officials, Chief Tom Bressette of the Kettle and Stony Point First Nation and local residents.

Carson, Transcript of Evidence, May 12/05, p. 127

149. Les Kobayashi, Ron Baldwin and other MNR staff were invited to the command centre by Inspector Carson as a professional courtesy and to facilitate smooth communications. The MNR staff were included in OPP briefings at the command centre, where information gathered by the police was shared, including the report of automatic gunfire in the park.

Carson, Transcript of Evidence, May 31/05, p. 180-181; June 2/05, pp. 56-58
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 64-65, 95-96

150. The OPP did not place any limits or boundaries on the MNR staff regarding the dissemination of the information they received from the police, and MNR staff had no reason to be concerned about communicating information within government.

Carson, Transcript of Evidence, May 31/05, p. 181
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 95-96

151. As part of their responsibilities in the operation of the Park and as civil servants, Superintendent Kobayashi and other MNR staff reported any information they obtained from the OPP to their superiors, such as Peter Sturdy, who in turn provided the information to the IMC and the Minister's staff in accordance with the usual reporting relationships.

Carson, Transcript of Evidence, May 18/05, p. 231 and May 31/05, pp. 180-181
Coles, Transcript of Evidence, Aug. 16/05, pp. 88-90
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 64-65, 72-74

152. When Inspector Carson, Chief Superintendent Coles and Mr. Fox became aware that information from the command post was being relayed by MNR staff through government channels, they were concerned that members of the bureaucracy and the government were receiving operational or unconfirmed information which was inappropriate for them to receive.

Carson, Transcript of Evidence, May 18/05, pp. 202, 231-232 and May 31/05, pp. 179-180
Fox, Transcript of Evidence, July 11/05, p. 216 and July 12/05, pp. 122-124
Coles, Transcript of Evidence, Aug. 16/05, pp. 88-93

153. Neither Chief Superintendent Coles nor Inspector Carson was critical of Kobayashi for providing the information to his superiors, as they understood the need for MNR to pass the information along.

Carson, Transcript of Evidence, May 31/05, pp. 180-181
Coles, Transcript of Evidence, Aug. 16/05, pp. 88-93

154. On September 6th or 7th, Chief Superintendent Coles met with Peter Sturdy and Les Kobayashi to discuss the sensitivity of some of the information that was being relayed by MNR. As a result of the meeting with Chief Coles, MNR staff became aware of the need to be more cautious about the information they were providing to Ministry officials. Chief Superintendent Coles did not give Mr. Sturdy or Mr. Kobayashi any direction or instruction regarding what they should or should not do.

Fox, Transcript of Evidence, July 12/05, p. 133
Sturdy, Transcript of Evidence, Oct. 19/05, pp. 92-97
Kobayashi, Transcript of Evidence, Oct. 20/05, p. 12

155. The difficulty with Chief Superintendent Coles' caution was that MNR staff was not in a position to know what information could be provided to government and what was confidential, sensitive or unconfirmed - those assessments could only be made by the police. In fact, the police are at liberty to disclose any information they wish, even if it is sensitive or unconfirmed.

156. Inspector Carson testified that with the benefit of hindsight, he would have excluded MNR from police briefings and broader discussions as he later

realized that the MNR staff was not in a position to put context to much of the information they received from the police.

Carson, Transcript of Evidence, May 31/05, pp. 180-181

157. As noted by Peter Sturdy during his testimony, the problem may have been avoided if the OPP had informed MNR staff not to communicate certain information to the Ministry.

Sturdy, Transcript of Evidence, Oct. 19/05, p. 96

158. The information about reports of gunfire that was relayed to the government by MNR appears to have caused the most concern on the part of Mr. Fox. However, Mr. Fox's concern was not that the information was given to the IMC, but that it was provided to the Committee by MNR staff and not by him. Mr. Fox acknowledged that the report of gunfire was important and significant information for the IMC. It was not operational information. However, it was information that Mr. Fox believed should have been filtered by him as the OPP liaison and representative of the Solicitor General on the IMC.

Fox, Transcript of Evidence, July 12/05, pp. 41-44, 49-55

159. The possible presence of guns in the park was also important and significant information for MNR as owner and operator of the Park since it raised a public safety issue. It was understandable that MNR staff would want to relay the information as quickly as possible through the usual reporting channels.

Conclusion – MNR Communications

160. It was clear from both Chief Superintendent Coles' and Inspector Carson's evidence that the presence of MNR staff at the command centre did not have a negative effect on police operations and there was never any interference by MNR staff with police discretion.

Carson, Transcript of Evidence, June 2/05, p. 58
Coles, Transcript of Evidence, Aug. 16/05, pp, 88-93

161. It is important in similar situations that the police and MNR maintain close communications with one another. In the future it would be prudent, however, for the OPP to clarify who should be reporting to government and what information should be given. This would guard against the possibility of information being disclosed that the OPP would prefer not to disclose, and would eliminate the perception of government involvement in police operations.

Key Meetings

162. In the context of Ipperwash, the Emergency Planning for Aboriginal Issues Interministerial Committee ("IMC") referred to in evidence was previously known as the "Aboriginal Emergencies Committee" or the "Blockade Committee," and the names were sometimes used interchangeably.

163. The IMC was established as a reactive body, which met following occupations of provincial land, blockades of public highways or other similar events.

Exh P. 709, Inquiry Doc. Nos. 1010501, Briefing Note of procedures for Aboriginal Emergencies, p.4
Hutchison, Transcript of Evidence, Aug. 25/05,p. 130-131
Jai, Transcript of Evidence, Aug. 30/05, p. 131

164. The purpose of the IMC in response to occupations and blockades was to determine a short-term strategy and response to demands that would result in an end to stoppages and removal of any blockades.

Ex. P-709, Inquiry Doc. No. 1010501, Briefing Note of procedures for Aboriginal Emergencies, p.4
Jai, Transcript of Evidence, Aug. 30/05, pp. 116-125

165. The IMC was chaired by the legal director of the Ontario Native Affairs Secretariat and consisted of representatives of the following:

- Cabinet Office
- Ministry of the Attorney General
- Ministry of Citizenship (now Ministry of Citizenship and Immigration)
- Ministry of Consumer and Commercial Relations (now Ministry of Government Services) (for Gaming Issues)
- Ministry of Intergovernmental Affairs
- Ministry of Natural Resources
- Ministry of Northern Development and Mines
- Ministry of the Solicitor General (now Ministry of Community Safety and Correctional Services) (including Ontario Provincial Police)

- Ministry of Transportation
- The Premier's Office
- Ontario Native Affairs Secretariat (now Ontario Secretariat for Aboriginal Affairs)

Exh. P-709, Inquiry Doc. No. 1010501, Briefing Note of procedures for Aboriginal Emergencies,
Jai, Transcript of Evidence, Aug. 30/05, p. 132

166. Civil servants would normally expect political staff to indicate their Minister's views about issues and what options they thought should be considered. Civil servants would not, however, expect to receive from political staff any direction about the recommendations or advice that was to be given.

Jai, Transcript of Evidence, Aug. 30/95, p. 143
Hutchison, Transcript of Evidence, Aug. 25/05 pp. 288- 290

167. The IMC developed options and recommendations that were then presented to the appropriate person for decision.

Hutchison, Transcript of Evidence, Aug. 25/05 p. 269

168. Since the IMC dealt with emergency situations and needed to gather facts within a short time frame, the meetings were sometimes attended by political staff in order that they could communicate new developments and recommendations to their ministers without the time delay inherent in the normal process.

Exh. P-498, Inquiry Doc. No. 1012232, Appendix Guidelines for responding to Aboriginal Emergencies, Briefing Note – p. 1, para. 1

169. Political staff did not typically participate in the meetings other than to observe and listen.

Hutchison, Transcript of Evidence, Aug. 25/05 p. 25, 11-14

170. The IMC had no decision making power with respect to Major Occurrences and Policy Determinations, including decisions requiring civil legal action such as injunctions. Recommendations of the IMC regarding such matters would be communicated by the civil servants to the Minister Responsible for Native Affairs and the Attorney General and instructions would be received from the Minister or from Cabinet.

Exh. P-498, Inquiry Doc. No. 1012232, Appendix to Briefing Note, p.7, Paras. 23-24
Hipfner, Transcript of Evidence, Sept. 15/05. p. 50: 9-17
Hutchison, Transcript of Evidence, Aug. 25/05, p. 267-268

August 2nd - IMC Meeting

171. Julie Jai convened a meeting of the IMC on August 2nd, 1995 after receiving information on August 1st from Ron Fox about the possibility that First Nations protesters occupying Camp Ipperwash might take over Ipperwash Provincial Park. MNR seemed concerned about the situation, but Ms. Jai and Mr. Fox thought that MNR was perhaps overly concerned.

Exh. P-500, Inquiry Doc. No, 3001085, Handwritten Notes of Julie Jai
Exh. P-646, Inquiry Doc. No. 1003358, Email from Julie Jai to distribution groups re: "Possible Emergency – Ipperwash" Aug 1/95
Jai, Transcript of Evidence, Aug. 30/95, p. 159

172. Prior to the meeting on August 2nd, Mr. Fox indicated in a telephone conversation with Ms Jai that he did not want OPP officers at Ipperwash to participate in the meeting by conference call. It appears that he was aware of the importance of separating the officers "on the ground" from government discussions.

Exh. P-505, Inquiry Doc. No. 3001086, Handwritten Notes of Julie Jai, Aug. 2/95
Jai, Transcript of Evidence, Aug. 30/95, pp. 170-171

173. Peter Sturdy, representing MNR, participated in the meeting by conference call. He expressed concern for the campers in the Park, and raised questions about the Government's obligations to the campers.

Jai, Transcript of Evidence, Aug. 30/95, pp. 186, 202

174. Mr. Fox had informed the IMC that one of the Aazhoodena had said that there was a burial ground in the Park and that the land was theirs.

Jai, Transcript of Evidence, Aug. 30/95, pp. 203-206

175. The IMC was provided with information about the history and background of the Park, and was satisfied that the Province had good title to the Park.

Exh. P-506, Inquiry Doc. No. 1011682, Meeting of IMC Aug. 2/95, p. 2
Jai, Transcript of Evidence, Aug. 30/95, pp. 198-199

176. Nothing was done by the IMC following the meeting about the rumour of a possible takeover of the Park. This could be attributed to any of the following facts, or a combination of them:

a) claims of a burial ground, or claims of ownership, were substantive issues that were not within the mandate of the IMC;

b) there were several other emergencies brewing at the same time that seemed potentially more serious;

c) there had been talk about a possible occupation of the Park during the two previous summers, but nothing had happened.

Jai, Transcript of Evidence, Aug. 30/95, pp. 188-189, 202-206

177. It was agreed that the IMC would keep in close communication and would trust the OPP and the MNR on the scene to take appropriate action. It was agreed that the IMC would meet again if there were an occupation or further incident.

Jai, Transcript of Evidence, Aug. 30/95, pp. 192-193

September 5th- Meeting – 11 a.m. – 1:30 p.m.

178. The IMC, chaired by Julie Jai, met again on September 5th, after the occupation of the Park to discuss what should be done.

179. There were different views expressed at the meeting as to whether a slow approach or prompt action would be best. Civil servants from the Crown Law Office - Civil (Elizabeth Christie), Ontario Native Affairs Secretariat (Julie Jai and Eileen Hipfner), and the Ministry of the Solicitor General and Correctional Services (Ron Fox) were of the view that it would be preferable not to take action to remove the occupiers from the Park immediately, but rather to adopt a "wait and see" approach.

180. Ministry of Natural Resources staff, who participated in the meeting by teleconference, were more anxious that some action be taken to remove the occupiers from the Park. Their concern is understandable as they were responsible for the safety of those using the Park, the operation of the water system for the Park and Army Camp, the protection of buildings and equipment at the Park, and the Park itself. In addition, local MNR staff had no experience with an occupation of this kind.

181. During the exchange of views and opinions, Deb Hutton, on behalf of the Premier, expressed a preference that an “aggressive approach” be undertaken to end the occupation within a few days. She relayed the message that “this may be the time and place to move decisively” and that the Premier was “hawkish”.

Jai, Transcript of Evidence, Aug. 31/05, p. 65
Hipfner, Transcript of Evidence, Sept. 15/05, p. 92
Christie, Transcript of Evidence, Sept. 26/05 p. 121-122

182. The IMC meeting was conducted by consensus, which proved to Chair Julie Jai to be rather challenging at this meeting. The consensus at the end of the meeting was that a civil injunction would be recommended. It was not determined whether it should be an *ex parte* or a regular injunction. This was subject to further consideration by a legal subgroup consisting of Julie Jai, Tim McCabe, Elizabeth Christie and Scott Hutchison.

Exh. P-509, Inquiry Doc. No. 1012252, Minutes of IMC Meeting, Sept 5/95
Exh. P-649, Inquiry Doc. 1011769, Email from J. Jai to Y. Lazor
Jai, Transcript of Evidence, Aug. 30/95, pp. 221, 263-266

183. “[N]o legal action would be taken until the lawyers sub-group completed a risk assessment of the options”. This was based on their experience with other occupations and blockades.

McCabe, Transcript of Evidence, Sept. 28/05, p. 62

184. That afternoon and evening, the legal subgroup prepared a memorandum about the available legal options for ending the occupation, with detail

about the implications of each option. The recommendation of the subgroup was to seek an interim injunction on approximately one week's notice to the occupiers of the Park.

Jai, Transcript of Evidence, Aug. 31/05, p. 40
Exh. P-549, Inquiry Doc. 1011745, Minister's Briefing Form with Yan Lazor's Handwritten Notes in Margin

September 5th or 6th – Meeting of Ministers and Deputies

185. The preponderance of evidence is that Attorney General Charles Harnick and Deputy Attorney General Larry Taman met with Solicitor General Robert Runciman and Deputy Solicitor General Elaine Todres either late in the afternoon of September 5th or early in the morning of September 6th to discuss the Ipperwash situation.

Taman, Transcript of Evidence, Nov. 14/05, pp. 89-90 (morning of Sept.6th); Nov. 15/05, p. 37 (wouldn't disagree that meeting was on Sept.5th); Nov. 16/05, pp. 42-43 (Sept. 6th met with Harnick, Runciman, Todres)
Harnick, Transcript of Evidence, Nov. 24/05, pp. 67, 74; Nov. 29/05, p. 103 (Sept. 5th met with Taman and Todres; Runciman not present)
Todres, Transcript of Evidence, Nov. 30/05, p. 26, 126 (Sept. 5th or 6th met with Harnick and Taman)
Runciman, Transcript of Evidence, Jan. 9/05, pp.116-121 (Sept.5th)

186. The Ministers and Deputies came to a consensus on the following points:

1) this was a law enforcement matter and the OPP should deal with it;

2) the priority was to ensure that no one got hurt and not to risk anybody's safety; and

3) this was a problem that time would solve and there was no urgency.

Exh. P-651, Inquiry Doc. No. 1011733, Julie Jai's handwritten Notes re: notes for briefing of Harnick, Transcript of Evidence, Sept. 6/95
Taman, Transcript of Evidence, Nov. 14/05, p. 90

September 6th - Briefing with Deputy Attorney General – before 8:30 a.m.

187. On the morning of September 6th, Julie Jai, Tim McCabe, Elizabeth Christie, Scott Hutchison (and possibly Yan Lazor) met with Deputy Attorney General Taman and reviewed the facts, options and discussions of the IMC.

Taman, Transcript of Evidence, Nov. 14/05, pp. 90-100
Jai, Transcript of Evidence, Aug. 31/05, p. 27
McCabe, Transcript of Evidence, Sept. 14/05, pp. 65-66

188. Deputy Attorney General Taman did not favour an *ex parte* injunction, although he was prepared to apply for an injunction on notice if it would assist the OPP. He asked the group to consider other options. His main concern was not to risk the safety of anyone, including the occupiers of the Park. He did not think that any immediate action was necessary.

Exh. P-549, Inquiry Doc. No. 1011745, Minister's Briefing Form with Yan Lazor's Handwritten Note in Margin
Jai, Transcript of Evidence, Aug. 31/05, pp. 46-50
McCabe, Transcript of Evidence, Sept. 28/05, p. 66
Taman, Transcript of Evidence, Nov. 14/05, pp. 94-94

189. Knowing that the Park was empty for the season there seemed to Deputy Attorney General Taman and Mr. McCabe no reason to take action that could aggravate the situation or endanger anyone.

Taman, Transcript of Evidence, Nov. 14/05, p. 92
McCabe, Transcript of Evidence, Sept. 28/05, pp. 86

September 6th - Briefing with Attorney General – between 8:30 – 9:30 a.m.

190. Deputy Attorney General Taman and Julie Jai attended an early morning meeting with the Attorney General at which time the topic of Ipperwash

was discussed. According to their recollection, the meeting took place at the Legislature building (Ms Jai says in the anteroom very close to the Cabinet room).

Taman, Transcript of Evidence, Nov.14/05, p. 105
Jai, Transcript of Evidence, Aug. 31/05, pp. 54, 133

191. The Attorney General was provided with a briefing note, a map and the memo prepared by the legal subgroup about the available options.

Exh. P-549, Inquiry Doc. No. 1011745, Minister's Briefing Form with Yan Lazor's Handwritten Note in Margin
Jai, Transcript of Evidence, Aug. 31/05, p. 55

192. The recommendation of the civil servants to the Minister was that they apply for a regular injunction on notice to the occupiers, while continuing to gather information and monitor the situation.

Exh. P-651, Inquiry Doc. No. 1011733, Julie Jai's Handwritten Notes re: notes for briefing of Harnick, Transcript of Evidence, Sept. 6/95
Jai, Transcript of Evidence, Aug. 31/05, pp. 58-59

193. Ms. Jai recalls that the Minister at one point left the room briefly and after speaking with someone, returned to the room. Ms Jai said that the Minister seemed to agree with their recommendation, and gave them the clear verbal instruction to proceed with an injunction in the normal way.

Jai, Transcript of Evidence, Aug. 31/05, pp. 60, 68, 70, 71, 76
Exh. P-653. Inquiry Doc. No. 1011762, Email from Jai to Lazor Sept. 6/95

194. Deputy Attorney General Taman testified he was certain that the Attorney General told him that the Premier wanted the occupiers removed from the Park "within 24 hours". Deputy Attorney General Taman made a note of this upon returning to his office.

Exh. P-550, Inquiry Doc. No. 3000776, Handwritten Notes by Larry Taman at Premier's meeting Sept 6/95
Taman, Transcript of Evidence, Nov.14/05, pp.105-110

September 6th - IMC Meeting – 9:30 – 11:45 a.m.

195. At 9:30 a.m., the IMC convened, and updates were provided by each of the Ministries.

Hipfner, Transcript of Evidence, Sept. 15/05, p. 103

196. It was reported that an injunction would be sought to remove the occupiers from the Park.

Hipfner, Transcript of Evidence, Sept. 15/05, p. 121

197. At that time, it was generally understood (Jai, Hipfner, Christie, McCabe) that a "regular" injunction, on notice, would be brought. Mr. McCabe understood that the return date of the injunction would be Friday, September 8th.

Jai, Transcript of Evidence, Aug. 31/05, supra
McCabe, Transcript of Evidence, Sept 28/05, p. 89
Exh. P-653, Inquiry Doc. No. 1011762, Email from Jai to Lazor dated Sept 6/95

198. Mr. McCabe had already begun preparing the motion materials for the injunction. Deb Hutton, again purporting to speak for the Premier, expressed the view that the occupiers should be removed sooner, "within a day or two", to which Mr. McCabe responded that this would mean proceeding "under the (Criminal) Code".

McCabe, Transcript of Evidence, Nov. 14/05, pp.307- 308

199. The timing of the injunction was discussed at the IMC meeting, but no instruction was given to Mr. McCabe at that time which would prompt him to proceed *ex parte*. At that time, he was considering requesting an abridgement of the three day notice requirement.

McCabe, Transcript of Evidence, Sept. 28/05 ,P-69

200. Mr. McCabe was less than enthusiastic about an *ex parte* injunction because he was concerned about lack of notice and whether the government could establish the legal requirements for an *ex parte* injunction. He provided advice as to the best procedure, and explained the pros and cons of each option.

Hutchison, Transcript of Evidence, Aug. 25/05, pp. 298-299; Aug.29/05, pp. 56-57, 248-249
Jai, Transcript of Evidence, Aug. 31/05, p. 141
McCabe, Transcript of Evidence, Sept. 28/05, pp. 68-69

201. Peter Sturdy of the MNR was present at the September 6, 1995 IMC meeting again by teleconference and he reported, by way of an update, that 100-150 rounds of automatic gunfire had been heard in the Park the previous night. This information had been provided to him by Les Kobayashi and later confirmed (by Ron Fox) at the IMC meeting.

Sturdy, Transcript of Evidence, Oct. 19/05, pp. 65-75
Hipfner, Transcript of Evidence, Sept 15/05, p. 88

202. He also reported concerns that there may be outsiders who had arrived to support the occupiers, that trees were being cut in the Park and that the entrance road to the beach was blocked by bonfires set by the occupiers. There were differing views at the meeting as to whether to adopt a pro-

active approach (which would include an injunction) or whether to take a slower, more conciliatory approach (which would involve negotiations).

Hutchison, Transcript of Evidence, Aug. 25/05, pp. 294-295;
Aug. 29/05, p. 57

203. Ms Hutton was strongly of the view that an injunction should be obtained as soon as possible.

Hipfner, Transcript of Evidence, Sept. 15/05, pp. 6-9

204. The new government did not want to bring in third party negotiators.

Hutchison, Transcript of Evidence, Aug. 29/05, pp.218-222;
Aug. 30/05, pp.30, 34-35

205. It was never suggested by anyone at the IMC meetings that the police be told to take action to physically remove the occupiers from the Park without an injunction.

Jai, Transcript of Evidence, Aug. 30/05, p. 262

206. Scott Hutchison provided advice about the independence of the OPP and advised that they could not be directed to lay charges or to take certain action.

Hutchison, Transcript of Evidence, Aug. 25/05, pp.296-298

207. It was understood by those at the meeting that the government was in the same position as any other property owner. The government could ask the police to take action with respect to trespassers, but could not direct the police.

Hutchison, Transcript of Evidence, Aug. 29/05, pp. 14-17, 19, 77-78, 223, 263
Jai, Transcript of Evidence, Aug.31/05, p.112

208. Julie Jai summarized the consensus of the meeting on this point in an e-mail, which read :

> "It was agreed at the meeting after much discussion that the Government cannot direct the OPP to lay charges and although it can request that they remove the occupiers, how and when they do so is a matter of police discretion. It was also agreed that the OPP on the ground are in the best position to assess the risk and determine when and how to act. Charges have been laid regarding specific incidents and will continue to be laid. The OPP will be advised as to their legal options…..and then it is up to them as to how to proceed."
>
> **Exh. P-653, Inquiry Doc. No. 1011762, E-mail Memorandum from Julie Jai re: Ipperwash Update, Sept 06/95.**

Dining Room Meeting

209. On the afternoon of September 6, 1995, a meeting was convened in the Premier's dining room at the Legislature. The evidence is consistent that the following people were in attendance: Premier Harris and his Executive Assistant Deb Hutton; Minister of Natural Resources Chris Hodgson and his Executive Assistant Jeff Bangs, Attorney General Charles Harnick and his Executive Assistant David Moran, and Solicitor General and Minister of Correctional Services Robert Runciman and his Executive Assistant Kathryn Hunt, Deputy Ministers Ron Vrancart (MNR), Larry Taman (AG) and Elaine Todres (SGCS).

210. There were likely others in attendance, but not all of the above-mentioned attendees have a consistent recollection of the identity of other attendees. At least four witnesses recalled that David Lindsey, the Premier's Principal

Secretary, was in attendance, and three thought that Paul Rhodes, also from the Premier's Office, was in attendance.

Vrancart, Transcript of Evidence, Oct. 27/05, p. 61
Taman, Transcript of Evidence, Nov. 14/05, p. 120
Patrick, Transcript of Evidence, Oct. 17/05, p. 100
Todres, Transcript of Evidence, Nov. 30/05, p. 51

211. OPP liaison officers Ron Fox and Scott Patrick attended the meeting, but they were only present for part of it.

Fox, Transcript of Evidence, July 12/05, p. 65
Patrick, Transcript of Evidence, Oct. 17/05, pp. 100, 102

212. The Deputy Ministers did not convene the meeting in the dining room; rather, they would have been called to the meeting. Deputy Vrancart recalled that he received instructions to attend the meeting from the Secretary of Cabinet, Rita Burak. He assumed that the Premier's office convened the meeting. Deputy Solicitor General Todres and Deputy Attorney General Taman did not recall who summoned them to the meeting. Deputy Taman testified that, as far as he knew, the meeting was organized by the Premier's Office.

Todres, Transcript of Evidence, Nov. 30/05, pp. 50-51
Vrancart, Transcript of Evidence, Oct. 27/05, pp. 58, 60
Taman, Transcript of Evidence, Nov. 14/05, p. 112; Nov. 15/05, p. 239

213. The Deputy Solicitor General was not aware of who else had been invited to the meeting until she arrived, nor was she informed of the specific purpose of the meeting. There is no evidence that other attendees were informed of the purpose of the meeting.

Todres, Transcript of Evidence, Nov. 30/05, pp. 50-51

214. The only controversy regarding the summoning of attendees to the meeting centered on Ron Fox and Scott Patrick, who were OPP Liaison officers seconded to the office of the Deputy Solicitor General. Ron Fox was paged to attend the dining room in the Legislature building. In his testimony, Fox did not indicate who asked him to attend.

Fox, Transcript of Evidence, July 12/05, p. 62
Patrick, Transcript of Evidence, Oct. 17/05

215. Deputy Solicitor General Todres was clear that she did not invite Ron Fox and Scott Patrick to the dining room meeting, because she "wouldn't have had the temerity to bring along a party list to a meeting like that." This was an unusual meeting in that prior to this occasion Dr. Todres, a senior Deputy Minister, had only met with a Premier once in her ten-year career as a Deputy.

Todres, Transcript of Evidence, Nov. 30/05, p. 50

216. Although Deb Hutton testified that it was likely that she would have said, "Let's get together", she does not recall specifically who convened the meeting.

Hutton, Transcript of Evidence, Nov. 22/05, p. 85

217. Deputy Solicitor General Todres recalls meeting Mr. Fox and Mr. Patrick on the way to the meeting. Mr. Patrick and Mr. Fox may have been asked to wait outside the meeting room.

Todres, Transcript of Evidence, Nov. 30/05, p. 50

218. After the meeting had begun, Mr. Fox and Mr. Patrick were invited into the meeting by Mr. Lindsey, the Premier's Principal Secretary. Mr. Patrick recalled that Fox was introduced as "Inspector Fox." No one else who attended the meeting recalls any introduction of Mr. Fox by name or title.

Patrick, Transcript of Evidence, Oct. 17/05, pp. 100-101
Hunt, Transcript of Evidence, Nov. 2/05, p. 50
Taman, Transcript of Evidence, Nov. 14/05, p. 122
Todres, Transcript of Evidence, Nov. 30/05, p. 68; Dec. 1/05, pp. 132-133
Runciman, Transcript of Evidence, Jan. 9/06, pp. 142-143

219. Witnesses who attended the meeting recalled that Deputy Solicitor General Todres reminded those in attendance that the police were independent of government, and that no direction could be given to the OPP as to how they should enforce the law.

Todres, Transcript of Evidence, Nov. 30/05, p. 52, 53
Taman, Transcript of Evidence, Nov. 14/05, pp. 120, 12
Moran, Transcript of Evidence, Nov. 1/05, p. 61

220. Deputy Attorney General Taman provided an outline of the different types of injunction available, and recommended a restrained approach to the occupation.

221. Deputy Solicitor General Todres did not recall Inspector Fox being present at the meeting. She further testified that in any event she did not hear anything at the meeting that would have caused her to ask Mr. Fox and Mr. Patrick to leave the room assuming they were present. Furthermore, there was no reason for her to report to Commissioner O'Grady about the meeting.

Todres, Transcript of Evidence, Nov. 30/05, pp. 63, 71

222. The Deputy Ministers who attended the meeting testified that they understood from the meeting that the Premier wanted the occupiers removed from the Park as soon as possible, and that this was to be accomplished by obtaining a court injunction.

Taman, Transcript of Evidence, Nov. 15/05, p. 182
Vrancart, Transcript of Evidence, Oct. 27/05, p. 264
Todres, Transcript of Evidence, Nov. 29/06, pp. 109-111

223. Deputy Taman had met with Attorney General Harnick prior to attending the dining room meeting. He believed that the Premier was simply confirming the Attorney General's instructions to obtain an injunction. He also stated that the purpose of the meeting was to make sure that the public servants understood the Government's expectations as to what should happen, and that the purpose of the meeting was to ensure that everybody understood the Premier's view.

Taman, Transcript of Evidence, Nov. 14/05, p. 112
Taman, Transcript of Evidence, Nov. 15/05, pp. 239, 241

224. Deputy Attorney General Taman recalled the meeting ending with the Premier saying words to the effect that he would leave the application for the injunction to the best judgment of government staff. Deputy Taman believed that he had responsibility for carrying out the direction he had been given regarding the injunction.

225. The Deputy Minister of Natural Resources and the Deputy Solicitor General were satisfied that they had no further role to play, as the Deputy Attorney General would assume responsibility for seeking an injunction

Vrancart, Transcript of Evidence, Oct. 27/05, pp. 64, 79

Todres, Transcript of Evidence, Nov. 30/05, p. 54

Call from Fox to Jai – approx. 3 p.m.

226. Julie Jai testified that in the afternoon of September 6th, probably around 3 p.m., she received a telephone call from Ron Fox who told her that he had been at a meeting at the Legislature and the instruction with respect to the injunction had changed from a normal injunction to an *ex parte* injunction. Ms Jai says she would have confirmed this with Deputy Attorney General Taman before conveying the instruction to Tim McCabe and Elizabeth Christie.

Jai, Transcript of Evidence, Aug. 31/05, pp. 114-115, 128

227. Ms. Jai testified that it would be unusual for someone of Mr. Fox's seniority to be called to a meeting of Cabinet.

Jai, Transcript of Evidence, Aug. 31/05, pp. 117

228. Mr. Fox told Ms Jai that he had entered the meeting after it had begun – perhaps in the middle – and he thought that some very strong views were expressed. She thought Mr. Fox seemed "excited" and "very animated" about it when he called her.

Jai, Transcript of Evidence, Aug. 31/05, pp. 117-118

229. Although Mr. Fox reported to Ms Jai following the dining room meeting that "the Commissioner is involved", there seems to be no support for this information in any of the evidence. No one in attendance at the meeting reported saying or hearing that the OPP Commissioner was or should be

involved, and there is no suggestion elsewhere that Mr. Fox's information on this point was accurate.

Exh. P-515, Inquiry Doc. No. 3001088, Handwritten Note from Julie Jai, Sept. 6/95 re: Conversation with Ron Fox
Jai, Transcript of Evidence, Aug. 31/05, p.119

September 7th - IMC Meeting

230. The IMC met again on September 7th. This meeting was attended by Deputy Attorney General Taman. The focus of the meeting was to ensure an orderly flow of information, advice and instructions between the Minister and civil servants. A "nerve centre" was created to separate the political staff from the civil servants. This body consisted of Deputy Ministers who would act as the conduits of advice from the civil service to the political side of government.

Hutchison, Transcript of Evidence, Aug. 25/05, pp. 316-319
Jai, Transcript of Evidence, Aug. 31/05, pp. 163, 172, 174

231. Following this meeting, on September 20th, Julie Jai was involved with other government staff in preparing a memorandum recommending the appointment of a negotiator/facilitator, but no appointment was made for reasons not communicated to her.

Jai, Transcript of Evidence, Aug. 31/05, p. 200

Injunction

232. There is conflicting evidence about whether:

- the Attorney General or the Premier gave the instruction to seek an injunction;
- the instruction was given before or after the dining room meeting;
- the instruction was to bring the injunction "within 24 hours" or "as soon as possible";
- the instruction was to bring the injunction "*ex parte*" or "as soon as possible".

233. It is not necessary to resolve any differences in the evidence on these points, as the result would have been the same.

234. The content of the application, the evidence, the hearing, the Order and the application to vary the Order played no role in the death of Mr. George, as the application was not heard until after his death.

235. There is no doubt from the evidence that either the Attorney General or the Premier, or both, gave the instruction to seek an injunction.

Jai, Transcript of Evidence, Aug. 31/05, p. 68

236. There is no doubt that the instruction was conveyed in the presence of the Deputy Attorney General and that it was in turn conveyed to Ministry lawyers either at or just before the IMC meeting of September 6th, 1995.

Jai, Transcript of Evidence, Aug. 31/05, pp. 69-70
McCabe, Transcript of Evidence, Sept. 28/05, p. 79

237. After the IMC meeting on September 5th, Mr. McCabe and Ms. Christie had begun preparing a memo summarizing legal options, including obtaining an injunction, to present to the IMC the next day.

McCabe, Transcript of Evidence, Sept. 28/05, pp. 59-64
Christie, Transcript of Evidence, Sept. 26/05, p. 120

238. Mr. McCabe originally planned to prepare the application on Wednesday, September 6th, serve it on the occupiers on September 7th and appear in court on September 8th.

Jai, Transcript of Evidence, Aug. 31/05, pp. 71-72
McCabe, Transcript of Evidence, Sept. 28/05, p. 69

239. At the IMC meeting of September 6th, Mr. McCabe said that they were preparing the application materials and trying to find a judge in Sarnia to hear the application. In Mr. McCabe's view, the "best case scenario" was that they could appear in court on Friday, September 8th.

Exh. P-536, Inquiry Doc. No. 1012579, Jai notes of IMC meeting Sept. 6/95
Exh. P-653, Inquiry Doc. No. 1011762, Email memorandum from Jai
Jai, Transcript of Evidence, Aug. 31/05, pp. 89-90, 94
McCabe, Transcript of Evidence, Sept. 28/05, pp. 85, 214-215

240. Mr. McCabe presented the IMC meeting with three options for bringing the injunction: *ex parte*, with abridged notice and normal service. The message given at the meeting was to use whatever method was fastest.

Hutchison, Transcript of Evidence, Aug. 29/05, pp. 247-248
Exh. P-536, Inquiry Doc. No. 1012579, Jai notes of IMC meeting Sept. 6/95

241. Mr. McCabe did not favour an *ex parte* injunction, because he thought it had less chance of success.

McCabe, Transcript of Evidence, Sept. 28/05, pp. 68-69, 86

Hutchison, Transcript of Evidence, Aug. 25/05, pp. 298-299; Aug. 29/05, pp. 56-57, 248-249

242. A legal subgroup convened to examine the options for ending the occupation, which included Mr. McCabe, concluded that the Province did not have a good case for an *ex parte* injunction, but recommended seeking a regular injunction on an expedited basis i.e. on short notice.

Jai, Transcript of Evidence, Aug. 31/05, p. 29

243. Ms. Jai testified that after the IMC meeting on September 6th, she received a telephone call from Ron Fox informing her that he had attended a "cabinet meeting" at which the instruction had changed and the injunction was to be brought *ex parte*. Ms Jai said she would have confirmed this with Larry Taman or Yan Lazor before conveying the instruction to Tim McCabe and Elizabeth Christie.

Jai, Transcript of Evidence, Aug. 31/05, pp. 114-115, 128

244. Mr. McCabe recalled being informed by Ms Christie sometime in the afternoon of September 6th, that the application was to be heard in court the following day, September 7th.

McCabe, Transcript of Evidence, Sept. 8/05, pp. 87, 90

245. Ms Christie recalls receiving that instruction from Deputy Attorney General Taman in the early afternoon of September 6th.

Christie, Transcript of Evidence, Sept. 26/05, pp.146-147

246. Deputy Attorney General Taman recalls instructing the lawyers to bring the application as soon as they possibly could.

Taman, Transcript of Evidence, Nov. 14/05, p.129

247. Neither Ms Christie nor Mr. McCabe remembered the use of the term *ex parte* being part of the instruction, but Mr. McCabe believed that the best chance of having a judge hear the application in such a short time frame would be to have it framed as an *ex parte* application and attempt to serve the material on the occupiers prior to the hearing. His explanation was that it was clear that they were to "seek an injunction without notice" although they were going to "attempt to serve."

McCabe, Transcript of Evidence, Sept. 28/05, pp.108, 215-216, 218

248. Mr. McCabe assumed responsibility for having decided to draft the application as "*ex parte"*, but he maintained that he always intended to serve the occupiers with the application for the injunction in order to give them notice of it and to provide them with an opportunity to appear in court. He was aware, as a senior litigator, that

a) the application would have a better chance of success if service had been effected; and

b) the injunction, if granted, would be limited in time to a maximum of 10 days and would not be continued unless the occupiers were given an opportunity to respond.

McCabe, Transcript of Evidence, Sept. 28/05, pp. 69, 219

249. It is clear from the recorded telephone calls, the scribe notes, and from the evidence of John Carson, Mark Wright and Tim McCabe, that Mr. McCabe requested that reasonable efforts be made to serve the occupiers with the

application, and that the police officers decided not to attempt service in light of the developing situation at the Park.

Exh. P-426, Inquiry Doc. No. 1002419, Scribe notes (OPP) Sept. 4-9/95
Exh. P-750, Inquiry Doc. No. 2000601, OPP logger tapes Sept. 6/95
Exh. P-752, Tim McCabe conversations CD Sept. 6/95
McCabe, Transcript of Evidence, Sept. 28/05, p. 169, 176
Exh. P-347, Inquiry Doc. No. 1001992, Logger tape command center Sept. 6/95, 21:12 Hours
Christie, Transcript of Evidence, Sept. 26/05, pp. 156-158
Carson, Transcript of Evidence, June 2/05, p. 43
Wright, Transcript of Evidence, Feb. 22/06, p. 222; Mar. 7/06, p.135

250. Given the limited time in which to prepare the evidence in support of the application and the changing circumstances at Ipperwash, Mr. McCabe decided to request the attendance of an OPP officer to give oral evidence at the hearing of the application for the injunction. By so doing, the evidence would be as up-to-date as possible and the judge could ask questions of the officer. If a representative of the occupiers appeared in court, the representative could also question the officer.

Exh. P-444(B), Tab 39, Transcript of audio logger Sept. 5-7/95
Exh. P-463, Inquiry Doc. No. 2000604, Command post logger transcript Sept. 6/95

251. Following the IMC meeting on the morning of September 6th, Mr. McCabe asked Ron Fox to contact the OPP about finding an officer to testify at the injunction hearing.

Exh. P-426, Tab 20, Inquiry Doc. No. 1002419, Scribe Notes (OPP) from Sept. 4/95 to Sept. 9/95, p. 63
McCabe, Transcript of Evidence, Sept. 28/05, p. 74

252. Ron Fox contacted Incident Commander Carson to ask him if he would testify. Inspector Carson initially said he would, subject to the Chief Superintendent's approval, but later Mark Wright was designated by John

Carson as the most appropriate member of the OPP to give evidence at the injunction hearing.

Exh. P-426, Tab 20, Inquiry Doc. No. 1002419, Scribe notes (OPP) from Sept. 4-9/95, p. 64
Exh. P-444(A), Tab 24, Transcript of audio logger Sept. 5-7/95
Exh. P-444(B), Tab 45, Transcript of audio logger Sept. 5-7/95

253. It is important to keep in mind that the OPP were giving evidence at the request of the Crown in support of the Crown's application. The effect would have been the same if a summons had been issued to the OPP. In this case, essentially, the OPP agreed to appear at the hearing without requiring a summons.

254. The evidence was to support the Crown's application, because the police had the best and most recent information regarding the situation at the Park, and could speak to the issue of public safety, which was relevant in the application for an injunction.

255. Inspector Carson told Mr. McCabe that reports of automatic gunfire caused him concern from a public safety point of view, even though officers had not seen guns or had guns pointed at them. When Inspector Carson was asked directly by Mr. McCabe what he would say if a judge were to ask him whether he, as a professional police officer thought an injunction should be granted on an urgent basis, Inspector Carson replied, "Yes, absolutely."

Exh. P-444(B), Tab 39, Transcript of audio logger Sept. 5-7/95, p.274

256. The OPP was not the “client” who requested the injunction, although it is clear that they would not go into the Park without an injunction. Similarly, the application was not brought “on behalf of” the OPP. The application was brought by the Crown, and although the office of Minister is not a legal person, the Minister of Natural Resources was named as one of the applicants.

Exh. P-551, Tab 35, Motion record

257. There was evidence that the OPP preferred to have an injunction because it put them in a better legal position to take action to remove the occupiers and they preferred an injunction to laying criminal charges.

Hutchison, Transcript of Evidence, Aug. 29/05, p.23
Jai, Transcript of Evidence, Aug. 31/05, pp.19-20
Carson, Transcript of Evidence, Jun. 2/05, p.9

258. Mr. McCabe spoke to Mark Wright by telephone on the evening of September 6th in preparation for the hearing, and the conversation was recorded. Mr. McCabe did not ask Sgt. Wright to present his evidence in a certain way, or to emphasize or omit relevant facts. He specifically said to Sgt. Wright, in response to Sgt. Wright’s concern about evidence regarding gunfire: “You know there won’t really be any leading questions, it’ll be sort of identifying yourself and telling the story.”

Exh. P-444B, Tab 39, Transcript of audio logger Sept. 5-7/95, p.274

259. At the hearing, Mr. McCabe elicited evidence about the claim to a burial site, and in his submissions he spoke about the issue of colour of right and

the importance of allowing the occupiers an opportunity to tell their side of the story.

Exh. P-737, Inquiry Doc. No. 3000504, Transcript of Court Proceedings Before Justice Daudlin
McCabe, Transcript of Evidence, Sept. 28/05, pp. 258-259; Sept. 29/05, pp. 79-81, 389-391

260. It is submitted that Mr. McCabe was scrupulously fair and candid in presenting the facts to the court and in making submissions.

261. At approximately 1 p.m. on September 7th, the Honourable Justice Daudlin issued his decision to grant the injunction, but he suspended the enforcement of it pending service of the application and Order on the occupiers. He ordered that service be effected by posting the application record and Order at the Park, and by dropping 50 copies of said documents from a helicopter into the Park in the area of the occupiers.

Exh. P-737, Inquiry Doc. No. 3000504, Transcript of Court Proceedings Before Justice Daudlin

262. This method of service had not been requested – or suggested - by Mr. McCabe, and was not raised by the judge in the course of the hearing.

263. Mr. McCabe, Inspector Carson and Sgt. Wright were concerned about the potential for personal injury should documents of this size be dropped from a helicopter. Mr. McCabe requested a meeting with Justice Daudlin in chambers in an effort to persuade him to amend the Order by deleting the provision about dropping the documents from a helicopter. The Honourable Justice Daudlin, however, refused to change the Order.

McCabe, Transcript of Evidence, Sept. 28/05, pp. 189-192

Carson, Transcript of Evidence, June 2/05, pp. 50-51

264. Mr. McCabe consulted with another counsel at the Crown Law Office – Civil and sought instructions to approach another judge to have the Order varied. The necessary documents were prepared, and he arranged to appear before a judge in London on September 8th. Inspector John Carson appeared to give evidence in court in London about the safety issues inherent in the method of service ordered by Justice Daudlin.

Jai, Transcript of Evidence, Aug. 31/05, p.204
McCabe, Transcript of Evidence, Sept. 28/05, pp.192-194, 196, 199
Carson, Transcript of Evidence, June 2/05, p.51

265. The Honourable Justice Flinn made an Order on September 8th, varying the earlier Order of Justice Daudlin, by deleting the words “is to” and “by 6:00 p.m., Friday, September 8, 1995” in paragraph 8, and adding the word “may” so that service “may be effected” by helicopter.

Exh. P-443, Inquiry Doc. No. 1003489, Hon. Justice Flinn’s Order Sept. 8/95

266. In cross-examination, Mr. McCabe was asked about the following paragraph of the Motion Record, which was filed with the court on September 7th:

> 3. An order that such officers, agents and servants of the Government of Ontario that are directed to do so by any Minister or Deputy Minister remove forthwith all camping equipment, vehicles, blockades and all other things whatsoever that have been placed on any road or public highway or any area by the defendants or their servants and agents, or by persons acting under the counsel instruction or direction of them or any of them, or on their behalf or on behalf of any of them, within or at any entrance to the Park.

Exh. P-551, Tab 35, Motion Record

267. Mr. McCabe, who drafted the paragraph, testified that the intent was to enable government officials to remove personal property after the injunction had been enforced and the occupiers had been removed from the Park. It was not intended that the Premier or anyone else would enter the Park to remove personal belongings of the occupiers while they remained in the Park.

McCabe, Transcript of Evidence, Sept. 29/05, pp. 36-37, 211

268. The paragraph is similar to a paragraph contained in another injunction order, known as the Beardmore Order. Two Superior Court Justices accepted these paragraphs as appropriate, and were evidently prepared to trust that they were sought in good faith and would be reasonably enforced.

Exh. P-748, Inquiry Doc. No. 3000425, Motion record from Tim McCabe Sep. 2/91
Exh. P-442, Inquiry Doc. No. 1000891, Hon. Justice Daudlin's Injunction Sep. 7/95

269. The injunction order provided that the parties were to appear in court on Monday, September 11th, 1995. Mr. McCabe testified that he was working on the application on Sunday, September 10th when he received a telephone call from Mr. Taman instructing him to abandon the application.

McCabe, Transcript of Evidence, Sep. 28/05, p.202

270. Mr. McCabe drafted a statement to be read in court on September 11th, 1995 and Deputy Attorney General Taman made some revisions to the

statement. The revisions clarify that the OPP were consulted about the withdrawal of the application, but did not give instructions.

Exh. P-756, Inquiry Doc. No. 1003722, Fax Message including Statement to be read to court on Sept. 11/95
Exh. P-743, Inquiry Doc. No. 1005988, Statement read into court on Sept. 11/95
McCabe, Transcript of Evidence, Sept. 28/05, pp. 202-205

271. The application was withdrawn on September 11th, 1995 out of respect for the George family because the funeral of Dudley George was to take place the same day. The application was never renewed.

Exh. P-743, Inquiry Doc. No. 1005988, Statement read into court on Sept. 11/95

Conclusion - Injunction

272. An injunction, in the context of an aboriginal dispute, is sought only in exceptional circumstances as a temporary remedy pending resolution of underlying issues. It is, however, a legitimate option for responding to an occupation of Crown land. The injunction sought in relation to Ipperwash was for a limited period of time, and was subject to the supervision of the Court. The Government's instruction to seek an injunction was a policy decision that civil servants were obliged to implement.

Part 1 - Conclusion

273. The civil servants represented by the Province at this Inquiry at all times acted in good faith, within the scope of their duties and, where applicable, on instructions from their respective Ministers. At no time did any of the civil servants direct the police or attempt to influence police operations in relation to the events at Ipperwash.

274. The civil servants were knowledgeable, experienced and sensitive to aboriginal issues. They were conscious about the complexities of the situation, including concerns about public safety, and preferred a cautious, measured approach to the occupation.

275. Government lawyers, when instructed on September 6th to seek an injunction as soon as possible, acted in accordance with legal procedural requirements and with their professional obligations. They made all reasonable efforts to have the application materials served on the occupiers in advance of the hearing.

276. The Province has worked, and continues to work, to develop and maintain positive, respectful relationships with First Nations communities and Aboriginal persons.

277. The Province looks forward to the Report of the Commissioner.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 28, 2006

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Kim Twohig

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Susan Freeborn

Counsel for the Province of Ontario

IN THE MATTER OF an Inquiry pursuant to the *Public Inquiries Act* R.S.O. 1990, c.P.41, as amended, into the events surrounding the death of Dudley George and the avoidance of violence in similar circumstances.

SUBMISSIONS OF THE PROVINCE OF ONTARIO

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